[2017] UKFTT 348 (TC)

# TC05822

**Appeal number: TC/2016/03868**

***EXCISE DUTY – assessment to Tobacco Products Duty – hardship application s 16(3) FA 1994 – application allowed***

***PROCEDURE – application by HMRC to strike out appeals against duty and penalty assessments on grounds that appellant failed to co-operate with Tribunal – application dismissed***

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

**E** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD THOMAS**
**RAYNA DEAN FCA**

**Sitting in public at Nottingham Justice Centre on 12 April 2017**

**The Appellant in person, assisted by Ms L, Support Worker**

**Hannah Whelan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. HMRC has published many statements in compliance with its obligations under the Equality Act 2010. See for example HMRC's report "How HMRC has complied with its Public Sector Equality Duties 2015-16" published 20 January 2017[1]. That report refers to the continuing operation in 2016-17 of HMRC's dedicated group called "Needs Extra Support".

2. The Report also says:

> "We raise awareness among staff of customer equality policy, developing and refreshing guidance for our new internal Customer Zone intranet pages, reviewing training needs, and ensuring the development content for new e-learning products take account of relevant policies. We also give presentations on customer equality policy and best practice, to help coach both policymakers and operational staff who work with vulnerable customers."

3. HMRC's Debt Management & Banking Guidance (among no doubt others) at paragraphs 585180 and 585185 gives clear and full guidance to staff in relation to vulnerable groups.

4. But these publications are of little use if HMRC staff ignore them or do not recognise when they should be applied. This case is a very unfortunate example of that.

5. When they received the initial papers for this case both members of the Tribunal had the same reaction, that the appellant is a "vulnerable adult". This was apparent from the Notice of Appeal where the appellant stated that she suffered from Asperger's Syndrome, Attention Deficit Hyperactivity Disorder (ADHD) and fibromyalgia and to which she appended notices of entitlement to benefits including Disability Living Allowance.

6. There is no indication at all that HMRC have recognised that these statements put the appellant firmly in the category that "Needs Extra Support".

7. The appellant attended the hearing and we are very grateful to her for doing so and to Ms L, her support worker, for assisting us. We are also grateful to the staff of the Nottingham Justice Centre who did realise that the appellant may be vulnerable and ensured that the hearing was in a much more informal setting than is standard in that building.

8. We were disappointed, but not surprised, that no one from HMRC attended the hearing and that Ms Whelan had clearly been provided with inadequate material at short notice. She did the best she could with the hand she had been dealt.

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[1] https://www.gov.uk/government/publications/hmrc-compliance-with-public-sector-equality-duties-2015-to-2016

9. Readers so far will have noted that neither the appellant's nor her support worker's real name is used. This case was not heard in private (as is possible in this Tribunal), though as a matter of fact no one other than the appellant, her support worker, Ms Whelan of counsel, the members of the Tribunal panel and the clerk were present (as we have pointed out no officer of HMRC was there). But in nearly all cases of this type (see §10) an oral decision is given, followed by a short or summary decision which is not published. For reasons foreshadowed in §6 we came to the view that this case merited a decision with full findings and reasons and those decisions are published. But we do not think it fair given the appellant's circumstances to name her or her support worker in this decision. We are following standard practice in other Chambers: even reported Upper Tribunal cases in the Administrative Appeals Chamber from the Social Entitlement Chamber of the First-tier Tribunal are anonymised.

## The issues

10. HMRC had stopped the appellant at Dover Docks and had subsequently issued an excise duty assessment for £928 and a penalty assessment for £185. The appellant had appealed both assessments. The hearing was listed to consider the appellant's application (the "hardship application") to the Tribunal to be allowed to proceed with her appeal without having to secure payment of the excise duty to which she had been assessed, as HMRC had refused to certify that her appeal could proceed without her providing that security. As we point out later, HMRC did not seem aware that that was what they were in fact doing.

11. When Judge Thomas saw the initial papers he noted that HMRC had informed the Tribunal and the appellant that if the Tribunal accepted the appellant's hardship application they would apply to strike out the appeals on the grounds that "the appellant has not engaged with her appeal with any due diligence". As it seemed to him that to have a further hearing to decide on this application would be a waste of time and resources for all concerned, he asked the Tribunal to inform HMRC that they should make a formal application to the Tribunal seeking the striking out and that the hearing of the hardship application would also be used to hear the strike out application.

12. We thus considered both applications. We have accepted the appellant's hardship application and refused to strike out the appeals.

## Facts

13. HMRC say in their first piece of correspondence with the appellant dated 14 April 2016 that on 27 April 2015 officers of Border Force seized excise goods from the appellant.

14. Included with that letter was a "Penalty Explanation Schedule". This gave further details:

> "On 27 April 2015 you and fellow travellers were stopped at Dover Eastern Docks by officers of Border Force. After questioning the

> officers seized a total of 15kg of hand rolling tobacco from your party as they did not consider it to be for your personal use but for a commercial purpose. Your share of the quantity seized has been calculated as 5kg."

15. In her notice of appeal (and to us) the appellant said that she had been tricked by someone she thought was a friend. She had been told that he and another woman would take her to Paris. Instead they went to Calais. She had spent about £5 of her own money on a bottle of beer and a bar of chocolate as a treat for herself.

16. When the appellant was being interviewed by Border Force she said she could hear the "friend" in the next room or cubicle telling the officer that the appellant had a business and was the one who could afford to pay for the hand rolling tobacco ("HRT"), thus putting the blame on her for trying to bring in the HRT.

17. She also said that she had been lied to and used as a scapegoat by being handed the bag to carry and then being blamed (for the seizure, we assume) and that she was dumped at a motorway service station and forced to make her own way home.

18. We had no further evidence from HMRC of what happened at Dover, and in particular we did not have the Border Force Officer's Notebook in our bundle or the report made by Border Force to HMRC. We do not know then whether the Border Force officer recognised the appellant's vulnerability – we somewhat doubt it given the outcome.

19. We accept in full the appellant's account of the events before, during and after the seizure of the HRT and find it as fact.

20. Returning to the letter of 14 April 2016 it stated that HMRC:

> "are in the process of evaluating the information we have available to us before deciding what further action to take.
>
> We have enclosed an Excise Duty Schedule and Penalty Explanation Sheet which set out our current view of the amount of duty and penalty we believe you are liable to pay. The purpose of this letter is to give you an opportunity to provide us with any further information which you consider to be relevant for the purposes of determining whether a penalty is due and the correct amount of duty and penalty to which you are liable."

21. The evaluation process that was still under way on the first page of the letter had it seems been completed by the time the second page was typed because that page said that a duty assessment was enclosed, as indeed it was, charging duty of £928 on 5kg of Amber Leaf HRT. So much for the appellant's opportunity to provide information about the correct amount of the duty. HMRC's actions here are no doubt explained, though not excused, by the impending time limit for assessment, which is one year from the date that the facts became known to HMRC (on whose behalf Border Force act).

22. On 3 May 2016 a penalty assessment was made under paragraph 4 Schedule 41 Finance Act ("FA") 2008 in the sum of £185 (approximately 20% of the duty). The time limit for the issue of the penalty assessment is later than that for duty.

23. On 13 May 2016 the appellant contacted HMRC to say she wanted to appeal as, she is reported as saying, "the situation was not her fault" and that "he just asked her to hold the goods". We observe that this statement is consistent with the appellant's account of events in her Notice of Appeal and to us.

24. On 17 May 2016 the appellant sent her notice of appeal to the Tribunal against the duty and penalty assessments. In section 5 (Hardship Applications) she correctly said that she had not paid or deposited the disputed tax. She also said she had applied to HMRC for their agreement that the appeal may proceed without payment of the tax, and that a decision was pending.

25. In the box for putting in reasons why "the hardship should be allowed" (*sic*) the appellant stressed, as she did elsewhere on the form and in statements to HMRC and to us that she was not a small business or any business. She added that her Mum helps her out with "food and stuff". She pleaded not to be sent to prison for non-payment and that "if I knew what was going on I would not have gone I would have kept myself safe but I did not." She said "Help me I cannot pay the amount £998 plus the £185".

26. Later she added "Please help me I am on benefits" and "I don't own anything of value". There is a lot more in the same vein including information about the money she has to spend to try to get her son out of care.

27. It is in the Notice of Appeal that she refers three times to the illnesses and syndromes she suffers from. For example, in box 8 "the desired result", she simply said "I cannot pay I get ESA and DLA Housing Benefit and Council Tax support". She also attached to the Notice of Appeal, notices of entitlement to ESA (Income Related), Housing Benefit and Council Tax Benefit, and Disability Living Allowance.

28. On 4 August 2016 Mr Cameron, an Appeals and Reviews Officer, wrote to the appellant to say that if the appellant wished her appeal to proceed without payment of the tax (*sic*) in dispute, she must provide more information, and he set out "the *type* of information" that he required, namely:

> (1) A current statement for each bank and building society account held in your name
>
> (2) Any other supporting documents which you think may be relevant eg benefit entitlements. (He added that she had already sent some documentation in already to support your appeal "in general").
>
> (3) Any other supporting information you think may be relevant.

29. On 9 September 2016 Mr Cameron wrote to the appellant saying that in the absence of a reply he was refusing her application for her appeal to be heard without

payment of the disputed tax, and he referred to her right to ask the Tribunal to determine the hardship application.

30. On 21 September 2016 HMRC, in the person of Mark Riley, an Officer in the Solicitor's Office of HMRC, notified the Tribunal that they "opposed hardship" and applied to strike out the appeal "without further reference on the grounds that the disputed amount remains unpaid and the Appellant has not provided the Respondents with any evidence [to support their application]".

31. On 31 October 2016 the Tribunal wrote to the appellant to say that a short hearing would be arranged to allow her to demonstrate to the Tribunal that "she would suffer hardship". With the letter were attached directions issued on the instructions of a judge (but not signed by her) requiring the appellant to provide a list of documents on which "it" (!) relied to determine whether "it" (!) should be relieved of paying the tax (*sic*) on grounds of hardship. It also asked the appellant to provide details of witnesses, the suggested duration of the hearing and dates to avoid and details of legislation and case law authorities on which the parties rely.

32. On 29 December 2016 Mr Riley wrote to the Tribunal to say that the appellant had not complied with the directions to provide a list of documents and asked the Tribunal to consider striking out the appeal as the appellant had not engaged with the appeal with any (*sic*) due diligence.

33. On 6 January Mr Riley said that HMRC wished to "pursue a direction" from the Tribunal to strike out the appeal as the appellant had not "prosecuted her appeal with any due diligence".

34. On 19 January Mr Riley repeated what he had said on 6 January, but instead of saying that the appellant had not "prosecuted" her appeal with any due diligence it was said that she "had absolutely not engaged with" her appeal with any due diligence.

35. Behind the Tribunal's copy of Mr Riley's email is a draft direction by the Tribunal directing that "these proceedings MAY BE STRUCK OUT without further reference to the parties". The reasons for that warning given in the draft direction is that the appellant had failed to comply with the Tribunal's directions [we assume to supply her list of documents, though that is not mentioned] and had failed to reply to a letter from the Tribunal of 5 January 2017 asking her to "advise the Tribunal of the position" within 7 days, the "position" being, it appears, her non-compliance with the directions. The appeal would not however be struck out, the draft said, if the appellant confirmed "in writing that [it he she] intends to proceed with the appeal and complied with the directions.

36. We do not know who drafted the directions or what the Tribunal was meant to do with the directions. It was not produced to us by Ms Whelan as something we should issue (even after (very) necessary amendments). It was not as far as we know issued by a judge or tribunal caseworker.

## Law

37. Neither Mr Cameron nor Mr Riley in letters to the appellant or in correspondence and formal applications to the Tribunal have ever mentioned what the law relating to hardship applications for excise duty appeals is. Nor could we see any such law included in the bundle.

38. We therefore asked Ms Whelan what the law we were supposed to be adjudicating on was. She referred us to the statute law in our bundle, which consisted of the whole of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) (the "2010 Regulations") and the whole of Schedule 41 FA 2008. Those may be relevant to any appeal against the duty assessment and the penalty, but as HMRC was coming to the Tribunal specifically to prevent those appeals being heard, they did not seem relevant to this hearing.

39. We had to inform Ms Whelan that the relevant law was to be found in s 16(3) FA 1994, which says:

> "An appeal which relates to a relevant decision falling within any of paragraphs (a) to (h) of section 13A(2), or which relates to a decision on a review of any such relevant decision, shall not be entertained if the amount of relevant duty which HMRC have determined to be payable in relation to that decision has not been paid or deposited with them unless—
>
> (a) the Commissioners have, on the application of the appellant, issued a certificate stating either—
>
> (i) that such security as appears to them to be adequate has been given to them for the payment of that amount; or
>
> (ii) that, on the grounds of the hardship that would otherwise be suffered by the appellant, they either do not require the giving of security for the payment of that amount or have accepted such lesser security as they consider appropriate;
>
> or
>
> (b) the tribunal to which the appeal is made decide that the Commissioners should not have refused to issue a certificate under paragraph (a) above and are satisfied that such security (if any) as it would have been reasonable for the Commissioners to accept in the circumstances has been given to the Commissioners."

40. It is in paragraph (b) of s 13A(2) (not in our bundle either) which contains a reference to a decision about excise duty:

> "(b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above;"

41. Section 12(1A) is the relevant part of that section:

> "(1A) Subject to subsection (4) below, 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) at 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."

42. Subsection (4) says:

"(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

…

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment."

43. Our jurisdiction then is given by s 16(3)(b) FA 1994.

44. We set out here, although it is not directly relevant to this case, the "hardship" provisions that apply in VAT appeals found in s 84(3B) Value Added Tax Act 1994:

"(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if—

(a) HMRC are satisfied (on the application of the appellant), or

(b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),

that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship."

45. There are some obvious differences. VAT is a tax, not a duty. (And equally excise duty is a duty, not a tax, a point that has escaped HMRC's hardship specialists and Solicitor's Office – hence the plethora of "(*sic*)" above). And for excise duty (and any other duty to which s 16 FA 1994 applies) the question is not whether the duty does not need to be paid on the grounds that to pay it would cause hardship but whether the person assessed should give security for the duty due or whether security should not be required because of the hardship it would cause to give it.

46. A recent decision of this Tribunal, *Sintra Global Inc v HMRC* [2016] UKFTT 726 (Judge Sarah Falk and Mr David E Williams) spells out the difference but accepts that subject to one point, the considerations that the Tribunal is required to take into account are the same, and are those set out in *Elbrook Cash & Carry Ltd v HMRC*

[2016] UKFTT 191 (Judge Richard Thomas and Mr David Earle) ("*Elbrook*") where in [12] the considerations relevant for duty applications that are listed are:

> (1) Decisions on hardship should not stifle meritorious appeals.
>
> (2) The test is one of capacity to pay without financial hardship, not just capacity to pay.
>
> (3) The time at which the question is to be asked is the time of the hearing.
>
> (4) This may be qualified if the appellant has put themselves in a current position of hardship deliberately (eg by extraction of funds otherwise readily available from a company by way of dividend), or if there is significant delay on the part of the appellant.
>
> (5) The question should be capable of decision promptly from readily available material.
>
> (6) The enquiry should be directed to the ability of an appellant to pay from resources which are immediately or readily available. A corollary of this is that a business is not expected to look outside its normal sources for funding, nor is it required to sell assets, especially if to do so would take time.
>
> (7) If the tribunal has fixed a cut off point for the admission of material, it is not an error of law for the Tribunal to ignore any later furnished evidence.
>
> (8) The absence of contemporaneous accounting information is a justification for the tribunal to conclude that it can place little if any weight on the appellant's assertion that it is unable to afford to pay.

47. A further provision that is relevant to this case is paragraph 18 Schedule 41 FA 2008:

> "(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).
>
> (2) Sub-paragraph (1) does not apply—
>
> (a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or
>
> …"

48. We should also set out the Rule of this Chamber of the Tribunal that covers striking out. That is Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) ("FTT Rules") of which the relevant paragraphs are:

> "(3) The Tribunal may strike out the whole or a part of the proceedings if—

(a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;

(b) the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Tribunal may not strike out the whole or a part of the proceedings under paragraph[….] (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out."

## Submissions of the parties: hardship

49. The appellant submitted in her Notice of Appeal and to us that:

(1) She is not in business or employed.

(2) She is in receipt only of benefits.

(3) Her mother helps her with "food and stuff".

(4) She spends what she can on efforts to get her son back from care.

(5) Her idea of a treat for herself in Calais was to spend £5 on beer and chocolates.

(6) She has a bank account and thought she had sent details to HMRC, but in any event for this hearing her support worker was unable to obtain information because of problems with security questions. Ms L explained that there had been another support worker involved but she was now on long-term sick leave. Ms L had asked for bank statements to be sent by post but the bank had said this would take a few weeks.

(7) She is terrified that bailiffs will come but she had nothing of value that they could take.

(8) She is also terrified that HMRC will send her to prison for not paying the duty.

(9) She has Asperger's, ADHD and fibromyalgia and she has asked HMRC on many occasions for help.

50. HMRC's submissions on hardship were:

(1) The appellant has not supplied her bank statements.

(2) The appellant has not supplied any supporting documents that may be relevant especially about her benefit entitlements, although it is admitted she had supplied those documents in support of her appeal in general.

(3) The appellant has not supplied any other information that may be relevant.

(4) Border Force had inferred that the appellant could afford to travel to France.

## Discussion: hardship

51. There is really nothing to discuss. The submissions speak for themselves. But we have had regard to the *Elbrook* considerations in coming to a clear view that the application must be allowed.

52. We agree the appellant has not supplied her bank statements. We do not think that is because they reveal the appellant's enormous wealth. On the contrary we would not be at all surprised if they showed the kind of available funds or lack of them that might be expected from someone in the appellant's position. We consider that the appellant has done everything it would be reasonable to expect of someone in her position and with her mental and physical problems.

53. We completely discount HMRC's other points. We do not understand the distinction that was being drawn by Mr Cameron (§50(2)) between information on benefit entitlements for the appellant's appeals in general and her application under s 16(3) FA 1994. A medieval philosopher accustomed to deciding and disputing the exact numbers of angels who could dance on any given pinhead may be able to understand the distinction, but we do not. In any event this request like the third one was for information that the appellant *thought* may be relevant. And a failure to respond to item (3) in §50 should surely be taken as an indication that there was no "relevant" information. Specifying merely that what is listed is the "type of information required" and leaving it to the recipient to make a decision on relevance, particularly where HMRC has not detailed what information it already has, does not put HMRC in a strong position to complain about a lack of response especially from a person who they should have appreciated was a vulnerable adult.

54. And we do not understand why HMRC persisted in saying wrongly that the appellant had not provided any evidence to support her hardship application when she had in many places in her Notice of Appeal.

55. Any reasonable officer of HMRC would have come to the conclusion that paying even £928 would cause the appellant hardship, even if wrongly they had not taken into account the appellant's circumstances which she had spelled out in detail to them.

56. What this case shows is that HMRC have throughout persisted in asking the wrong questions and making assumptions through ignorance or not being bothered to read the papers in front of them (in paper form or on screen) in a way that cannot be defended.

57. HMRC say throughout that the appellant's appeal cannot go ahead if she does not pay the "tax". It is of course "duty", not tax, but that is a minor point: but it does suggest that the mindset of those dealing with hardship applications is rigidly focussed on the VAT rules where the considerations may be different and which do not ask the same questions. VAT assessments are only made on people who are in

business in a relatively substantial way. Excise duty assessments are also made on such businesses but, since 2010, have been made on many people who are not in business and who have little income, but the hardship provisions are applied in the same way to these type of people as the VAT ones are applied to suspected MTIC fraudsters.

58. The main legal difference between the hardship rules for VAT and those for other duties is that in excise duty and these other duties the question is not whether the appellant can, at the time the question is asked, pay the full amount of the tax outstanding without hardship. The question is how much security should the appellant be required to give, and if to give security of a particular amount would cause hardship, how much if any could still be given?

59. We did not have Mr Cameron present to give evidence, nor had he made a witness statement, so we do not know what was in his mind or that of any other HMRC officer involved in this case. But the documentation available to him from the Notice of Appeal including the information on benefits strongly suggests that the appellant could not give any normal form of security or guarantee and that to force her to do so would cause hardship. The impression we have from the course of correspondence is of a rigid adherence to a set of standard questions irrespective of what information had already been supplied or is known.

60. But the most worrying error on the part of HMRC is their insistence that the "appeal" (in the singular) cannot go ahead without payment of the tax or a successful hardship application. There are two appeals here as there potentially are in every case where a person attempts to bring in to the UK from another member state excise goods which Border Force seize. One is against the assessment to duty where the provisions of s 16(3) FA 1994 applies. The other as here is against the assessment to a penalty where paragraph 18(2) Schedule 41 FA 2008 makes it plain that the penalty does not have to be paid until the appeal is determined. There is no question of any need to show hardship. But that was never made clear to the appellant in this case[2].

61. We have made our decision purely on the basis of the submissions of the parties as set out in §§49 and 50. But these other points may well have swayed us had the balance of argument been closer.

## The strike out application

62. We turn now to the application to strike out. We had the benefit for this of written submissions by Ms Whelan which were handed to us in the hearing. The appellant had no points to make on this technical legal point, at least on the point which we thought was the only application being made (the "due diligence

[2] Judge Thomas has seen many excise duty appeals by individual travellers from other member states where this same mistake has been made. Fortunately in all cases where a hardship application has been made HMRC have granted it in respect of both the duty *and* the penalty, and these were all cases where the appellant was clearly better off in all respects than the appellant in this case. The Tribunal itself cannot be immune from all criticism as the form of the Notice of Appeal accidentally encourages the view that the penalty is subject to a hardship application

application"). As it turned out the due diligence application was used as a pretext for foreshadowing a forthcoming application to strike out both appeals against duty and penalty under Rule 8(2)(a) and 8(3)(c) and then arguing it.

63. As to the due diligence application itself HMRC argued that strike out was justified because:

> (1) The Tribunal has no jurisdiction to hear the matter (by which they said they meant the appeal against the assessment: we supply the missing words "to duty" which are implicit) in the light of the failure on the part of the appellant to pay the sums due to HMRC.
>
> (2) The appellant had not complied with directions or prosecuted her appeal with due diligence (at least counsel recognised that Mr Riley's phrase "with any due diligence" is ungrammatical) in that she had failed to supply any supporting evidence that she is impecunious in respect of her hardship application.

64. This Tribunal now recognises that, by requiring HMRC to produce a formal application for strike out in the light of the numerous suggestions they made to the Tribunal on the topic, it may have misunderstood from a reading of those papers supplied beforehand what was being argued by HMRC.

65. It seems to us now that by saying that the appeal against duty should be struck out for lack of prosecution or due diligence HMRC was simply putting forward arguments why the hardship application should not succeed or perhaps should itself be struck out. This clearly accords better with the facts, namely that the directions in the case were, contrary to this panel's original supposition, given merely for the hardship application, and that Mr Cameron's letters seeking more information (or the same information but for a different reason) were also only concerned with the hardship application.

66. On that basis this application falls away as a separate point. It becomes irrelevant anyway in the light of our decision on hardship which is of course to accept the appellant's application. But we think that if that the point of the due diligence application was as we suggest in §65 then it was misconceived.

67. We are not aware whether the Tribunal when it issued its directions, had been informed by HMRC, as it should have been, that the appellant was a vulnerable adult. We also think that HMRC should have appreciated that if a litigant in person who is a vulnerable adult does not supply a list of documents on which she will seek to rely, it is because she does not know what that means or the significance of it, or it could mean that there are no such documents and that the appellant will rely, as most litigants in person do, on documents that have already been given to HMRC or the Tribunal and to oral evidence. Why should a list be provided that contains no entries?

68. But beyond that is a more important point. The unspoken point being made here (which in other cases is spoken) is HMRC's belief that the *BPP*[3] sauce for their

[3] *BPP Holdings v HMRC* [2016] EWCA Civ 121

goose should in all cases, irrespective of the importance of the issue, be sauce for an appellant's gander. In other words they seem to be using any non-compliance with directions as a weapon with which to engineer a strike out. But why in this particular case? Both members of the panel here have been involved in many other cases involving litigants in person where HMRC do not seek to take any points about a failure to comply with directions and where the HMRC representative will go out of their way to help the appellant (thus furthering the overriding objective in Rule 2 of the FTT Rules and cooperating with the Tribunal).

69. That it is not just HMRC who seek to use infringements of directions as a weapon can be seen from, among other cases, *Essential Telecom Ltd v HMRC* [2016] UKFTT 475 where the appellant sought to have HMRC debarred from the proceedings for being 24 hours late with a skeleton. There it was said:

> "22. We consider that there are two very relevant paragraphs in *Denton*[4] which, in this case, we draw to the attention of the appellant:
>
> '40 Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.
>
> 41 We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4).'
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> 23. This approach has already been reflected in decisions of Tribunals. In *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) the Administrative Appeals Chamber of the Upper Tribunal said of Rule 2 of the First-tier Tribunal Rules (Overriding Objective):
>
> 'Those provisions therefore impose an express obligation upon the parties to assist in the furtherance of the objective of dealing with cases fairly and justly, which includes the avoidance of unnecessary

[4] *Denton & Ors v TH White & anor* [2014] EWCA Civ 906

> applications and unnecessary delay. That requires parties to cooperate and liaise with each other concerning procedural matters, with a view to agreeing a procedural course promptly where they are able to do so, before making any application to the tribunal. This is particularly to be expected where parties have legal representation.'"

70. This is as true here as it was there. But the question that is not answered anywhere in HMRC's applications or emails is this: under what part of Rule 8 was the due diligence application being made? The Tribunal has not issued an "unless" direction in this case (at least there is no evidence put before us that the draft in the papers was ever issued). The only other candidate would seem to be that the failure to comply with the direction shows that the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

71. HMRC's first submission though (see §63(1)) does faintly suggest that the argument is lack of jurisdiction on the basis that an appeal may not be entertained by the Tribunal in the absence of payment of the duty. But that cannot be right because that is precisely the point that the hardship hearing was convened to decide. And even if the decision on hardship had been against the appellant then an unsuccessful application for relief from paying (or needing to give security to be more accurate) does not prevent the appeal being entertained if the duty is subsequently paid or secured. On the lack of jurisdiction basis this application was bound to fail and does so.

72. Nor does it succeed on the basis of lack of co-operation with the Tribunal. First we are sure that no lack of co-operation was intended by this appellant for obvious reasons. Secondly if there was a lack of co-operation we fail to see how it could possibly have made it impossible to deal with the case fairly and justly. We have just dealt with it: if HMRC were concerned that the appellant's lack of co-operation prejudiced their ability to put their case properly, then someone from HMRC should have been at the hearing to assist counsel in dealing with any points that were felt by them to have amounted to an ambush or some other catching of HMRC off guard caused by the appellant's failure to list her documents or to provide bank statements or to produce her evidence of benefit entitlements in a way which was not just "in general".

73. If HMRC think we have committed some procedural error or acted contrary to the overriding objective and thereby not acted fairly and justly then their remedy is to appeal this decision.

74. We rather incline to the view that if any party has failed to co-operate with the Tribunal in the manner described in Rule 8(3)(c) it is HMRC. They were the ones who should have (even if "must have" is going too far) realised the vulnerability of the appellant and should not only have made all appropriate adjustments themselves but should have informed the Tribunal, so that the rather unsuitable directions and letters from the Tribunal would not have been issued in the form they were and which

could easily have led the panel hearing the application to take a very different course from the one it did. That would not have been just and fair.

75. HMRC will know from *BPP* if they didn't know before that Rule 8(7) is not a hollow threat.

76. The application so far as it is grounded in Rule 8(3)(c) also fails.

77. Ms Whelan's submission on the due diligence application goes on to say that if that strike out application is unsuccessful and the hardship application succeeds, HMRC puts the "Court" and the appellant on notice that in due course another application to strike out will be made on grounds with which this panel is, and most other judges and members of the Tribunal will be, familiar, namely that the Tribunal has no jurisdiction to hear the appeal because of familiar case law[5] or that there is no reasonable prospect of success for the appellant.

78. We have said "the appeal", but it must not be forgotten that there are two appeals, only one of which, despite what HMRC may think, is the subject of the hardship application and the due diligence application.

79. The way the foreshadowed application is put in the submission is that:

(1) the appellant's case is wholly without merit and the Tribunal has no jurisdiction to consider the grounds of seizure,

(2) the appeal has no prospects of success.

80. As to §79(1), the submission makes the familiar point that the goods have been duly condemned as forfeit under paragraph 5 of Schedule 3 to the Customs and Excise Management Act 1979 and accordingly have conclusively been determined to be held for commercial purposes, and the Tribunal has no jurisdiction to hear submissions on that basis as part of any appeal.

81. As to §79(2) it is said that the appellant does not challenge the validity of the decision to assess both duty and penalty or the calculations of the duty or penalty.

82. Having had these arguments set out we felt it right to inform Ms Whelan and thus HMRC that so far as the penalty is concerned, had we actually been considering HMRC's threatened strike out application, we would have been strongly attracted to the view that on the basis of what the appellant has already said in her appeal notice she had a reasonable excuse for doing what she is accused of doing and that there were special circumstances justifying a special reduction to nil which had obviously not been taken into account by HMRC.

83. As to §79(1) we do not know what the grounds of seizure given by the Border Force were. The appellant's account of being duped into being a "mule" (our characterisation) and being lied about as to a business may well give her grounds other than "private use" to contest the assessment. For example she may be able to

[5] *Jones & Jones v HMRC* [2011] EWCA Civ 824 and *Race v HMRC* [2014] UKUT 331 (TCC)

argue that in the circumstances of what she says happened at Dover she was not "holding the goods intended for delivery" in the sense of that phrase in Regulation 13(2)(b) of the 2010 Regulations. We do not propose to go through all the points made in *Liam Hill v HMRC* [2017] UKFTT 18 but on the face of it there seem to be some deficiencies of process in the letter and associated documents of 14 April 2016 and there was no obvious offer of a review as is required by s 15A(1) FA 1994.

84. We informed Ms Whelan and the appellant that in view of the fact that we had had to delve deeply already into the facts of this case and in view of the submissions she had made to us in relation to the foreshadowed strike out that we would reserve any further hearing of applications or appeals to ourselves.

85. But we sincerely hope that HMRC will read this decision, and in the fashionable phrase, "learn lessons", and that one of those lessons will be that when dealing with vulnerable adults the approach taken in this case is profoundly wrong. We also very much hope, though we cannot dictate it, that we will not be called upon to hear any more applications or appeals in this case.

## Decision

86. We record here that for the reasons we have given:

(1) We decide that, on the grounds that it would have caused hardship to the appellant, the Commissioners for Her Majesty's Revenue and Customs should not have refused to issue a certificate under paragraph (a) of section 16(3) FA 1994 and we are satisfied that no security need be given to those Commissioners.

(2) We refuse to grant HMRC's application to strike out the appellant's appeals against duty and a penalty.

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

**RICHARD THOMAS**

**TRIBUNAL JUDGE**
**RELEASE DATE: 26 APRIL 2017**