[2016] UKFTT 0128 (TC)

# TC04916

**Appeal number: TC/2014/03033**

***EXCISE DUTY – Cigarettes brought to UK from Poland – Seized at UK airport – Subsequent assessment to excise duty – Whether appellant can rely on the "Consumption point" and "Proportionality point" – No – Whether Tribunal has jurisdiction to consider these issues***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MARCIN STANISZEWSKI** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JOHN BROOKS**

**Sitting in public at North Shields on 4 February 2016**

**Tomasz Krause, of Serwis Prawny, for the Appellant**

**Andrew Macnab, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION on PRELIMINARY ISSUES

1. In *Staniszewski v HMRC* [2015] UKFTT 349 (TC), a decision released on 17 July 2015 (the "Strike Out Decision"), the Tribunal (Judge Walters QC and Ms Pollard) dismissed an application by HM Revenue and Customs ("HMRC") to strike out Mr Marcin Staniszewski's appeal against an assessment to excise duty (in the sum of £799) and a non-deliberate wrongdoing penalty (in the sum of £159) imposed on him following the seizure of 3,560 cigarettes brought into the United Kingdom from Poland.

2. The Tribunal reached its decision because, in the case of the penalty, it was open to Mr Staniszewski to argue that the penalty should be reduced or stayed by reason of special circumstances (see at [19]); and, in the case of the assessment, because of two issues raised in the case of *Jeffrey Williams v HMRC* [2015] UKFTT 330 (TC) that did not need to be decided on the facts that case of that case, but which could be relevant in this case. These were referred to by the Tribunal as the "Consumption point'" and the "Proportionality point" and were described Tribunal in the Strike Out Decision as follows:

> "25. Shortly stated, the Consumption point was that the assessment in *Williams* was bad because it was not compliant with the spirit of the Excise Directive (Directive 2008/118/EC). This was said to be because the Directive makes it clear that excise duty is a duty on consumption and should not be charged where goods have been destroyed or irrevocably lost. The suggested importance of consumption being the justification for excise duty to be levied was said not to have been reflected in the Excise Duty (Holding, Movement and Duty Point) Regulations 2010 under which the assessment in *Williams*, as in this case, was raised. It was submitted in *Williams* that HMRC cannot properly act contrary to the aims of the Directive by assessing for excise duty on goods which they have seized and condemned, or, alternatively, even if duty is chargeable, it ought to be remitted back in the circumstances, and so it was not reasonable to raise an assessment to excise duty in the first place.
>
> 26. The Proportionality point was that the assessment to excise duty was bad in that to raise it in addition to seizing the goods was a disproportionate response and a duplicated remedy for a perceived wrong (*viz:* the evasion of duty)."

3. The Tribunal, notwithstanding having found (at [18]) that the grounds of appeal originally advanced by Mr Staniszewski (that the cigarettes were for his personal use) had no prospect of success, directed that, in the circumstances, Mr Staniszewski could reconsider and amend his grounds of appeal to include the consumption and proportionality issues. On 18 November 2015, perhaps not surprisingly in the light of the Tribunal's decision, amended grounds of appeal incorporating these issues were served on Mr Staniszewski's behalf.

4. As the consumption and proportionality issues, which involve discrete questions of law, have been raised in other excise appeals (which have been stayed pending the outcome of this case), and have the potential to arise in many more, and as this appeal

was at a stage where it could be listed, the Tribunal of its own initiative directed that the consumption point and proportionality point be determined as preliminary issues.

5. On 8 December 2015 the parties were notified that the preliminary issues would be listed for a hearing at North Shields on 4 February 2016.

*Interlocutory Applications*

6. On 26 January 2016 an application was made on behalf of Mr Staniszewski for the hearing listed for 4 February 2016 to be vacated and the appeal be stood over for three months pending the conclusion of the appeal to the Tax and Chancery Chamber of the Upper Tribunal of *HMRC v Jeffrey Williams* or three months after any notification that the appeal would not consider the consumption and proportionality points. The application had been drafted by Mr Tristan Thornton of TT Tax who had acted for Mr Jeffrey Williams (before Judge Walters QC) in which the consumption and proportionality points were first raised.

7. In essence the grounds of the application were that it was not in the interests of justice to proceed with Mr Staniszewski's appeal as although he was represented he faced a "significant prejudice in being required to argue a point without speciality representation before the Upper Tribunal has the benefit of deciding a case already before it", namely that of *Jeffrey Williams.* It further appeared from the grounds of the application that the appeal of Mr Williams, which has yet to be listed for a hearing by the Upper Tribunal, had been stayed behind the appeals in the Upper Tribunal of *Michael Duggan, Liam McKeown* and *Thomas McPalin.* No date has been fixed for these appeals either.

8. I dismissed the application on 29 January 2016 as it was far from certain that the Upper Tribunal would consider the consumption and proportionality points. The First-tier Tribunal had found for Mr Williams without reference to these issues and if the Upper Tribunal were to reach the same conclusion it too may find consideration of these issues unnecessary. I was also concerned that neither the appeal of Mr Williams nor the other appeals which it appeared, from the application, to be stood behind had been listed and considered that it was in the interests of justice that the consumption and proportionality issues, the importance of which was recognised in the application, should be determined without undue delay rather than postponed indefinitely which was in effect what was proposed by the application.

9. At the commencement of the hearing on 4 February 2016 Mr Tomasz Krause, representing Mr Staniszewski, made two applications. First, seeking permission to appeal against my decision of 29 January 2016; and secondly for the hearing to be adjourned to consider the application for permission to appeal and subsequently relisted for a hearing in London.

10. The written applications submitted by Mr Krause had, like the application of 26 January 2016, been drafted by Mr Thornton. Both applications were opposed by Mr Andrew Macnab of counsel, who appeared for HMRC.

11. The grounds on which permission to appeal were sought were that there had been an error of law in failing to apply the overriding objective of rule 2 of the

Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 to deal with the case "fairly and justly", in particular by treating Mr Staniszewski differently to other appellants, by failing to ensure that that HMRC complied with their duty to assist the Tribunal to give effect to the overriding objective, by taking into account that *Williams* had been stood over behind three other cases; and by failing to follow the rule 18 of the Tribunal Procedure Rules (lead case) procedure.

12. These grounds were expanded in the application and Mr Staniszewski's case compared to another in which Judge Walters QC had raised the consumption and proportionality points, *James Murray v HMRC* [2015] UKFTT 371 (TC). In that case the Tribunal had written to the appellant saying the appeal had been stayed. It seems it was assumed, incorrectly, by those advising him that Mr Murray's case was stayed behind the appeal to the Upper Tribunal in *Jeffrey Williams*. Mr Krause submitted that it was also expected that Mr Staniszewski's appeal would be stayed behind the *Williams* appeal. However, no letter was sent by the Tribunal to state that Mr Staniszewski's appeal would be stayed. The only letter sent to him was that of 8 December 2015 with notification that a hearing would be listed on 4 February 2016 to consider the consumption and proportionality points as preliminary issues. There was, therefore, no basis for an assumption that this case would be stayed.

13. Turning to the second ground, that the Tribunal failed to ensure HMRC complied with the obligation to assist it in giving effect to the overriding objective, the main thrust of this ground is the complaint is that HMRC has instructed experienced counsel, Mr Macnab, in this appeal whereas Mr Krause, who represents Mr Staniszewski is described by Mr Thornton as, "not used to the Tax Tribunal or this area of law". Indeed if the application for an adjournment were to be granted and the hearing relisted in London, Mr Thornton has offered his services, pro bono, to Mr Staniszewski. However, in the application Mr Thornton says that he was not sufficiently prepared to attend the hearing in North Shields on 4 February 2016 to argue the issues in question.

14. Clearly it is for the parties to decide who they wish to instruct to represent them, or whether they wish to instruct anyone at all. It is not as though the hearing on 4 February was listed at short notice. The parties were notified of it on 8 December 2015 and, even with the Christmas holiday in between, had sufficient time to instruct whoever they considered appropriate. Moreover, as regards the duty of HMRC to assist the Tribunal in giving effect to the overriding objective, as the application states, Mr Macnab is experienced counsel and as such is well aware of his duty to draw to the attention of the Tribunal to any decision or provision which may be adverse to the interests of his client (see paragraph gC5 Bar Standards Board Handbook). I say that not in any way as a criticism of Mr Macnab but to emphasise that by instructing counsel, especially experienced counsel such as Mr Macnab, HMRC are obviously complying with the obligation to assist the Tribunal.

15. As the application itself recognises, the 26 January 2016 application was ambiguous as to whether the *Williams* appeal had or might by stayed behind other appeals to the Upper Tribunal. However, although I did refer to *Williams* being stayed behind other appeals, as stated above (at paragraph 8) it was because the Upper Tribunal may not find it necessary to consider the consumption and proportionality points that I dismissed the application to vacate the 4 February 2016 hearing. Also, as

the application recognises, it is open for the Tribunal, as it did in this case, to adopt a less formal procedure than that envisaged by rule 18 of the Tribunal Procedure Rules. As noted above (at paragraph 4) as Mr Staniszewski's appeal was at an appropriate stage it, rather than another appeal, was listed to enable the consumption and proportionality points to be determined as preliminary issues.

16. For the above reasons I dismissed the application to adjourn and relist the hearing and also refused permission to appeal against my directions of 29 January 2016.

*Background*

17. Before considering the consumption and proportionality points and whether the Tribunal has the jurisdiction to do so in any event, it is convenient to first set out the factual background as described by the Tribunal in the Strike Out Decision:

> "2. The appeal by the appellant, Mr Staniszewski, is dated 31 May 2014. It refers to an assessment to excise duty of £799 dated 2 May 2014 in respect of 3,560 cigarettes of various brands seized from him by officers of the UK Border Force on 1 April 2013, and a penalty for excise wrongdoing, also dated 2 May 2014, in the amount of £159. It appears from Mr Staniszewski's Notice of Appeal that he also asks for the return of the seized cigarettes or for compensation for their seizure. However, there appears to have been no application by Mr Staniszewski for restoration of the cigarettes and therefore no refusal of such restoration. There is no basis therefore for us to consider further the question of restoration.
>
> 3. The assessment and the penalty have been raised in the following circumstances.
>
> 4. On 1 April 2013, Mr Staniszewski was stopped by officers of the UK Border Force at Doncaster Sheffield Airport after arriving on a flight from Warsaw, Poland. He had with him the 3,560 cigarettes and he filled out a questionnaire prepared for Polish-speaking passengers, in which he stated that he lived in the UK and had brought with him cigarettes, and other goods, which he had purchased abroad. He stated that he was a smoker and smoked 30 to 40 cigarettes a day, and that he intended to smoke all the cigarettes that he had brought with him. He estimated that it would take him 6 months to do so. He stated that he was not receiving any money for the cigarettes. He also stated that he worked as a 'printman'.
>
> 5. The officer (Officer Morton) was not satisfied that the cigarettes were for Mr Staniszewski's personal use and they were seized. Mr Staniszewski was issued with a Seizure Information Notice, a warning letter (which warned Mr Staniszewski specifically about possible assessment to evaded tax or duty and a wrongdoing penalty, and also to possible prosecution), and Notice 12A – a document entitled "What you can do if things are seized by HM Revenue & Customs or UK Border Agency" which gives information about challenging a seizure by sending a Notice of Claim to request condemnation proceedings to be commenced. Notice 12A also states that a Notice of Claim must be received within one calendar month of the date shown on the Seizure

Information notice and warns that if this time limit is not observed "you will not be able to challenge the legality of the seizure".

6. We heard no witness evidence, but it is clear that Mr Staniszewski did not send a Notice of Claim to request condemnation proceedings to be commenced. He was apparently offered an interview at the time of the seizure of the goods but did not attend. Mr Krause, who appeared on his behalf, suggested that he had not been able to wait for the interview because he would have been late for his train. He also suggested that Mr Staniszewski, a native Pole, and Polish-speaker, did not argue with the authorities because his attitude was that to do so would have made things worse. We were told that the cigarettes would have cost between £400 and £500 in Poland. Mr Staniszewski had bought them at Warsaw Airport.

7. Mr Staniszewski appears to have accepted the loss of his cigarettes until, one year after their seizure, he received a letter dated 1 April 2014 from HMRC informing him that "[a]s you have not applied for condemnation within the time limit, we will now charge you the Excise duty on the goods that were seized. Excise duty is chargeable even though the goods have been seized from you, and paying the Excise duty will **not** entitle you to get the goods back."

8. The letter informed Mr Staniszewski that "[o]n this occasion we have decided **not** to take criminal proceedings against you" but warned that this might happen on a future occasion.

9. The letter also informed Mr Staniszewski that because he had brought goods into the UK from the EU on which Excise duty was due but not paid or accounted for, he had committed an Excise wrongdoing, in relation to which a penalty would be charged.

10. The letter stated that HMRC intended to charge £799 in Excise duty and £159 in penalty. Mr Staniszewski was informed that if he had a reasonable excuse the penalty would not be charged, and he was invited to write to HMRC to tell them about any reasonable excuse for committing the Excise wrongdoing that he might have had.

11. Mr Staniszewski wrote to HMRC on 30 April 2014 informing them of his intention to appeal the decisions to assess to Excise duty and to impose a penalty. He stated that he was not aware of the time limit of one month to contest the seizure or that failure to do so would amount to admitting to the wrongdoing. He repeated that he was carrying the cigarettes for his own personal use and that he was a regular smoker. He accepted that the information given about the quantity of cigarettes, the description of them and the date of seizure was correct.

12. As stated above, the assessments to Excise duty and the penalty were raised on 2 May 2014 and Mr Staniszewski duly appealed to this Tribunal.

*Jurisdiction of Tribunal*

18. It is not disputed that the cigarettes which Mr Staniszewski brought into the United Kingdom from Poland were excise goods subject to excise duty under s 2 of the Tobacco Products Duty Act 1979 (and Article 1(1)(c) of the Excise Directive 2008/118/EC) and that duty has not been paid.

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

> **12.– Assessments to excise duty**
>
> (1) … where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.
>
> (1A) … where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,
>
> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.

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

> **Goods released for consumption in the United Kingdom-excise duty point**
>
> **5.** … there is an excise duty point at the time when excise goods are released for consumption within the United Kingdom.
>
> **6.**–(1) Excise goods are released for consumption in the United Kingdom at the time when goods–
>
> (a) leave a duty suspension arrangement;
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> (c) are produced outside a duty suspension arrangement; or
>
> (d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.
>
> (2) In paragraph (1)(d) "importation" means—
>
> (a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or
>
> (b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.
>
> (3) In paragraph (2)(a) "EU excise goods" means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.

…

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

**13.**–(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person:

(a) making the delivery of the goods; and

(b) holding the goods intended for delivery; or

(c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held --

(a) by a person other than a private individual; or

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

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

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

(b) whether or not P is a revenue trader

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

(d) the location of those goods;

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

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

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

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

... 3200 cigarettes

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

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

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

(a) …

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

…

**Time of payment of the duty**

**20.**–(1) Subject to–

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

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

(c) any duty deferment arrangement,

duty must be paid at or before an excise duty point

…

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

**88.** If in relation to any excise goods that are liable to duty that has not been paid there is–

(a) a contravention of any provision of these Regulations, or

(b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods should be liable to forfeiture.

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

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

22. Section 139 CEMA provides:

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable, or any member of Her Majesty's armed forces or coastguard.

(2) – (5)

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the customs and excise Acts.

23. Under schedule 3 to CEMA, in order to challenge the legality of the seizure a person is required to give notice of his claim to HMRC within a month of a notice of seizure being served on him. A failure to do so will, by virtue of paragraph 5 of schedule 3, result in the goods being "deemed to have been duly condemned as forfeited." As is clear from the Strike Out Decision Mr Staniszewski did not challenge the seizure of the cigarettes within the statutory time limit and therefore, as a result of paragraph 5 of schedule 3 to CEMA, they were "deemed to have been duly condemned as forfeited."

24. The effect of this deeming provision, as clarified by the Court of Appeal in *HMRC v Jones and Jones* [2011] STC 2206 ("*Jones*") and the Upper Tribunal in *HMRC v Race* [2014] UKUT 331 (TCC) (and as recognised at [18] of the Strike Out

Decision) is that it is no longer open for Mr Staniszewski to argue that the cigarettes seized at Doncaster Sheffield Airport on 1 April 2014 were for his personal use either in relation to a claim for restoration or, as in the present case, in the event of an assessment. It therefore follows that, by virtue of Regulation 13(1), the cigarettes were held by Mr Staniszewski for a "commercial purpose" and liable to excise duty with the excise duty point being when they were "first so held" in the United Kingdom.

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

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

He continued:

> 32. It is against that analysis that I turn to the Judge's reasons for refusing to strike out the appeal against the main assessment. His reasons were, in essence, the four particular factors which he summarised in [35] of the Decision:
>
> > a. It was arguable that *Jones* did not limit the jurisdiction of the tribunal in relation to an appeal against an assessment to excise duty.
> >
> > b. If Mr Race were to satisfy the tribunal that he was frustrated in a genuine attempt to challenge the legality of the seizure, then the tribunal must arguably give him a remedy in order to vindicate his rights under Article 1 of the Convention which includes the right to a fair hearing.
> >
> > c. The same factual issues would in any event arise at the hearing of the appeal against the Penalty Assessment.
> >
> > d. Insofar as the strike-out application raised issues of law, the Judge did not consider it appropriate to determine those issues without a full investigation of the facts, referring to *Barratt v Enfield LB* [1999] UKHL 25.
>
> 33. Taking those factors in turn, I do not consider it to be arguable that *Jones* does not demonstrate the limits of the jurisdiction. It is clearly not open to the tribunal to go behind the deeming effect of paragraph 5 Schedule 3 for the reasons explained in *Jones* and applied in *EBT*. The fact that the appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference because the substantive issue raised by Mr Race is no different from that raised by Mr and Mrs Jones.
>
> 34. The Judge supported his contrary conclusion by referring to the period between the expiry of the one month time-limit for challenging seizure and the point at which the assessment to excise duty was issued. The Judge commented that the owner of seized goods should

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

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

…

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

40. …

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

> "Courts are now encouraged, where an issue or issue can be identified which will resolve or help to resolve litigation, to take that issue or those issues at an early stage of the proceedings so as to achieve expedition and save expense. ……..Defendants as well as claimants are entitled to a fair trial and it is an important part of the case management function to bring proceedings to an end as expeditiously as possible. Although strike out may appear to be a summary remedy, it is in fact indistinguishable from deciding a case on a preliminary point of law."

> 42. In the present case, the application to strike out was dealt with on the basis that Mr Race's factual contentions could be established. The basis for the application to strike out was a matter of law that did not require further factual determination. The question whether the First-tier Tribunal possessed a jurisdiction to reopen the issue of duty payment is one of law; the answer is, in my judgment, that it does not have such a jurisdiction. This conclusion means Mr Race's appeal against the Assessment cannot succeed even if the goods were acquired in another Member State by Mr Race or his son."

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

27. The consumption point is in essence an argument in relation to the chargeability to excise duty of the cigarettes brought into the United Kingdom from Poland by Mr Staniszewski. The proportionality point relates to a challenge to the assessment for that duty. These issues, as is clear from *Jones* and *Race*, like that of liability to seizure and forfeiture have been conclusively determined by reason of the deeming provision in paragraph 5 of schedule 3 to the Finance Act 1994 and, as such, the Tribunal does not have the jurisdiction to determine them. As Warren J said at [26] of *Race*:

> "*Jones* is clear authority for the proposition that the First-tier Tribunal has no jurisdiction behind the deeming provisions of paragraph 5 schedule 3"

28. Having found that the Tribunal does not have jurisdiction to consider the consumption and proportionality points it is not strictly necessary to consider these further. However, as both were argued before me and in case of any further appeal, I have set out below my conclusions in relation to these issues. Also, I appreciate that Mr Krause sought to distinguish *Jones* on the facts. However this was in relation to an Article 6 ECHR argument about which, as it is not before me in this hearing, I need not say anything more.

*Consumption Point*

29. The Consumption point as described the Tribunal at [25] of the Strike Out Decision (see paragraph 2, above) is, in essence, an argument that Regulations, under which the assessment was made in this case are, as Judge Walters put it in the Strike Out Decision (and is repeated in Mr Staniszewski's amended grounds of appeal) "not

compliant with the spirit" of the Excise Directive (Directive 2008/118/EC) in particular Paragraph 9 of the preamble which states:

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

30. The amended grounds of appeal further explain that:

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

31. However, rather than consider Article 37 in isolation, as in the amended grounds of appeal, it is necessary to look at it in context within the Excise Directive (Directive 2008/118/EC) as a whole to ascertain whether it provides a basis for the consumption point argument advanced on behalf of Mr Staniszewski. All subsequent references to the Directive or Articles are, unless other stated, are references to this Directive or its Articles.

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

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

Article 2 provides:

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

Article 7 provides:

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

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

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

35. Article 33 provides:

> 1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> 2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State.
>
> 4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.
>
> …

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

37. Article 37 provides;

> 1. In the situations referred to in Article 33(1) and Article 36(1), in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.
>
> The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.
>
> The guarantee lodged pursuant to Article 34(2)(a) or Article 36(4)(a) shall be released.

> 2. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 1 are determined.

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

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

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

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

*Proportionality Point*

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

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

> "It is also important to appreciate, at the outset, that the principle of proportionality in EU law is neither expressed nor applied in the same way as the principle of proportionality under the European Convention on Human Rights. Although there is some common ground, the four-stage analysis of proportionality which was explained in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, paras

> 20 and 72-76, in relation to the justification under domestic law (in particular, under the Human Rights Act 1998) of interferences with fundamental rights, is not applicable to proportionality in EU law."

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

> "33. Proportionality as a general principle of EU law involves a consideration of two questions: first, whether the measure in question is suitable or appropriate to achieve the objective pursued; and secondly, whether the measure is necessary to achieve that objective, or whether it could be attained by a less onerous method. There is some debate as to whether there is a third question, sometimes referred to as proportionality stricto sensu: namely, whether the burden imposed by the measure is disproportionate to the benefits secured. In practice, the court usually omits this question from its formulation of the proportionality principle. Where the question has been argued, however, the court has often included it in its formulation and addressed it separately, as in *R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa* (Case C-331/88) [1990] ECR I-4023.
>
> 34. Apart from the questions which need to be addressed, the other critical aspect of the principle of proportionality is the intensity with which it is applied. In that regard, the court has been influenced by a wide range of factors, and the intensity with which the principle has been applied has varied accordingly. It is possible to distinguish certain broad categories of case. It is however important to avoid an excessively schematic approach, since the jurisprudence indicates that the principle of proportionality is flexible in its application. The court's case law applying the principle in one context cannot necessarily be treated as a reliable guide to how the principle will be applied in another context: it is necessary to examine how in practice the court has applied the principle in the particular context in question.
>
> 35. Subject to that caveat, however, it may be helpful to describe the court's general approach in relation to three types of case: the review of EU measures, the review of national measures relying upon derogations from general EU rights, and the review of national measures implementing EU law.
>
> 36. …
>
> 37. …
>
> 38. Where member states adopt measures implementing EU legislation, they are generally contributing towards the integration of the internal market, rather than seeking to limit it in their national interests. In general, therefore, proportionality functions in that context as a conventional public law principle. On the other hand, where member states rely on reservations or derogations in EU legislation in order to introduce measures restricting fundamental freedoms, proportionality is generally applied more strictly, subject to the qualifications which we have mentioned."

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

"The requirements of rationality and proportionality, as applied to decisions engaging the human rights of applicants, inevitably overlap. The classic formulation of the test is to be found in the advice of the Privy Council, delivered by Lord Clyde, in *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80. But this decision, although it was a milestone in the development of the law, is now more important for the way in which it has been adapted and applied in the subsequent case-law, notably *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (in particular the speech of Lord Steyn), *R v Shayler* [2003] 1 AC 247 at paras 57-59 (Lord Hope of Craighead), *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill) and *R (Quila) v Secretary of State for the Home Department* [2012] 1 AC 621 at para 45. Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective. Lord Reed, whose judgment I have had the advantage of seeing in draft, takes a different view on the application of the test, but there is nothing in his formulation of the concept of proportionality (see his paras 68-76) which I would disagree with."

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

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

> "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are

> rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

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

73. The *De Freitas* formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act. It was however observed in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 19 that the formulation was derived from the judgment of Dickson CJ in *R v Oakes* [1986] 1 SCR 103, and that a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups. That, it was said, was an aspect which should never be overlooked or discounted. That this aspect constituted a fourth criterion was noted by Lord Wilson, with whom Lord Phillips and Lord Clarke agreed, in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45.

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

75. In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be "one that it was reasonable for the legislature to impose", and that the courts were "not called upon to substitute judicial opinions for legislative ones as to the place at which

> to draw a precise line". This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation, and thereby enable himself to vote to strike legislation down (*Illinois Elections Bd v Socialist Workers Party* (1979) 440 US 173, 188-189); especially, one might add, if he is unaware of the relevant practicalities and indifferent to considerations of cost. To allow the legislature a margin of appreciation is also essential if a federal system such as that of Canada, or a devolved system such as that of the United Kingdom, is to work, since a strict application of a "least restrictive means" test would allow only one legislative response to an objective that involved limiting a protected right.
>
> 76. In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four)."

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

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

It continued:

> "56. In respect of penalties the principle of proportionality, according to EU law, is concerned with two objectives. One is the objective of the penalty itself; the other the underlying aims of the directive. But more broadly, the objective of the penalty in enforcing collection of tax is itself a natural consequence of the essential aim of the directive to ensure the neutrality of taxation of economic activities.
>
> 57. In *Total Technology* the Upper Tribunal rightly focused not only on the general aim of the default surcharge regime to ensure compliance with a taxpayer's obligations to file returns and to pay tax, but on the specifics of that regime. It did so because questions of proportionality can only be judged against the aim of the legislation (*Total Technology*, at [79]). But the tribunal did not 5 examine in detail the other relevant objective, namely the underlying aim of the directive, which we consider to be the more fundamental question.

> 58. That question is in our view fundamental because the way the principle of proportionality has been expressed in the case law is not confined to an examination of the penalty simply by reference to the gravity of the infringement. It is not enough for a penalty simply to be found to be disproportionate to the gravity of the default; it must be "so disproportionate to the gravity of the infringement that it becomes an obstacle to [the underlying aims of the directive"] (*Louloudakis*, at [70], referred to above).
>
> 59. The underlying aim of the directive that is relevant for this purpose was considered in *Profaktor*. It is the principle of fiscal neutrality in its sense of ensuring a neutral tax burden which protects the taxable person, since the common system of VAT is intended to tax only the final consumer. This is reflected, for example, in the system of deductions, in the UK of input tax, designed to ensure that the taxable person is not improperly charged to VAT.

48. Excise duty, like VAT, is a tax derived from EU Directives and its aim is to raise revenue either directly or indirectly on the consumption of excise goods. Although the United Kingdom measure that requires payment of the duty in accordance with the Directive, namely s 12 of the Finance Act 1994, is, as a revenue raising measure, not immune to challenge on grounds of proportionality, as Stanley Burnton J (as he then was) recognised in *R (Federation of Tour Operator) v HM Treasury* [2008] STC 547 (in a passage which was quoted with approval by Waller LJ on appeal at [2008] STC 2524 at [21]):

> "134. The latitude to be accorded by the judicial branch of government to the Executive and Legislative branches varies with the context: see the speech of Lord Nicholls in *A v Secretary of State for the Home Dep*t; *X v Secretary of State for the Home Dept* [2004] UKHL 56 at [80], [2005] 2 AC 68 at [80]:
>
> > "80 … the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question and the extent of the encroachment upon that right."
>
> 135. The right engaged in the present case is less important than Human Rights Convention rights under, for example, arts 2, 3 and 5. In this connection, it is pertinent to recall what the European Court of Human Rights said in *James v UK* (Application 8793/79) (1986) 8 EHRR 123, para 42 of the judgment:
>
> > "42 … the object and purpose of Article 1 (P1-1) … is primarily to guard against the arbitrary confiscation of property."
> >
> > The encroachment on the claimants' rights under A1P1 in this case does not approach confiscation, and does not demand anxious scrutiny by the court. Far from it, in the present context (see (1986) 8 EHRR 123, para 46):
> >
> > "46. … The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will

> respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation …"

136. Thus in the Gasus case [*Gasus Dosier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403], referred to above, the European Court of Human Rights held that a measure entitling the Netherlands tax authorities to seize and to realise property in the possession of a defaulting taxpayer that belonged to the applicant, who had sold that property subject to its retention of title, was not disproportionate. It expressed the approach of the Court of Human Rights in such a case as follows (see (1995) 20 EHRR 403, para 60 of the judgment):

> "60. As follows from the previous paragraph, the present case concerns the right of States to enact such laws as they deem necessary for the purpose of 'securing the payment of taxes' …
>
> In passing such laws the legislature must be allowed a wide margin of appreciation, especially with regard to the question whether—and if so, to what extent—the tax authorities should be put in a better position to enforce tax debts than ordinary creditors are in to enforce commercial debts. The Court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation."

137. In my judgment, there is no difference between the approach of the court to a measure to secure the payment of taxes in the sense of that considered in Gasus and the approach to a substantive tax measure, ie a decision to impose a particular tax or to increase it. In order to challenge successfully such a measure, it must be shown that the legislature's assessment is "devoid of reasonable foundation".

138. Furthermore, the jurisprudence of the European Court of Human Rights does not justify this court in declaring a tax measure incompatible because its objects could have been secured more efficiently or effectively by a different measure. The cases of James and Gasus show that the fact that a particular class of persons is subject to a measure that engages A1P1 is a factor to be taken into account, but does not of itself lead to a conclusion of incompatibility.'

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

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

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

51. With regard to proportionality in relation to excise duty penalties, although, not part of this preliminary hearing, I consider that an analogy can be drawn with the

VAT default surcharge regime which has been considered by the Upper Tribunal in *HMRC v Total Technology Limited* [2013] STC 681 and *HMRC v Trinity Mirror plc* (see above) in which the regime itself was held to be fair, or as the Upper Tribunal at [100] of *Total Technology* said;

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

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

*Summary of Conclusions*

53. For the above reasons I find that the Tribunal does not have the jurisdiction to consider the consumption and proportionality points in relation to the assessment for excise duty and, even if this were not the case, Mr Staniszewski cannot succeed on either argument.

*Right to Apply for Permission to Appeal*

54. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

**JOHN BROOKS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 FEBRUARY 2016**