[2017] UKFTT 0230 (TC)

TC05718

Appeal number: TC/2014/04664

PROCEDURE – application to strike appeal against excise duty assessment and wrongdoing penalty – Whether grounds of appeal within Tribunal's jurisdiction – No – Whether realistic prospect of success – No – Appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

LISA HALE **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Eastgate House, Newport Road, Cardiff on 14 March 2017

The Appellant in person

Ben Lloyd, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the application of HM Revenue and Customs ("HMRC") that Mrs Lisa Hale's appeal, against an excise duty assessment and a "deliberate but not concealed" excise wrongdoing penalty, be struck out.

2. Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (insofar as applicable to the present case) provides:

> (1) …
>
> (2) The Tribunal must strike out the whole or part of the proceedings if the Tribunal–
>
> (a) does not have jurisdiction in relation to the proceedings …
>
> (3) The Tribunal may strike out the whole or part of the proceedings if–
>
> (a) …
>
> (b) …
>
> (c) The Tribunal considers that there is no reasonable prospect of the appellant's case, or part of it succeeding.

It is clear from the use of "may" in Rule 8(3), which in contrast to the use of "must" in Rule 8(2), that the Tribunal has a discretion as to whether or not to strike out an appellant's case under Rule 8(3) which it does not under Rule 8(2).

3. The approach to a strike out application under Rule 8(3) was considered by the Tax and Chancery Chamber of the Upper Tribunal in *Fairford Group Ltd and another v HMRC* [2015] STC 156. It said, at [41]:

> "In our judgment an application to strike out in the FTT [First-tier Tribunal] under Rule 8(3)(c) should be considered in a similar way to an application under CPR 3.4 in civil proceedings (whilst recognising that there is no equivalent jurisdiction in the First-tier Tribunal Rules to summary judgment under Part 24). The Tribunal must consider whether there is a realistic, as opposed to a fanciful (in the sense of it being entirely without substance) prospect of succeeding on the issue at a full hearing, see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* (see above) Lord Hope at [95]. A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. The tribunal must avoid conducting a 'mini-trial'. As Lord Hope observed in *Three Rivers*, the strike out procedure is to deal with cases that are not fit for a full hearing at all."

4. It is therefore necessary to consider whether the Tribunal has the jurisdiction to consider Mrs Hale's appeal and, if so, whether it has a realistic prospect of succeeding but, before doing so I first briefly set out the background to the case.

Background

5. On 23 August 2012, the appellant, Mrs Lisa Hale, was stopped by UK Border Force Officers at Plymouth Ferry Port having travelled with her children from Spain. Her vehicle was searched and 50,000 Lambert and Butler and 4,000 Regal cigarettes were seized in what was undoubtedly a traumatic experience for her. Mrs Hale told the officers that the cigarettes were not for her personal use, something she confirmed when she voluntarily attended an interview with HMRC at Avonmouth on 15 January 2013.

6. An excise duty assessment was issued by HM Revenue and Customs ("HMRC") on 24 January 2013 but subsequently withdrawn as it had referred to the incorrect legislation. However, a new excise duty assessment, in the sum of £12,251.34, was issued under s 12(1A) of the Finance Act 1994, by HMRC on 19 April 2013.

7. On 11 March 2013 HMRC had issued Mrs Hale with a "deliberate but not concealed" excise wrongdoing penalty under paragraph 4 of schedule 41 to the Finance Act 2008 in the sum of £4,287. This was calculated on the basis that the disclosure was "prompted" (ie Mrs Hale did not inform the officers of the cigarettes before she had reason to believe they were about to be discovered – see paragraph 12 schedule 41 Finance Act 2008) and was reduced, in accordance with paragraph 12(2)(a) of schedule 41, because of Mrs Hale's cooperation and voluntary attendance for interview.

8. Mrs Hale's Notice of appeal was received by the Tribunal on 20 August 2014. Although it had not been made within the statutory time limit her application for it to be allowed to proceed was allowed by the Tribunal on 13 August 2015. The grounds of Mrs Hale's appeal, that the total of the assessment and penalty are "totally disproportionate" and that the cigarettes were "purportedly destroyed – so did not enter the economy and no revenue was lost", raise issues described in other strike out applications (eg *Staniszewski v HMRC* [2015] UKFTT 349 (TC)), as the "consumption point'" and the "proportionality point".

9. The consumption point and proportionality point were explained in the strike out decision in *Staniszewski* as follows:

> "25. Shortly stated, the Consumption point was that the assessment … 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 …, was raised. It was submitted … 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)."

10. On 11 December 2015 the Tribunal directed that Mrs Hale's appeal be stayed for six months pending the resolution of a preliminary hearing before me in *Staniszewski* in which the consumption and proportionality points were to be considered.

11. My decision in relation to these issues was released on 12 February 2016 (see *Staniszewski v HMRC* [2016] UKFTT 128 (TC)) and all subsequent references to *Staniszewski* are to that decision. Also, for convenience, and to avoid extensive references to *Staniszewski* in this decision, I have included the relevant part of that decision, which also includes the statutory provisions relevant to this case, in the appendix.

12. On 18 May 2016, after the expiry of the time in which an appeal could be made in in *Staniszewski*, the Tribunal wrote to Mrs Hale to notify her that the stay in her appeal had been lifted. The letter also asked Mrs Hale whether, in the light of the decision in *Staniszewski*, she wished to continue with her appeal.

13. On 14 June 2016 HMRC applied for the appeal to be struck contending that, on the basis of the decision of the Tribunal in *Staniszewski*, the Tribunal did not have the jurisdiction to consider the consumption or proportionality points on which Mrs Hale relied.

Discussion and conclusion

14. I have already referred to the necessity to first consider whether the Tribunal has the jurisdiction to consider Mrs Hale's appeal. If it does not the appeal must be struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009. However, if the Tribunal does have the jurisdiction it is necessary to consider whether the appeal has a realistic prospect of succeeding and whether I should exercise my discretion to strike it out under Rule 8(3)(c) as Mr Ben Lloyd, who appears for HMRC, contends I should.

15. In *Staniszewski* I held that the Tribunal did not have the jurisdiction to consider the consumption and proportionality points in relation to an excise duty assessment and even if it did these arguments could not succeed. However, in relation to penalties I said:

> "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."

16. The Upper Tribunal has subsequently held, in *Euro Wines (C & C) Ltd v HMRC* [2016] UKUT 359 (TCC) at [43], that the excise duty penalty provisions "as a whole represent a proportionate scheme" which "does not go beyond what is necessary for the protection of the revenue".

17. *Staniszewski* has been considered by the Tribunal in two recent cases. The first, *Hill v HMRC* [2017] UKFTT 18 (TC) in which, because of the existence of additional arguments to those raised in *Staniszewski*, Judge Richard Thomas dismissed HMRC's application to strike out that appeal. *Hill* was applied by Judge Aleksander, who also dismissed a strike out application in *Adewale v HMRC* [2017] UKFTT 103 (TC).

18. It is therefore necessary to consider the following arguments identified by Judge Thomas in relation to excise duty in *Hill* to ascertain whether they have any application to the present case:

(1) The "forfeit for other reasons" argument;

(2) The different consumption argument;

(3) The invalid assessment argument; and

(4) The RSP argument.

19. The "forfeit for other reasons" argument involves an examination of the reason for the seizure by UK Border Force Officers. It potentially arose in *Hill* because Mr Hill in his Notice of Appeal that he was told by UK Border Force that his tobacco had been seized because he was unable to provide a contact telephone number for his mother.

20. The different consumption argument as Judge Thomas explained at [85] in *Hill*:

> "… relies on inferences that might be drawn from a decision of the European Court of Justice, Case C-230/08 *Dansk Transport og*

Logistik v Skatteministeriet ECR 2010 I-03799 ("*DTL*"). The argument would be based on the following nine paragraphs (§§86 to 94) which is my analysis of what the decision in *DTL* stands for and how it might be applied by analogy. By way of a note of caution it should be explained that the provisions of the Customs Code and the Excise Duty Directive referred to are not necessarily the current provisions, which may have changed in relevant parts.

He continued:

"86. It is beyond doubt that when tobacco is seized and confiscated at the first customs point on entry into the EU, any customs debt is extinguished in accordance with Article ("Art") 233(1)(d) of the Customs Code ("CC").

87. It is also beyond doubt that where tobacco brought into the EU is seized and confiscated at any other location within the EU, whether in the first territory or on or after crossing the border into another member state ("MS"), the customs debt is not extinguished, and so a customs debt may be due.

88. The rationale for this difference is that in the first situation the goods do not enter the economic networks of the EU and so there is no competition with EU goods, whereas in the second there is a risk that the goods will not be detected and will enter those networks. See also Case C-459/07 *Veli Elshani v Hauptzollamt Linz* [2009] ECR I-2759.

89. For VAT purposes the relevant provisions must be interpreted in the same way as for customs duty.

90. For excise duty, Art 5(1) of the Excise Duty Directive ("EDD") must be interpreted in the light of the concept of "introduction" in the CC, and so goods enter the EU as soon as they go beyond the place of the first customs post is in the EU. No chargeable event occurs for the EDD if Art 233(1)(d) of the CC applies and the goods are confiscated.

91. But after the goods go beyond the first customs point there is a chargeable event.

92. Art 6(1) EDD must be interpreted as meaning that excise goods are only imported into the EU after they have gone past the first customs point.

93. References in *DTL* to the case where goods are released for consumption in EU state and transported to another MS do not refer to cases where goods are seized and confiscated at the border of the second state, but deal with the competence of either state to collect excise duty.

94. On an intra-EU movement of goods on which excise duty has been paid in the MS of departure and where the goods are held in the arrival MS for a commercial purpose but are not declared or on which duty is not paid, the goods may be seized and confiscated. There is of course no customs duty or VAT on such a movement or introduction. Seizure and confiscation under CEMA results in the goods being removed

> from the economic network of the arriving MS and so not being in competition with domestic products on which duty is paid in the arrival MS.
>
> 95. In my view in these circumstances it is not a fanciful argument to say that the EDD must be interpreted as extinguishing the arriving MS excise duty debt (or not imposing it in the first place)."

21. The invalid assessment argument arises from my observation at [29] in *NTA-ADA Ltd (formerly NT Jersey Ltd) v HMRC* [2016] UKFTT 642 (TC) that there was not an appealable decision under s 83 of the Value Added Tax Act 1994 where HMRC's letter had stated that an appellant could "ask for a review" as opposed to stating that there was a "statutory right" to one.

22. The RSP argument can arise where, as in this case, more than one brand of cigarettes have been seized. As tobacco duty is a mixture of a fixed amount and an ad valorem amount (s 2 Tobacco Products Duty Act 1979) with the ad valorem amount based on the UK retail selling price (RSP) of the tobacco it is possible that an incorrect price for the brand has been used resulting in wrong calculation of duty.

23. Judge Thomas also identified the following possible arguments that could be advanced against a penalty assessment:

(1) The "*Jacobson*" argument;

(2) The invalid penalty argument;

(3) The paragraph 4 "unpaid duty" argument;

(4) Quality of disclosure argument;

(5) Reasonable excuse argument; and

(6) Special circumstances argument.

24. The "*Jacobson*" argument refers to a decision of the Tribunal (Judge Thomas and Ms Stott), *Jacobson v HMRC* [2016] UKFTT 570 (TC) in which it was held that a penalty under schedule 41 Finance Act 2008 did not apply at an airport. Although the case is being appealed to the Upper Tribunal it is suggested that the same could apply to a port.

25. The invalid penalty argument is, in effect, the invalid assessment argument described above but applied to a penalty.

26. The paragraph 4 "unpaid duty" argument relies on an argument that the deeming provisions in paragraph 5 of schedule 3 to the Customs and Excise Management Act 1979 do not apply to penalties an appellant may be able to establish that the goods were held for personal use. However, such an argument is not applicable in the present case where Mrs Hales accepts that she did not hold the cigarettes for her own use.

27. The quality of disclosure argument relates to the reductions to a penalty available under paragraph 12 of schedule 41 Finance Act 2008 as a result of the

disclosure by a person whose good have been seized and whether the reduction should be greater than that allowed by HMRC. The reasonable excuse and special circumstances reductions argument arise where an appellant has a reasonable excuse or there are special circumstances for reducing the penalty.

28. Although, the above additional arguments identified by Judge Thomas were brought to Mrs Hale's attention she did not seek to rely on them and said that she accepted that she was liable to the penalty. While I appreciate that she is a litigant in person representing herself, as Maurice Kay LJ observed in *Tinkler & Anr v Elliott* [2012] EWCA Civ 1289 at [32]:

> "… An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. It seems to me that, on any view, the fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him … does not entitle him to extra indulgence"

29. Having regard to all the circumstances, I do not consider, in the light of *Staniszewski*, that the Tribunal has the jurisdiction to consider Mrs Hale's appeal in relation to excise duty and that even if it did that it does not have a reasonable prospect of succeeding. I also consider, having regard to all the circumstances, particularly the reduction given for Mrs Hale's cooperation and disclosure, that the penalty is proportionate and that the appeal against it does not have a realistic prospect of success.

30. In the circumstances, notwithstanding that, as Judge Thomas identified in *Hill*, further potential arguments may arise if the appeal were allowed to proceed to a full hearing, I consider that the appeal should be struck out. As Moore-Bick LJ commented at [14] in *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725 that:

> "… it is not enough simply to argue that the case should be allowed to go to trial because something may turn up …"

31. Finally, I should add that it was clear to me when Mrs Hale described how she had been stopped in Plymouth and her subsequent interview at Avonmouth that she clearly still feels aggrieved by the manner in which she was treated by the Revenue authorities. However, as I explained at the hearing, this Tribunal, the Tax Chamber of the First-tier Tribunal, was created by statute and its jurisdiction, which is defined and limited by legislation, does not extend to the power to supervise the conduct of HMRC. This is clear from the decision, which is binding on me, of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC).

32. Therefore, for the above reasons, I allow HMRC's application and strike out the appeal.

Appeal rights

33. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 21 MARCH 2017

Appendix

Extract from *Staniszewski v HMRC* [2016] UKFTT 128 (TC)

17. …

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 [counsel for HMRC] 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.