



TC04977

Appeal number:TC/2013/05262

PROCEDURE – application by Respondent to amend statement of case and to adduce supplementary expert evidence – principles to be applied in determining late applications – applications refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MORETON ALARM SERVICES (MAS) LIMITED Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR JOHN WILSON**

Sitting in public in Manchester on 14 December 2015

Mr Hammad Baig instructed by Equipe Limited for the Appellant

**Mr Richard Chapman of counsel instructed by the General Counsel and
Solicitor of HM Revenue & Customs for the Respondents**

DECISION

Introduction

1. The hearing of this appeal was listed for 14 December 2015. At the commencement of the hearing the Respondents applied to adduce a supplementary report from their expert witness (“the Supplementary Report”). The Appellant objected to that application and also submitted that the Supplementary Report gave rise to new issues which the Respondents had not set out in their Statement of Case and which they should not be permitted to raise so late in the day.

2. We heard detailed submissions from both parties as to whether the Respondents should be permitted to raise the new issues and rely on the Supplementary Report. In the event the appeal itself did not proceed. This decision deals with the Respondents’ application.

3. The Appellant carries on the business of sales, installation and technical support of CCTV, intruder alarms and associated electrical products. The appeal itself concerns the correct classification for customs duty purposes of various pieces of equipment imported by the Appellant in the period April 2010 to October 2012. The Respondents contend that the equipment was imported using incorrect commodity codes and as a result they issued a C18 post clearance demand on 7 May 2013 in the sum of £40,496 covering both customs duty and VAT.

4. Following a review of the decision to issue the C18, the Respondents reduced the amount claimed by £1,840 in relation to imports in April 2010 which they accepted were out of time to for the purposes of the demand.

5. During the course of the hearing the Appellant also acknowledged that customs duty and VAT totalling £10,752 was properly due and indicated that it did not challenge the C18 to that extent. We were told that the dispute concerns customs duty and VAT totalling approximately £29,000 comprised as follows:

1) £9,000 relating to the importation of what were variously described as “Nano embedded DVRs” and “encoders” which were “non-PC based”. We shall describe these as “the Nano Products”.

2) £20,000 relating to certain “PC based” equipment. We shall describe these as the “PC Based Products”.

6. For present purposes we can simply record that the Appellant accepts that it used incorrect commodity codes for all the goods imported, but that in relation to the Nano Products and the PC Based Products they should have been classified to a code which gave a zero rate of customs duty. HMRC contend that they should have been classified to codes which gave a rate of 13.9% duty.

7. It is necessary to set out in some detail the circumstances in which the C18 came to be issued, the circumstances in which the Appellant sought a review of the decision to issue the C18 and the subsequent appeal to this Tribunal.

Background

8. We did not hear any evidence. We set out the following factual background based on the documents before us and the inferences that we draw from those documents, where necessary based on the submissions of the parties.

5 9. The Appellant was visited in February 2012 by a customs officer who identified errors in the classification of the PC Based Products on importation. On 19 November 2012 the officer asked for a schedule of all imports of that description which had been given incorrect commodity codes. The Appellant instructed Mr Jerry Wellens of Equipe (UK) Limited to act in relation to matters arising from the visit. On 10
10 December 2012 Mr Wellens wrote to the officer referring to the fact that she was claiming the goods had been incorrectly classified and put forward the Appellant's case that whilst the goods had been incorrectly classified, the correct classification involved a zero rate of customs duty. It is clear that at this stage both parties were discussing the PC Based Products.

15 10. HMRC maintained their position but Mr Wellens accepted that duty was due in respect of some of the products identified. During the course of this exercise the Appellant identified that a number of other devices had also been imported using incorrect commodity codes. These were the Nano Products and Mr Wellens specifically referred to them in a letter dated 29 January 2013 in which he also
20 distinguished them from the PC Based Products.

11. The C18 was issued on 7 May 2013 in the sum of £40,496. That amount included the PC Based Products, the Nano Products and other products where the Appellant now accepts duty is owed. In or about May 2013 the Appellant paid the amount demanded by the C18. Imports in April 2010 were later removed from the
25 demand.

12. On 3 June 2013 Mr Wellens requested a review of the decision to issue the C18. At that stage the Appellant was accepting that £16,678 of customs duty and VAT was properly due. Whilst the letter might have been clearer we are satisfied that Mr Wellens was requesting a review in relation to the duty demanded for both the PC
30 Based Products and the Nano Products. Mr Chapman for the Respondents conceded as much. The Appellant in this letter renewed a previous offer to demonstrate the products.

13. The Appellant was notified the results of the review by letter dated 17 July 2013. It is clear that the review officer was concerned only with the PC Based
35 Products. She gave no consideration to the Nano Products. Overall, however her conclusion was to uphold the whole of the C18 demand, apart from entries in April 2010 which she recognised were out of time.

14. Following the review, the Appellant was notified that the reduced debt was £38,656 and a schedule with the April 2010 entries removed was sent to the
40 Appellant.

15. The Appellant lodged its Notice of Appeal to the Tribunal on 5 August 2013. The grounds of appeal were that the decision was unreasonable. Essentially the Appellant was challenging the classification that the review officer had confirmed. There was no specific reference to either the PC Based Products or the Nano Products in the grounds of appeal and the grounds did not clearly identify that the review decision had failed to address issues in relation to the Nano Products.
16. The Respondents served their Statement of Case on 6 January 2014. It set out the Respondents case only in relation to the PC Based Products. It made no reference to the Nano Products.
17. The Tribunal gave standard directions on 22 January 2014 which made provision for witness statements to be served and also provided that witnesses should attend for cross-examination.
18. In or about May 2014, for some reason that was not explained but apparently in error, HMRC repaid the amount of the C18 to an associated company of the Appellant.
19. On 9 June 2014 the parties were notified that the appeal was listed for final hearing on 15 September 2014. Skeleton arguments were exchanged from which it was apparent that the Appellant was contending for different classifications to those it had previously contended for. The Appellant applied on 3 September 2014 for that hearing to be vacated on the grounds that it wished to rely on an expert report. It is clear from the Appellant's skeleton and its application to vacate that the Appellant was concerned with the classification of both the PC Based Products and the Nano Products, although neither were specifically identified as such. In contrast the Respondents' skeleton dealt only with the PC Based Products.
20. The Respondents consented to the Appellant's application to vacate and its application to rely on an expert report. The Tribunal made a direction to that effect on 9 September 2014. Pursuant to that direction on 18 November 2014 the Appellant served the expert report it intended to rely on. That expert report dealt with the PC Based Products and the Nano Products.
21. There was then a case management hearing on 15 December 2014. On 8 January 2015 the Tribunal gave directions in a form agreed by the parties which made provision for the Respondents to rely on their own expert witness in the form of an expert report, together with further directions for the final hearing, but not including any direction in relation to the attendance of witnesses.
22. The Respondents' expert report was served on 11 March 2015. It did not deal with the Nano Products, but the expert recorded that he had examined the PC Based Products at the Appellant's premises during a meeting with two of the Appellant's directors and an officer of HMRC. The report records that the Nano Product was set out for inspection but that it "*was agreed by all parties present was not to be included as part of the examination*".

23. We had no evidence as to the basis on which the parties reached that agreement in relation to the Nano Products, or why the Appellant had set out the Nano Product for inspection.

24. On 26 March 2015 HMRC's Solicitor's Office spoke with Mr Wellens. Their conversation is referred to in an email the following day. Mr Wellens had stated that HMRC's expert had not addressed part of the Appellant's case. The email explained that this was "... because your argument regarding it being an encoder is a legal one ..." (emphasis added). Nevertheless HMRC stated that they would consider instructing their expert in that regard. The "it" was not defined, but what is clear is that anyone reading the two expert reports would see that the Respondents' report was concerned only with the PC Based Products whereas the Appellant's report was concerned with the PC Based Products and the Nano Products.

25. We had no evidence as to the context of this email, but it seems likely to us that Mr Wellens was referring to the fact that HMRC's expert had not dealt with the Nano Products. HMRC did not at this stage properly address their minds to the scope of the issues in the appeal. If they had done they would have realised, as they later came to realise, that the review letter ought to have dealt specifically with the Nano Products. Further that the Appellant's case on the appeal extended to the Nano Products.

26. The Tribunal directions made provision for the experts to meet and identify areas of agreement and disagreement. A document outlining the areas of agreement and disagreement in relation to the PC Based Products was produced in April 2015. There was no mention of the Nano Products.

27. In or about September 2015 the parties realised that the amount demanded in the C18 had been repaid by HMRC in error and that in the absence of a hardship direction the Tribunal could not entertain the appeal.

28. On 24 September 2015 Mr Baig, the advocate instructed by Mr Wellens, emailed HMRC's Solicitor's Office regarding "Expert Evidence and Payment". He stated:

"As you are aware, the HMRC expert has conceded the Nano machines, in light of this kindly provide an updated assessment to take into account the machines on which the tax is not due so that our client may make the payment."

29. The response was as follows on 30 September 2015:

"The [PC Based Products] were the only items considered in the request for review and review decision so we have not considered these before.

In fact, we were wondering why they formed a part of your expert's evidence and invite you to clarify.

If they were part of the goods imported, can you please list the import entries to which they refer in the present case. We can then consider whether it is appropriate to reduce the demand. We will do this as quickly as possible."

30. Mr Wellens responded on the same date. He explained that the C18 covered the PC Based Products, the Nano Products and other products. He stated that the review request and the Notice of Appeal included all of the items in the C18. We pause there to say that is not quite right. The Appellant does not appear to have ever contested the demand in relation to products other than the PC Based Products and the Nano Products.

31. HMRC responded on the same date stating that the amount required to be paid was £38,656. The response continued as follows:

10 *“The Commissioners do not accept the case you put forward below. The correct forum to decide whether parts of the C18 demand are correct or incorrect is the First-tier (Tax) Tribunal and as such will be argued there. Whether the ‘nano’ product is different to the products mentioned in the review letters, statement of case, skeleton argument, your email dated 19 February 2014 [not before us] and so on is a matter for the Tribunal.”*

15 32. If there was an issue between the parties as to the scope of the appeal, as there plainly was, it ought to have been the subject of an appropriate application to the Tribunal. In this regard we consider that the onus was on the Respondents because their statement of case and expert report had not dealt with the Nano Products.

20 33. We understand that the Appellant then repaid to HMRC the total sum demanded to allow the appeal to proceed. On 15 October 2015 the Tribunal gave notice to the parties that the hearing of the appeal would take place on 14 December 2015.

25 34. We are not aware of any further contact between the parties until skeleton arguments were exchanged. The Appellant served its skeleton argument on 6 December 2015. It dealt with both the PC Based Products and the Nano Products. In relation to the Nano Products it maintained that neither the original decision nor the review decision mentioned the Nano Products and that the Statement of Case identified the issue solely by reference to the PC Based Products. It was submitted that the Respondents had failed to make any case on the classification of the Nano Products.

30 35. HMRC’s skeleton argument was served on 10 December 2015. It identified as issues in the appeal (1) the correct classification of the PC Based Products, and (2) the correct classification of the Nano Products. It was submitted that as far as the Nano Products were concerned the burden was on the Appellant to establish that HMRC’s classification was wrong. It acknowledged that at the time of writing HMRC’s expert had not examined the Nano Products.

35 36. On the same date that HMRC served their skeleton argument, their Solicitor’s Office also emailed Mr Wellens. It referred to recent correspondence in which the Appellant had confirmed that a machine on eBay was the same as the Nano Products imported by the Appellant. The Respondent’s expert had purchased the device and was examining it, anticipating that a report would be provided the following day.

There was reference to the Appellant being unable to accommodate an examination of the Nano Product over the previous two weeks.

5 37. Mr Wellens responded on 11 December 2015 expressing his dismay that the Respondents were changing their position in relation to the Nano Products so late in the day. He made the point previously made in Mr Baig's skeleton that the original decision, the review decision and the Statement of Case did not refer to the Nano Products.

10 38. The Respondents replied by email stating that they had not appreciated that the Nano Products were being treated any differently until they received Mr Baig's skeleton argument. Pausing there, that is not right. The Nano Products were identified in the Appellant's expert report and had been the subject of correspondence in September 2015. The email attached a copy of the Supplementary Report, albeit dated Saturday 12 December 2015.

15 39. Finally we should record that at the hearing on Monday 14 December 2015 the Respondents' expert was present expecting to give oral evidence but the Appellant's expert was not present. Mr Baig explained that the Appellant's had understood that the experts' reports would be treated as their evidence and it had not been anticipated that there would be oral evidence from the experts.

Discussion

20 40. At the hearing Mr Chapman made an oral application to adduce the Supplementary Report in evidence. He also submitted that in any event the Respondents were entitled to put forward their case that the Nano Products were correctly classified in the C18 demand. In the course of his submissions Mr Chapman properly accepted that the Respondents had mistakenly assumed that there was no
25 dispute in relation to the Nano Products. It seems to us that the Respondents' reluctance to inspect the goods at the time of the review contributed in no small measure to their mistaken assumption. We also recognise that the distinction between the PC Based Products and the Nano Products could have been more clearly identified in the Appellant's request for a review and in its grounds of appeal.

30 41. Mr Baig opposed the Respondents' application to adduce the Supplementary Report in evidence.

42. Both parties sought to proceed with the appeal, although in relation to the Appellant its position might have changed depending on how we viewed the absence of its expert witness.

35 43. We deal firstly with the position of the experts. As we have noted, the standard directions released on 22 January 2014 made provision for witnesses to attend for cross-examination. Subsequently on 9 September 2014 further directions were given which provided as follows:

“The Appellant shall have permission to adduce the evidence of an expert witness in the form of an expert report which shall be served on the Respondents ...”

44. The directions released on 8 January 2015 provided as follows:

5 *“1. The Respondents shall have permission to adduce the evidence of an expert witness in the form of an expert report which shall be served ...*

2. *...the experts shall use all reasonable endeavours to identify all areas of agreement and disagreement.”*

10 45. The Appellant’s position was that in the light of those directions they did not consider that the experts would be required to give oral evidence or attend for cross-examination. We do not accept that was a correct position to take. The expert reports effectively took the place of witness statements and the direction dated 22 January 2014 required witnesses to be present for cross examination. We do not consider that this was varied by the later directions. In our view it would require a specific direction
15 if the intention was that an expert witness was not required to attend for cross-examination. It is difficult to see how in a case such as this any areas of disagreement could be resolved by the Tribunal without having the benefit of seeing and hearing their evidence tested in cross-examination.

20 46. On that basis therefore the Appellant would have been in some difficulty if the hearing had proceeded on 14 December 2015. The question of the appeal proceeding did not arise because we did not finish hearing submissions as to preliminary matters including the Respondents’ application to adduce the Supplementary Report until after lunch. The hearing had been listed for one day and it would have been impractical to deal with it in one afternoon, even if we had been in a position to give a
25 decision on the Respondents’ application at the time.

47. If all parties had been ready to proceed with the evidence and with their witnesses in place then there is no reason the appeal could not have been heard in a day, although there would still have been a possibility of going part heard.

30 48. We turn now to the Respondents’ submission that it was entitled to defend the appeal and support the decision of the review officer on the basis that the classification of the Nano Products was correctly reflected in the C18 demand. We cannot accept that submission.

35 49. It is common ground that the Respondents had not put forward any case whatsoever in relation to the Nano Products until service of their second skeleton argument in December 2015. That was the first statement of their case in relation to the Nano Products. Whilst the burden on this appeal is on the Appellant, if the Respondents intended to take issue with the classification of the Nano Products then that case ought to have been set out in their Statement of Case. Tribunal Rule 25(2) requires the Respondents to set out their position in relation to the case. The
40 Respondents did not set out their position on the Nano Products, nor indeed was it set out in any correspondence or other document at any stage prior to 10 December 2015.

Whilst the burden was on the Appellant, it would not be fair to permit the Respondents to challenge the Appellant's case without warning as to the nature of the challenge. The classification of the Nano Products is clearly a significant issue which the Respondents were seeking to address extremely late in the day. Plainly there would be prejudice to the Appellant if it were expected to meet the Respondents' arguments without prior warning, or at least on notice amounting to only one business day prior to the hearing.

50. The position is not simply that the Respondents are applying late in the day to adduce the Supplementary Report, but also that they need permission to amend their Statement of Case. The arguments they wish to raise are new arguments in relation to a significantly different product.

51. Mr Baig relied on authorities in the context of late amendments to pleadings in the civil courts. In particular the summary of principles by Carr J in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) at [37] and [38]:

15 " 37. ... the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities : *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735 (at paras. 69 to 72, 85 and 106); *Worldwide Corporation Ltd v GPT Ltd* [CA Transcript No 1835] 2 December 1988; *Hague Plant Limited v Hague* [2014] EWCA Civ 1609 (at paras. 27 to 33); *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 928 (QB) (at paras. 4 to 7 and 29); *Durley House Ltd v Firmdale Hotels plc* [2014] EWHC 2608 (Ch) (at paras. 31 and 32); *Mitchell v News Group Newspapers* [2013] EWCA Civ 1537.

25 38. Drawing these authorities together, the relevant principles can be stated simply as follows:

30 a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

35 b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

40 c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be

lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

5 *d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;*

10 *e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;*

15 *f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;*

20 *g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.”*

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52. As to the last point, it is clear that a similar approach applies to compliance with the Rules of this Tribunal – see *BPP Holdings Limited v Revenue & Customs Commissioners [2016] EWCA Civ 121*.

30 53. In the light of the principles described by Carr J we are firmly of the view that the Respondents should not be permitted to raise a new case in relation to the Nano Products.

35 54. We consider that by 3 June 2013 the Respondents ought to have appreciated that the C18 demand included a sum referable to the Nano Products and that the Appellant was challenging the Respondents’ classification of the Nano Products. That was the date of the request for a review. Even if they had been in any doubt at that point in time, by 18 November 2014 there could have been no doubt that the Appellant was challenging classification of the Nano Products. That was the date the Appellant served its expert report. The Respondents then had two further opportunities to

40 recognise and engage with the Appellant’s arguments in March 2015 and in September 2015.

55. What happened was that the Respondents made a very late application to amend their case and adduce the Supplementary Report. If we had granted the application then the hearing date would inevitably have been lost. Indeed the process of hearing

the application left insufficient time for the hearing to proceed. With the benefit of hindsight we probably ought to have refused the application summarily at the hearing and proceeded with the appeal.

56. There is a heavy burden on the Respondents to show why it is fair and just for the application to be granted. The Respondents were seeking to put forward a significant amendment introducing issues in relation to an entirely different product. There was no good reason why the application was made so late. Nor was there any real explanation as to why previous opportunities to amend the Respondents' case were not taken. It is no answer in such circumstances to say that there would be no prejudice to the Appellant, that the Appellant could be given an opportunity to reply to the new case or that any prejudice could be compensated for in costs.

57. We take into account that the Appellant itself may not have been in a position to proceed because its expert was not available to give oral evidence. That was an error on the part of the Appellant but it is not such an error as would cause us to reach a different conclusion on the Respondents' application. It does not tip the balance in favour of allowing the Respondents' application.

58. We acknowledge that refusing the application will prejudice the Respondents. We set out below the effect of a refusal on the appeal in relation to the Nano Products and we have taken that into account in our balancing exercise.

59. The amount of customs duty and VAT in relation to the Nano Products is approximately £9,000. It is a relatively modest sum and less than a third of the overall sum in issue on the C18 demand.

60. It was common ground that the decision under appeal was the review decision dated 17 July 2013. That decision confirmed the C18 demand as a whole, albeit the reasoning did not address the Nano Products.

61. The appeal against the review decision engages our jurisdiction under section 16(5) Finance Act 1994, which must be read together with section 16(4). To put these provisions into context the present appeal is against a matter which is not an ancillary matter. The provisions read as follows:

“ 16(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

5 (c) ...

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.”

10 62. Section 16(5) expressly provides that our jurisdiction “shall also include” the power to quash a decision and substitute our own decision. There was some discussion as to whether our powers on an appeal such as this would include a power to direct a further review. In other words, are the powers under section 16(5) in addition to the powers under section 16(4)? We express no view on that matter. If we
15 refused the Respondents’ application having found that they are not entitled to challenge the Appellant’s case on the Nano Products we would not be minded to direct a further review. To do so in the present circumstances would be unfair to the Appellant who we consider is entitled to a determination of any issues arising from the C18 demand within the scope of its appeal.

20 63. Mr Baig submitted that the review officer’s failure to consider the Nano Products meant that she should be taken as accepting the Appellant’s case on classification. We do not agree. As Mr Chapman pointed out, if the review officer had not carried out any review at all then section 15(2) FA 1994 provides that the original decision is deemed to be confirmed. It is difficult to see why the result of a partial
25 review should be that a part of the decision which is not reviewed is deemed to be overturned.

64. In any event we are satisfied that the original decision to include the Nano Products in the C18 demand was confirmed by the review. The review letter clearly confirmed the C18 demand save for the April 2010 entry. The failure of the review
30 officer was a failure to give reasons in relation to the Nano Products.

65. We turn now to consider the effect of a decision refusing the Respondents’ applications. It would not necessarily mean that the appeal in respect of the Nano Products must be allowed. We say nothing at this stage about the merits of the Appellant’s arguments on classification, although we note that the Respondents have
35 never suggested that the Appellant’s case is unarguable. The question which arises is whether we can or should allow the appeal regardless of the merits or take some other approach.

66. Tribunal Rule 7(2) provides as follows:

40 *“If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include –*

- (a) *waiving the requirement;*
- (b) *requiring the failure to be remedied;*
- (c) *Exercising its power under rule 8 (striking out a party’s case);*
- (d) *Restricting a party’s participation in proceedings; or*
- 5 (e) *Exercising its power under paragraph (3)”*

67. It seems to us that Rule 7(2) is engaged because the Respondents failed to set out their case in the statement of case. Pursuant to Rule 7(2) we could certainly restrict the Respondents’ participation in the proceedings. Mr Chapman suggested that
10 the Respondents should be entitled to challenge the Appellant’s expert evidence in cross examination and make submissions on the correct classification. That would involve the Respondents’ effectively presenting their new case, albeit without the benefit of the Supplementary Report. What is not clear is whether we could summarily allow the appeal in relation to the Nano Products.

15 68. The extent of the Tribunal’s jurisdiction under Rule 7 was considered in *Elder v Commissioners for HM Revenue & Customs [2014] UKFTT 728 (TC)*, a decision of Tribunal Judge Cannan, in the following terms:

“ 82. *It is not clear and I did not have any submissions as to whether Rule 7(2)(d) encompasses a power to effectively strike out a case, which is what
20 barring the respondents from taking further part in the proceedings would involve. I would be inclined to the view that it does not because the grounds for striking out are comprehensively set out in Rule 8. In particular Rule 8(1) provides for automatic striking out for breach of a direction which stated that the appeal would be struck out in the event of non-compliance. Similarly, Rule
25 8(3)(a) provides for discretionary striking out for failure to comply with a direction which stated that non-compliance could lead to the striking out of the proceedings. There is no equivalent in the Tribunal Rules to CPR 3.4(2) which gives a court discretionary power to strike out a claim where there has been failure to comply with a rule.*

30 83. *Rule 7(2)(d) may be directed at some more limited form of restriction on participation in the proceedings falling short of striking out. Alternatively, at some exceptional circumstances which do not for some reason fall within the ambit of Rule 8. See for example the decision of Morgan J sitting in the Upper Tribunal in Foulser v Commissioners of Revenue & Customs [2013] UKUT 38
35 (TCC) (not cited).*

84. *Neither party invited me to make any more limited order than a barring order.*

40 85. *I am not minded to resolve issues as to the relationship between Rule 7 and Rule 8 in the context of the present application in the absence of detailed submissions. However what is clear is that if I have jurisdiction to bar the*

respondents from taking further part in the proceedings it would be a matter of discretion and the Court of Appeal's guidance in Denton would be directly relevant."

5 69. Those issues now arise in the present case. We did not hear detailed argument as
to how the appeal against the Nano Products should proceed in the event that the
Respondents' applications were refused. The extent to which the Tribunal Rules
should be interpreted in the light of the Civil Procedure Rules in circumstances such
10 as this might also be affected by the recent decision of the Court of Appeal in *BPP
Holdings Limited* above.

70. Taking all the circumstances into account we are satisfied that it would be just
and fair to refuse the Respondents' application to amend their case and to rely on the
Supplementary Report. Further we are satisfied that the Respondents should be barred
from cross examining the Appellant's expert witness and from making submissions
15 on the Appellant's case in relation to the Nano Products. We would have been minded
to summarily allow the appeal in relation to the Nano Products but it is not clear to us
that we have such jurisdiction. We will hear arguments as to the extent of our
jurisdiction at the final hearing of the appeal in relation to the PC Based Products.

Conclusion

20 71. For the reasons given above we refuse the Respondents' application to amend
their statement of case and to adduce the Supplementary Report. The Respondents
will also be barred from cross-examining the Appellant's expert witness and from
making submissions in relation to the classification of the Nano Products. Any further
sanction will be considered at the final hearing of the appeal.

25 72. 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
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)"
which accompanies and forms part of this decision notice.

35 **JONATHAN CANNAN**
TRIBUNAL JUDGE

RELEASE DATE: 21 MARCH 2016