NCN: [2021] UKFTT 215 (TC)

TC08164

PROCEDURE – application by HMRC to admit new witness evidence and amend their statement of case – opposed by the appellant - application by the appellant to strike out those parts of HMRC's case which relate to the appellant's compliance history – opposed by HMRC – underlying appeal relates to review of decisions by HMRC to refuse end use authorization for importation of seven civil aircraft – ambit of s 16(4) FA 94 and UCC Article 211 reviewed – First De Sales Partnership, John Dee, Gora and Bezhad considered – HMRC application allowed – appellant's application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2018/00697
TC/2018/03722
TC/2018/08002

BETWEEN

DHL AIR LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted remotely by video on 29 and 30 April 2021

Jeremy White instructed by KPMG LLP for the Appellant

Mark Fell instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This is a case management decision. The substantive appeals to which it relates arise from the importation of seven civil aircraft by the appellant (or "**DHL**)" between June 2016 and February 2017. At the time of those importations, subject to authorisation, civil aircraft were eligible to be imported at a zero rate of duty by reason of their end use. At the time of the importations, DHL was not authorised for end use, and so was not permitted to zero rate the importations. DHL requested regularisation of the importations including the appropriate authorisation for end use which was refused by HMRC who then assessed DHL to import duty of £3,010,108.52. HMRC has also refused to grant a remission/repayment application in respect of that duty. DHL has appealed against all three of these decisions.

2. In November 2020 HMRC made an application for directions permitting the admission of additional evidence from Officer Andrew Coulsey and Officer Katherine Salter, and to amend their statement of case.

3. DHL opposed this application, and in January 2021 made its own application to strike out parts of HMRC's case.

4. This decision deals with those applications.

BACKGROUND TO THE APPLICATIONS

5. Under end use relief, a trader may be relieved from duty on goods imported on account of their use (including aircraft and aircraft parts). Customs duty on such goods is not discharged until they are put into the relevant use and prior to that they remain under customs supervision. However, reliance on end users requires authorisation from the customs authority in question.

6. The seven aircraft, imported between June 2016 and February 2017, were imported into the UK from the United States of America and all bar one were imported at East Midlands airport. They were eligible for end use. However DHL was not authorised for end use at the time of the importations although it had previously been authorised to operate end use between 8 March 2002 and March 2015.

7. There is no dispute between the parties that had the appropriate authorisation been in place at the time of the importations, DHL would have been entitled to end use relief. The issue, however, in the underlying appeals, arises from the fact that there was no such authorisation in place.

8. Following a voluntary disclosure, on 31 March 2017, DHL applied retroactively for renewal of its previous authorisation. This was received by HMRC on 4 April 2017, and the application was refused in a decision dated 10 July 2017 ("**the end use decision**"). The appellant requested a statutory review of that decision (the "**statutory review**") and the end use decision was upheld by HMRC on 30 November 2017. DHL has appealed against the end use decision (the "**end use appeal**").

9. On 6 December 2017 HMRC decided to issue a post-clearance demand notice (or C18) for a customs debt of £3,010,108.52. This decision was upheld on statutory review and DHL has appealed against this decision (the "**C18 appeal**").

10. On 5 November 2018 HMRC decided to refuse to grant a remission/repayment application in respect of that customs debt. DHL has appealed against this decision (the "**repayment appeal**").

11. The parties agreed that Officer Salter should perform a further review of the end use decision. She concluded her review on 29 April 2020 and upheld the end use decision ("**Officer Salter's review**").

12. By notice dated 30 November 2020 HMRC applied for permission to serve further witness evidence from Officer Coulsey and Officer Salter and to amend their statement of case. DHL replied by notice dated 11 January 2021 objecting to HMRC's application largely on the grounds that the witness evidence is not relevant and that accordingly the statement of case should not be amended. HMRC replied by notice dated 21 January 2021 saying that DHL should have applied the material part of HMRC's case to be struck out. By notice dated 25 January 2021 DHL applied to strike out certain parts of HMRC's case. Paragraph 2 of that notice reads:

> "2. In particular, the Appellant applies to strike out:
>
> a. The Commissioners case that the Appellant's compliance history was and is relevant to the determination of the Appellants application for authorisation to operate End Use ("the **End Use decision**"); and
>
> b. Consequently, paragraphs 8, 9, 27 and 28 of the Commissioners Original Statement of Case, together with the last sentence of paragraph 19."

13. HMRC have submitted a consolidated statement of case and the amended version is dated 26 November 2020. It deals with all three appeals. Section A provides an introduction to the appeals and within that section, paragraph 3A is the new and relatively uncontroversial inclusion sought by HMRC. Section B is entitled "Events relevant to the appeals" and B1 contains the compliance history. This includes paragraphs 8 and 9 which the appellant has now sought to strike out. Section C deals with the end use appeal. This includes paragraphs 27 and 28 which the appellant seeks to strike out and paragraph 19 of which the appellant seeks to strike out part. Section D deals with the C 18 appeal, and Section E deals with the repayment appeal.

14. In the main the paragraphs which DHL wish to strike out are those which relate to its compliance history in relation to the end use authorisations which it held from 2002 until 2015.

THE ISSUES IN A NUTSHELL

15. There are a number of interrelated issues which are relevant to this application**.**

16. Firstly whether the appellant's compliance record is relevant to an application for end use relief which has purely retrospective effect. I shall refer to this as the "211 issue".

17. Secondly whether the appellant's application for end use relief which it made on 31 March 2017 was an application for purely retrospective relief or whether it was both retrospective and prospective. I shall refer to this as the "application issue".

18. Thirdly whether the application comes within the ambit of Article 172 and HMRC are only obliged to allow an authorisation for retrospective effect in exceptional circumstances. I shall refer to this as the "exceptional circumstances issue".

19. Fourthly the extent of the Tribunal's jurisdiction given that the parties agree that the matter under consideration is an ancillary matter to which the provisions of section 16(4) Finance Act 1994 apply. I shall refer to this as the "jurisdiction issue".

20. Fifthly the "decisions" which might not have been reasonably arrived at by HMRC. I shall refer to this as the "decisions issue".

21. Finally whether, if I were to allow DHL's application to strike out that part of HMRC's case which relates to the end use decision, that would be determinative of all the matters under appeal. I shall refer to this as the "determination issue".

RELEVANT LAW

22. The relevant law is set out in the Appendix where the abbreviations used in the body of this decision can be found. UCC 211 uses the word "retroactive", but in written and oral submissions the parties also used the word "retrospective". They mean the same and are used interchangeably in this decision.

STRIKE OUT, BARRING AND RULE 5

23. HMRC's application of 30 November 2020 to amend their statement of case and to admit new evidence was made under Rules 5 and 15. DHL's application of 25 January 2021 was an application to strike out under Rules 2, 5 and 8. Neither party made any point that an application for strike out which does not relate to want of jurisdiction can only be made by HMRC. The flipside of strike out is barring, the technical name given to prohibiting HMRC from taking part in proceedings, and in the context of this appeal, where the Tribunal considers there is no reasonable prospect of HMRCs case succeeding.

24. Strictly speaking, therefore, references in this decision should be to barring rather than to striking out but given that that was the language used in the original application and during the hearing, I have persisted in using it in this decision. But technically, the appellant's application is that HMRC should be barred from taking part in those parts of their case which relates to the appellant's compliance history.

25. Mr White did suggest that there was a procedural point in that barring appears only to be available to prevent the respondent from taking further part in "the proceedings", whereas strike out deals with the appellant's case "or part of it". And DHL are only asking the Tribunal to bar HMRC from taking part in part of the proceedings. And so, for reasons which I am afraid I am not fully clear, the principles which apply to strike out and which are set out in *FDSP* do not necessarily apply to DHL's application. Furthermore, given that the application is made under Rule 5 as well as Rule 2, and *FDSP* does not apply to applications under Rule 5, then again, the principles in that case do not necessarily apply to DHL's application. Mr Fell disagrees and thinks that the principles to which I must have regard when considering whether to allow DHL's application are those set out in *FDSP*. I agree with Mr Fell. As can be seen later in this decision when I come to deal with the determination issue, it is clear that Mr White believes that if I were to grant the application, that would be determinative of all of the issues in all three appeals. That is tantamount to strike out or summary judgment. DHL's application both walks and quacks like a strike out application, and I shall deal with it as such.

STRIKE OUT AND THE PARTIES SUBMISSIONS

26. Although the initial applications were made by HMRC to admit additional witness evidence, the substantive issue which was considered in detail at the hearing concerned whether I should strike out those parts of HMRCs case which reflect HMRCs view that the appellant's compliance history was relevant to the end use decision. So the focus of this decision is very much on the application for strike out.

27. I remind myself, therefore, of the principles set out in *FDSP*. When considering the issues I have set out above I should not conduct a mini trial. I should consider whether HMRC's case relating to the issues on which strike out is sought, has a realistic rather than fanciful prospect of succeeding at a full hearing. This is not a high bar. It merely requires some degree of conviction. I shall refer to the aforesaid principles as "fanciful" or "realistic" for convenience in this decision. I can investigate the parties' respective contentions relating to the issues and should not take everything HMRC says at face value. I should consider what evidence might be brought and considered at the trial. I should be slow to strike out where there is a disagreement on the facts which a fuller investigation at the trial would affect the outcome of the appeal. If I have before me all of the information on which I could make a proper determination one element of the appeal, then I should grasp the nettle and determine that element.

28. For the reasons which I set out in more detail below, it is my judgment that HMRC have established that their case relating to the strike out issues is one which has a realistic prospect of succeeding at a full hearing. They have provided sufficient evidence on which I can come to that conclusion in respect of the application issue notwithstanding submissions to the contrary by DHL. Their arguments regarding the 211 issue have merit. There are respectable technical competing arguments relating to the jurisdiction and decisions issues. I do not think that if I were to strike out those parts of HMRCs case which relate to the relevance of the compliance history, that would determine all of the issues in this appeal.

29. The hearing lasted two days. I was privileged to benefit from the eloquent and coherent arguments from Mr White on behalf of DHL and Mr Fell on behalf of HMRC. I am extremely grateful for their clear and helpful submissions both written and oral which I have carefully considered in reaching my conclusions. I have not found it necessary to refer to each and every argument advanced by them on behalf of their respective clients, and I have also taken the view that, having concluded for the reasons given below, that HMRC's case has a realistic prospect of success, it would be inappropriate for me to make extensive findings between the competing arguments which might prejudice the ability of the trial judge to consider these issues fairly and justly. I would not want anything which I say in this decision to be treated as a finding of fact which might affect the trial at which all of the issues may be fully aired, and the oral evidence given by the parties' respective witnesses fully investigated. And so when considering the parties competing arguments on the issues I have mentioned above, I have refrained from coming to conclusion as to the facts, and the competing interpretations of the law. I have simply considered whether the arguments advanced by HMRC have a realistic prospect of success at trial, and I consider that they do. And so by restricting the consideration of the submissions advanced by Mr White and Mr Fell, I mean no discourtesy to either of them. It is simply a function of the nature of the decision which I must reach.

30. Given that the issues I have mentioned above are so interrelated, I shall set out below the parties respective submissions on all of them rather than teasing them out.

31. Mr White on behalf of DHL submitted as follows: the principle issue which the Tribunal needs to determine is whether DHL should be granted the limited authorisation it is applying for and the factors which HMRC should have taken into account when considering the application; although the application made by DHL for end use authorisation was for a renewal of its authorisation which expired in 2015, and so was retrospective and prospective, it is clear from the correspondence that the authorisation finally sought was retrospective only; indeed there was no need for any prospective element given that the aircraft which were the subject of the authorisation had already been imported and released into circulation before authorisation was sought; given that the authorisation sought was thus limited in this way, it is pointless to have a trial on the basis that the original application was both prospective and retrospective; at the time of Officer Salter's Review it was apparent that the application was solely retrospective; that review is one which is within the ambit of the Tribunal's review powers in Section 16(4) Finance Act 1994 given that following that review there was a legal issue to be determined and the end use decision and subsequent review had still not been operated on; UCC 211 makes it clear that there is no need for a person seeking solely retrospective authorisation to provide necessary assurances of the proper conduct of the operations; whilst that might be relevant to a prospective authorisation, it does not apply to a solely retrospective authorisation; this is apparent from the provisions of UCC 211; UCC 211(2) is a self-contained regime which applies to an application for authorisation with retrospective effect and does not include any requirement to provide necessary assurances; it is also clear from an examination of the statutory derivation of UCC 211 which makes clear that the "applicant offers every guarantee necessary" criterion applies solely to prospective applications; in any event, UCC 211 is a revenue protection measure and where a retrospective application is made and the goods have been put into circulation, there is no need to protect the revenue; revenue can be protected by way, for example, of seeking security; furthermore, there has been a change in the law from 1 May 2016 and there is no need now to provide any necessary assurances whether the application is for retrospective or prospective authorisation; the interpretation of UCC 211 should be viewed in light of this change; on the exceptional circumstances issue, HMRC have made an error of law in interpreting Article 172; the renewal authorisation sought by DHL was a renewal authorisation which does not require exceptional circumstances unlike a de novo application for retroactive authorisation; the Tribunal's jurisdiction under section 16(4) Finance Act 1994 is both appellate and supervisory; the Tribunal can consider evidence now of facts which were not known to the decision maker not merely because they were unknown to the decision maker at the time of making her decision, but also any facts which came into existence after the date on which the decision maker made the relevant decision; in the context of this appeal, the Tribunal can consider facts which were in existence not just at the time of the end use decision, and the immediately following statutory review, but also those facts which were before Officer Salter at the time of her review; and given that at that time it was abundantly clear that the appellant's application was solely retroactive, and that UCC 211 makes it equally clear that necessary assurances/compliance history are irrelevant when considering such an application, it is inevitable that a remission of the decision back to HMRC to reconsider its original decision will result in HMRC accepting that they have made an error of law and they will remake the end use decision by granting retrospective authorisation to DHL; this will be determinative not just of the end use appeal but also of the C18 appeal and repayment appeal; the retrospective authorisation means that the aircraft would have suffered a zero rate of tax when being released into free circulation, so there is no liability to a customs debt, and therefore no need to make any application for repayment; so by striking out the elements of HMRC's case which reflect their incorrect understanding of the appellant's application at the relevant time (namely that it was a solely retrospective application) and there was no statutory requirement for HMRC to consider the appellant's compliance history given that there was no need for DHL to provide necessary assurances under UCC 211, the appeal

can be settled without the need for a lengthy trial which will need to investigate the appellant's previous compliance history; this will bring with it a considerable saving in time and cost.

32. Mr Fell submits as follows: the end use decision was made following an application by DHL for both a retrospective and prospective authorisation which was not limited to the importation of the aircraft but included aircraft parts; his preferred position is that it is this end use decision which is the decision to which the Tribunal must apply its powers under section 16(4) Finance Act 1994; his alternative position is that those powers could be applied to a combination of the end use decision and the immediately following statutory review; but in both cases, at the time of those events, the application was for both retrospective and prospective authorisation and thus, on DHL's own interpretation of UCC 211, DHL's compliance history is relevant since authorisation depended on DHL providing necessary assurances of the proper conduct of its operations; Officer Salter's Review does not engage the Tribunal's jurisdiction under section 16 Finance Act 1994, and was not conducted at the direction of the Tribunal under section 16(4) of that Act; the Tribunal's jurisdiction is circumscribed by section 16 Finance Act 1994 and is limited to assessing the reasonableness of the statutory decisions under challenge; this means that the Tribunal does not have jurisdiction to consider whether, as things have turned out, a prospective authorisation was unnecessary given that the aircraft had already been released into free circulation; the Tribunal's jurisdiction is partially appellate (something on which both parties agree) but its appellate jurisdiction extends only to considering evidence now which might result in findings of facts which were in existence at the time that the decision maker reached her decision but which were not known to the decision maker at that time; it does not extend to findings of fact which were not in existence at that time but which only came into existence after the decision maker came to her decision; an examination of the documentary evidence makes it clear that the application for end use which led to the relevant statutory (and thus reviewable) decisions was not purely retroactive nor did it relate solely to the importation of the aircraft; but in any event, even if the appellant's application was treated as one for solely retrospective authorisation, it was still required to provide necessary assurances of the proper conduct of its operations; this requirement in UCC 211(3) extends to applications for all end use authorisations whether prospective or retrospective, under UCC 211(1), and the safe harbour provisions of (2) which Mr White suggests apply to absolve the appellant from an obligation to provide necessary assurances where there is a solely retroactive application, do not apply as he suggests; the current provisions are clear on that; it might be the case that the provisions were imposed for the protection of the revenue, but the provisions themselves are clear; and require necessary assurances for any end use authorisation; the fact that the law changed in 2016 does not affect this interpretation; EU guidance which comments on the necessary assurances requirement makes clear that a taxpayer in DHL's position will need to have its background records checked regarding their activities in the field of customs and taxation by HMRC; this illustrates that the requirement to provide the necessary conduct of proper operations is a broader requirement than simply showing that the requirements for a specific procedure which has been carried out, have been met; given that the requirement of providing necessary assurances operates to grant relief from customs duty, the Tribunal should interpret and apply its terms strictly; the standard of necessary assurance should be applied consistently and not be appreciably lower in relation to an applicant for retrospective authorisation than in relation to an applicant for prospective authorisation; on the exceptional circumstances issue, Mr Fell thinks that DHL are in a difficult position; if it claims, as it appears to, that its application was solely retrospective, then it seems clear that it is subject to the exceptional circumstances condition; if it however contends that there is no need to satisfy the exceptional circumstances condition because it falls within the ambit of Article 172(3) since it is an application for a renewal of an authorisation, and given that DHL's original authorisation was

both retrospective and prospective, and DHL accepts that a prospective authorisation does require the giving of necessary assurances, then it must logically follow that a consideration of whether those necessary assurances had been given, and the appellant's compliance history, were matters which the decision maker rightly took into account when coming to the end use decision and immediately following statutory review; Officer Coulsey's evidence is relevant to the exceptional circumstances issue which will need to be determined even if DHL is successful in its strike out application.

DISCUSSION

The UCC 211 issue

33. The UCC 211 issue appears to be straightforward difference of statutory interpretation. It is HMRC's view that UCC 211(1) applies to all authorisations, whether purely retrospective, purely prospective, or a combination of both, and UCC 211(3) expressly makes any such authorisation subject to the conditions in (3) which includes the obligation for a trader to provide the necessary assurances. There is nothing in UCC 211(2) which expressly or impliedly disapplies (3). DHL says that the provisions of UCC 211(2) which deals with authorisations for retroactive effect, shall be granted where the conditions in that paragraph (2) are fulfilled, and nowhere in those conditions is there a condition that DHL provides necessary assurances. DHL supports this submission with the further submission that the necessary assurances condition is required to protect the revenue and there is no need, in DHL's circumstances, or for any purely retrospective application, for that revenue to need protecting, since the importation and release have already occurred. Mr White also asked me to consider the predecessor of UCC 211, the Customs Community Code Implementation Provisions at Article 293 which provides that an authorisation shall be granted only where an applicant offers every guarantee necessary for the proper conduct of operations "to be carried out….." This makes clear that the predecessor legislation only required necessary guarantees (the forerunner of necessary assurances) for prospective authorisations and not purely retrospective ones.

34. The competing interpretations took a considerable time at the hearing, and I am afraid that I am not, as suggested by Mr White, going to grasp this particular nettle and come to a decision as to which statutory interpretation is the correct one. It is my view this is a matter which needs to be considered by the trial judge in the context of all of the evidence which is adduced at that hearing. But it is clear to me that both parties' interpretations have merit, and equally clear, for the reasons given by Mr Fell, that HMRC's position is not fanciful, and in my judgment has a realistic chance of success. I say this for the following brief reasons. Firstly it seems to me that on its face UCC 211(1) applies to any application for end use authorisation including one which is for retroactive effect, and not just to an application for prospective authorisation. This is clear on the face of the legislation and, as Mr Fell suggests, any exclusion from such a general principle is, generally speaking, specifically flagged in the UCC but there is no such flagging in this case. Secondly, as I believe Mr White accepts, the conditions other than the provision of necessary assurances in UCC 211(3) apply to solely retroactive applications. For example a retroactive application can only be granted to a person who is established in the customs territory of the Union. If this is the case, then I can see no distinction between those other conditions, and the condition to provide necessary assurances. Thirdly if necessary assurances are not required in respect of a retroactive application, there is a perverse incentive for a trader to seek a succession of retroactive applications if that trader has misgivings about its compliance history. Such a trader would be in a better position than would be the case if he were to make a prospective application. And although UCC 211 clearly makes provision for retroactive application, my instinct is that the regime is better served by

encouraging prospective applications. So that whilst retroactive applications are envisaged, they are an exception to the general rule. And I do not believe that the legislation is intended to give them preferential treatment as regards necessary assurances. I say this notwithstanding the force of Mr White's submissions that the precursor legislation to UCC 211 appears to indicate that the forerunner of necessary assurances applied solely to prospective applications, and that since the law change in May 2016, there is no need for necessary assurances for any form of end use authorisation.

The application issue

35. HMRC's view is that it is clear, even from a cursory analysis of the appellant's application for end use relief of 31 March 2017, that it was an application for a renewal of the authorisation which had expired on 6 March 2015 which is the date from which DHL required its further authorisation to start. The application form shows that the application was for authorisation until 5 March 2020. It also covers both aircraft and goods for use in aircraft. DHL's position is that the voluntary disclosure which predated the application for end use relief arose as a result of the changes in law on 1 May 2016 which DHL found difficult to understand, and in their voluntary disclosure, made clear that they were intending to put in a "retrospective application form".

36. Following HMRC's right to be heard letter, DHL wrote to HMRC on 5 May 2017 providing further information concerning the application and indicated in their letter that the application was submitted on the basis that DHL met the requirements of UCC 211(2) the authorisation to be granted with retroactive effect. In that letter DHL also considers that HMRC's interpretation of UCC 211 is not correct and that necessary assurances are only required for a prospective authorisation. But if it is wrong in that interpretation, then DHL's compliance history should be considered in light of the items for which prospective authorisation is required. These items are civil aircraft (for a period of 12 months) and not aircraft parts in respect of which DHL appears to accept that there have been compliance issues in the past. DHL states clearly in that letter that their proposal is that it will limit the use of end use for a period of 12 months to aircraft only (i.e. prospective until 4 May 2018).

37. HMRCs decision refusing DHL's application for authorisation was given to DHL in a letter dated 10 July 2017 and on 24 July 2017 DHL in a letter to HMRC requested a departmental review. In that letter DHL indicated that it was disappointed that HMRC did not appear to have considered the contents of DHL's right to be heard letter, and in particular HMRCs response to it makes no reference to DHL's proposal to limit end use to aircraft only for a period of 12 months in order to alleviate HMRC's concerns regarding proper conduct.

38. In connection with Officer Salter's review, KPMG on behalf of DHL, set out a brief summary of DHL's case in which they state that "we suggest that what assurance is necessary needs to take into account the limited application that DHL wish to use End Use - i.e. only in respect of aircraft and only in respect of historic imports."

39. Once again, both parties have meritorious arguments. It seems reasonably clear to me that the original application for end use was both retrospective and prospective, and the information provided, subsequently, by DHL in its right to be heard letter and subsequent letter of 24 July 2017 seems to endorse this by clearly stating that end use authorisation is required for a further 12 months i.e. until 4 May 2018. But that reasonably clear position has been blurred since then by correspondence between the parties and, furthermore, by the fact that as things turned out, prospective authorisation was not necessary since my understanding is that

by the time the application for end use authorisation was made on 31 March 2017, all seven aircraft had in fact been delivered on importation to DHL.

40. I appreciate that the application issue is joined at the hip with the jurisdiction issue. If the Tribunal's jurisdiction is limited to considering only the original decision and, perhaps, the immediately following statutory review, then the weight of evidence that I have seen suggests that this was an application for both retrospective and prospective authorisation. If, however, the Tribunal can review not only those decisions but Officer Salter's Review decision, then the position is more nuanced, and DHL's suggestion that at that stage it was clear that only retrospective authorisation had been sought has greater weight.

41. But purely on the application issue, on the evidence that I have seen, I cannot say that HMRCs case that the relevant decisions related to an application for end use authorisation with both prospective and retrospective effect, is fanciful.

The exceptional circumstances issue

42. Mr Fell submits that Article 172 presents a problem for the appellant when considered in conjunction with the application issue. Article 172(2) states that in exceptional circumstances a customs authority may allow an authorisation with retroactive effect to take effect at the earliest one year before the date of acceptance of the application. So if Mr White is saying that DHL's application was purely retrospective, then DHL need to make out that there were exceptional circumstances permitting HMRC to grant that application. And no such exceptional circumstances have been made out. And furthermore, Officer Coulsey's evidence is relevant should exceptional circumstances be an issue. If, on the other hand, Mr White is saying that DHL's application falls outside Article 172(2) because it is an application with both retrospective and prospective effect, that means that the application issue must be decided in favour of HMRC. Mr White countered this by saying that exceptional circumstances are only required to be made out in respect of de novo applications for retrospective authorisation and not for renewal authorisations which DHL was. Thus the exceptional circumstances issue is relevant not only to the evidence which may need to be considered by the trial judge, but also to one of the fundamental issues in this appeal, namely the application issue.

43. Once again, for the reasons given by Mr Fell and Mr White I find both parties have respectable technical arguments on this point, and I cannot say that HMRC's is fanciful. It looks to me, on the face of the legislation, and given that Mr White is arguing that at the relevant time, DHL's application was an application for authorisation with retroactive effect (and so is within Article 172) which was to take effect from the expiry of DHL's previous authorisation in 2015 (and so to take effect more than one year before the date of acceptance of the application) that HMRC are right to say that DHL must establish that there are exceptional circumstances. Mr White's point that this is only the case where there is a "de novo" application seems to sit unhappily in the context of his submission in respect of the application issue that as things turned out, the application was for a solely retroactive authorisation. However given that this point was not extensively explored at the hearing, nor in written submissions, I might be missing Mr White's point completely. But even if I am, it is my view that Mr Fell's submissions have considerable force.

The jurisdiction issue and the decision issue

44. I shall deal with these two issues together. Whilst it is my view that deciding on the Tribunal's jurisdiction is a matter for the trial judge, and as I have said above, I would not want anything that I say in this decision to impact on the trial judge's duty to conduct the appeal

fairly and justly, as the jurisdiction and decision issues were argued in detail, I think it is only fair to set out my view on them.

45. The Tribunal's jurisdiction stems from section 16 Finance Act 1994. Both parties agree that the decision to refuse DHL's application for end use authorisation is a decision as to an ancillary matter, and thus engages the jurisdiction in section 16(4) Finance Act 1994. It is not open for the Tribunal to quash the decision, instead its jurisdiction appears to be supervisory in that the Tribunal can, if it is satisfied that HMRC's decision was an unreasonable one, direct that the decision, if still operational, ceases to have effect; and that HMRC should conduct a review or further review of the original decision in accordance with directions given by the Tribunal.

46. However where an appeal is brought before a Tribunal, the Tribunal is exercising an appellate jurisdiction. The relationship between supervisory and appellate has been considered in a number of cases, and in particular by the Court of Appeal in *John Dee Limited* [1995] STC 941 and *Gora* [2003] EWCA Civ 525. Mr White relies on *John Dee* in support of his submission that the Tribunal's jurisdiction is determined by the nature of the disputed decision. I do not believe that Mr Fell takes issue with this. Both parties rely on the case of *Gora*. This case is important since it considers the application of section 16(4) Finance Act 1994, and in particular makes clear that since the Tribunal is tasked with undertaking a fact finding exercise, it can make findings of fact on primary facts and then consider the reasonableness of HMRC's decision in light of those findings.

47. In *Gora* the Court of Appeal said that "Strictly speaking, it appears that under s 16(4) of the 1994 Act, the Tribunal would be limited to considering whether there was sufficient evidence to support the Commissioners' finding of blameworthiness. However, in practice, given the power of the Tribunal to carry out a fact finding exercise, the Tribunal could decide for itself this primary fact. The Tribunal should then go on to decide whether, in the light of its findings of fact, the decision on restoration was reasonable….."

48. As I have said, neither party has any significant issues with the foregoing legal principles. The issues in DHL's appeal concerns the extent of the primary facts and what comprises the decision for the purposes of the application of section 16(4) Finance Act 1994.

49. In Mr White's submission, the Tribunal must consider whether HMRC have made an error of law and this includes errors of law made not only in the original decision and the statutory review, but also errors made by Officer Salter in her review since that further review and legal effect. The parties agreed that if Officer Salter had concluded that HMRC's original decisions were unreasonable, HMRC had the power to grant the retrospective authorisation sought by DHL. In deciding whether such an error of law had been made, the Tribunal is able to take into account subsequent facts, the key subsequent fact subsequent to the original decision and the statutory review decision was that future disposals were impossible due to the passage of time.

50. Mr Fell heartily disagrees with these submissions. In his view the Tribunal does not have a wide ranging appellate function, its role is circumscribed by section 16(4) Finance Act 1994 which requires a consideration of the decision on the ancillary matter or any decision on the review of such a decision. The relevance of the decision is self-explanatory. The relevance of the statutory review of such a decision is that that review is made pursuant to the statutory provisions in section 15ff Finance Act 1994, and thus forms part of the statutory process. Officer Salter's Review comprises neither the original decision nor the statutory review, and

thus falls outside the scope of the decisions which the Tribunal has jurisdiction to review under section 16(4) Finance Act 1994. Furthermore, the Tribunal's fact finding exercise is limited to finding primary facts (in *Gora*, it was whether there was sufficient evidence to support the Commissioners' finding of blameworthiness). This exercise, therefore, is limited to considering what facts were in existence at the time of the relevant decisions (namely the decision and the statutory review) which he described as "hidden" facts. It does not extend to a fact finding exercise to consider what facts were not in existence at the time of those relevant decisions but which might have come into existence thereafter. In the context of this appeal, therefore, if the fact that DHL was seeking only a retrospective authorisation was only apparent after the date on which the decision and the statutory review were carried out, then that is not a fact which can now be taken into account by the Tribunal when considering whether the decision maker or reviewing officer had reached a reasonable decision.

51. In support of this proposition, Mr Fell referred to the Court of Appeal decision in *Behzad Fuels* [2019] EWCA Civ 319, a case which concerned the forfeiture of goods arising from the improper use of red diesel. It was therefore an appeal to which the provisions of section 16(4) Finance Act 1994, applied. This was an appeal by HMRC, who argued that the Tribunal had been incorrect to direct that the further review of the original decision should be conducted on the basis of a version of a public notice which was in force at the date of the original decision rather than the version which was subsequently in force. This was on the basis that it made no sense to review the original decision on the basis of a policy which was no longer in force at the time that the direction for further review was made. The Court of Appeal was robust in dismissing this argument. It said that since the original decision was made by reference to the published guidance contained in the original notice, then any review of that decision should also be taken by reference to the same guidance.

52. The Court went on to say, at paragraph 67 of its decision that:

> "The mere fact that protection of the revenue is a ground for revocation under both versions of the Notice seems to me irrelevant. The real reason, to my mind, lies in the limited nature of the Upper Tribunal's jurisdiction under section 16(4), and the general principle that when a decision is reviewed, the review should be conducted by reference to the facts as they existed, and the law as it stood, at the date of the original decision. That is the critical distinction between the review of a previous decision, on the one hand, and the taking of an entirely fresh decision, on the other hand."

53. Mr White's view was that *Bezhad* had to be considered in light of the particular issues in that case, and that the foregoing principles, even if of more general application than to the consideration of whether the relevant public notice was one in force at the date of the original decision or on the date of the subsequent direction by the Upper Tribunal, shed no light on the application of section 16(4) Finance Act 1994 to the issues under consideration in this appeal, namely the decision concerning the appellant's application for end use authorisation.

54. It is my view that the question of jurisdiction is something for the trial judge. But I think that Mr Fell's submissions have greater merit than those of Mr White. The Tribunal's power to carry out a fact finding exercise is a fact finding exercise in respect of the primary facts, and I take that expression to mean, as submitted by Mr Fell, facts which were in existence at that time but which may have been unknown to the decision maker. It is difficult enough for the decision maker to be asked to take into account facts that he or she did not actually know about at the time of making the decision, but that is, to my mind, the correct reading of the Court of Appeal decision in *Gora*. The decision makers position would be impossible if he or she had

to take into account facts which were not in existence at the date of making the decision but which came into existence thereafter. Testing the reasonableness of that decision in light of all subsequent facts would be extremely harsh on the decision maker and I do not think that the decision in *Gora* can be taken as extending the ambit of the fact finding process to that extent.

55. I am fortified in that view by the sentiments expressed by the Court of Appeal in *Bezhad* who, admittedly in a different context from the underlying legislation in this appeal, confirmed that the review of the decision must be conducted in accordance with the facts as they existed, and the law as it stood, at the time of the original decision.

56. And I also prefer Mr Fell's submissions to those of Mr White when it comes to determining the identity of that decision. The original decision and its statutory review occupy a privileged place since they are both contemplated and specifically dealt with in the relevant sections of the Finance Act 1994. Any subsequent review which was a matter of contractual agreement between the parties does not have that privileged status notwithstanding that I accept Mr White's submission that by the time that Officer Salter's Review was carried out, the issue regarding the end use authorisation had not been legally resolved. But that is the case where there is any disagreement between the parties concerning a reviewable decision. It is not legally resolved until the relevant Tribunal comes to a decision, and even then may be subject to appeal.

57. If, therefore, I was obliged to decide the issue, I would decide it in favour of HMRC. The reviewable decisions are only the original decision and the statutory review decision, and do not include Officer Salter's Review. And the fact finding power of the Tribunal extends only to finding facts which were in existence at the time that the original decision and that statutory review were undertaken.

58. From this it is apparent that I believe HMRC have a much better than fanciful case as regards the jurisdiction issue and the decisions issue.

59. Finally on these points, *Bezhad* is also relevant to a point made by Mr White namely that the review and appeals legislation should be interpreted to avoid a pointless result which would be the case if the focus of the review and appeal were on the initial application for end use authorisation which was both retroactive and prospective, when time had moved on and it is clear from the evidence that by the time of Officer Salter's Review the only authorisation sought was retroactive, and indeed by then all the aircraft had been put into free circulation without any loss to the revenue. HMRC had argued, in *Bezhad* that it made no sense to conduct a further review by reference to a policy was no longer in force at the time of that further review. The Court of Appeal in *Bezhad* made it clear that the Upper Tribunal only had jurisdiction to conduct a further review of the original decision and did not have jurisdiction to require a fresh review to be undertaken in the light of the circumstances and published guidance in force at the date when the review is carried out (paragraph 66). This reflects Mr Fell's position in this appeal.

The determination issue

60. Mr White submits that if I were to strike out those parts of HMRC's case which are the subject of DHL's application, then that would determine not just the end use appeal but also the C18 and repayment appeals since it would reflect my view that HMRC had applied the law incorrectly to the relevant decision and thus it would be inevitable that any remission for a further review would result in a revised decision that DHL should be granted an end use authorisation which covered the importation of the aircraft. And thus there will be no liability

to customs duty and no need for an application for repayment. There would, therefore, be a considerable saving in time and costs and no need to proceed to a full hearing which would require an examination of DHL's previous compliance record which will have to take place should the matter proceed to that full hearing. In his first skeleton argument, Mr White seeks directions that HMRC's grounds for refusing retroactive authorisation based on past compliance history be struck out and HMRC's witness evidence of past compliance history is excluded. Mr White goes on to say that the consequences of these directions are that HMRC should grant the authorisation that DHL is requesting, HMRC should withdraw their disputed decision on authorisation and HMRC should withdraw their disputed decision on liability to import duty.

61. I have already decided that the matter should proceed to a full hearing. But I have two observations on Mr White's submissions on the determination issue. The first stems from the Tribunal's jurisdiction in section 16(4) Finance Act 1994. *Bezhad* makes clear that this is a limited jurisdiction, which is limited to requiring HMRC to conduct a further review. I have no power to quash the decision of HMRC under section 16(5) Finance Act 1994, since that only applies to decisions on matters which are not ancillary issues. And the relevant decisions in this appeal are decisions as to ancillary matters. The practical effect of the direction sought by DHL, and their consequences, is that I would, effectively, be quashing HMRC's decision. Mr White has not asked me to remit the relevant decisions to HMRC for a further review based on my opinion of the law. This is a strike out application, and the decision whether to remit is one for the trial judge. But if I were to strike out HMRCs case on the basis sought by Mr White, then it seems to me that the Tribunal would be exceeding its jurisdiction. The best that Mr White can hope for at trial is a decision that the relevant decisions should be reviewed in light of directions given by the trial judge. He cannot hope for HMRC decision to be quashed. And in a strike out application I do not believe that I have the power to quash the decision, either.

62. Secondly, and whilst I heard no argument on this point, it seems to me from sections D and E of HMRC's revised statement of case that HMRC have respectable technical arguments that even if the end use appeal was determined in the appellant's favour, that does not automatically mean that the C18 and repayment appeals should be allowed. Furthermore, as submitted by Mr Fell, compliance history, and thus the provisions in HMRC statement of case which deal with this, and Mr Coulsey's new witness statement are also relevant to the exceptional circumstances issue. And if I were to decide that the appellant's application was solely for a retroactive authorisation, that would bring Article 172 into play which would have to be considered by the trial judge.

CONCLUSION ON THE STRIKE OUT

63. Drawing these strands together, I have concluded that HMRC has a realistic case that:

(1) The decisions which are subject to review under section 16(4) Finance Act 1994 are limited to the original decision and the immediately subsequent statutory review, and do not extend to Officer Salter's Review;

(2) The extent of the fact finding exercise which the Tribunal has power to undertake is limited to finding facts which existed at the date of those decisions and does not extend to findings of fact which might have come into existence after that date;

(3) UCC 211 should be interpreted such that necessary assurances are required for applications for end use authorisation for both purely retroactive and for retroactive and prospective (and indeed purely prospective) authorisations;

(4) DHL's application for end use authorisation was both for retroactive and prospective authorisation;

(5) If DHL's application was solely for retroactive authorisation, then it must establish the existence of exceptional circumstances.

DECISION ON THE STRIKE OUT

64. I dismiss DHL's application to strike out those parts of HMRC's case set out in DHL's application to do so dated 25 January 2021.

HMRC's APPLICATIONS

65. In their application notice dated 30 November 2020, HMRC applied for directions permitting the admission of an additional witness statement from Officer Coulsey and a first witness statement from Officer Salter. They also applied for a direction to amend their statement of case. The purpose of Officer Coulsey's new statement is to cover, based on his knowledge and consideration of HMRCs files, the key factual matters set out in HMRC statement of case and formerly intended to have been covered by Officer Graney's statement, that officer having now retired from HMRC (and HMRC cannot now call her nor can they rely upon her statement which has already been circulated in this appeal). The justification for requesting the introduction of Officer Salter's statement is that she had undertaken a further review, and her statement explains that review process and her conclusions. Her statement will enable the Tribunal to understand the further review process that she undertook. The amendment to the statement of case reflects Officer Salter's Review, and in HMRC's view it is in the interests of justice for the pleadings to be kept up to date as it will enable the Tribunal to understand the issues in the case.

66. DHL's response to this application set out in their notice of objection of 11 January 2021 reflects the views aired extensively at the hearing, namely that DHL's compliance history is irrelevant since DHL only sought retrospective authorisation and so the new witness statements and the amendment to the statement of case are not relevant to the issues which need to be decided by the Tribunal.

67. As can be seen from the foregoing provisions of this decision it is my view that the compliance history of DHL is relevant to the issues which the Tribunal will need to determine in this appeal. HMRC have a realistic case that compliance history is relevant to applications for solely retroactive end use authorisation, that DHL's application was not for solely retroactive authorisation but was for prospective authorisation too, and the relevant decisions which the Tribunal must review under section 16(4) Finance Act 1994 are limited to the original decision and the statutory review thereof and to a power to find facts in existence at the date of those decisions. These are matters which need to be considered by the trial judge and in order that he or she may do so justly and fairly, it is my view that the compliance history of the appellant is relevant to these issues and so the amendment to HMRC statement of case and the witness statements of Officer Coulsey and Officer Salter are also relevant to those issues.

DECISION ON HMRC'S APPLICATION

68. I allow HMRC's application dated 30 November 2020. I direct that copies of the revised statement of case and the aforesaid witness statements, are formally served on DHL (or its

authorised agent) within 28 days from the date of release of this decision. At the same time copies of those documents should be sent to the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 11 JUNE 2021

APPENDIX

RELEVANT LAW

The F-tT Rules

1. The relevant Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**") are Rules 2, 5 and 8:

2. Rule 2(3) requires me to give effect to the over-riding objective when exercising any power under the Rules. The over-riding objective, as set out in Rule 2(1), is as follows:

> (1) "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly."

3. Rule 5 deals with case management powers:

> **"5. Case management powers**
>
> (1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.
>
> (2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.
>
> (3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—
>
> (a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;
>
> (b) consolidate or hear together two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
>
> (c) permit or require a party to amend a document;
>
> (d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party;
>
> (e) deal with an issue in the proceedings as a preliminary issue;
>
> (f) hold a hearing to consider any matter, including a case management hearing;
>
> (g) decide the form of any hearing;
>
> (h) adjourn or postpone a hearing;
>
> (i) require a party to produce a bundle for a hearing;

(j) stay (or, in Scotland, sist) proceedings;

(k) transfer proceedings to another tribunal if that other tribunal has jurisdiction in relation to the proceedings and, because of a change of circumstances since the proceedings were started—

(i) the Tribunal no longer has jurisdiction in relation to the proceedings; or

(ii) the Tribunal considers that the other tribunal is a more appropriate forum for the determination of the case;

(l) suspend the effect of its own decision pending the determination by the Tribunal or the Upper Tribunal, as the case may be, of an application for permission to appeal, a review or an appeal."

4. Rule 8 deals with strike out:

"8. Striking out a party's case

(1) The proceedings, or the appropriate part of them, will automatically be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal—

(a) does not have jurisdiction in relation to the proceedings or that part of them; and

(b) does not exercise its power under rule 5(3)(k)(i) transfer to another court or tribunal) in relation to the proceedings or that part of them.

(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 paragraphs (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) If the proceedings, or part of them, have been struck out under paragraphs (1) or (3)(a), the appellant may apply for the proceedings, or part of them, to be reinstated.

(6) An application under paragraph (5) must be made in writing and received by

the Tribunal within 28 days after the date that the Tribunal sent notification of the striking out to the appellant.

(7) This rule applies to a respondent as it applies to an appellant except that—

(a) a reference to the striking out of the proceedings must be read as a reference to the barring of the respondent from taking further part in the proceedings; and

(b) a reference to an application for the reinstatement of proceedings which have been struck out must be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submissions made by that respondent, and may summarily determine any or all issues against that respondent."

Strike out – case law

5. The legal principles which I must consider have been neatly set out in the Upper Tribunal in *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 ("***FDSP***")

"Approach to applications to strike out - legal principles

31 At [30] of the decision, the judge applied the summary of principles set out by the Upper Tribunal in *HMRC v Fairford Group plc* [2014] UKUT 329; [2015] STC 156 ('*Fairford Group plc'*). The Upper Tribunal held (at [41]) that:

"In our judgment an application to strike out in the FTT under r 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 FTT Rules to summary judgment under Pt 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] 1 All ER 91 and *Three Rivers* [2000] 3 All ER 1 at [95], [2003] 2 AC 1 per Lord Hope of Craighead. 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 Ltd v Patel* [2003] EWCA Civ 472, [2003] 24 LS Gaz R 37. 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."

32. It was common ground that the application 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 FTT Rules to summary judgment under Part 24).

33. Although the summary in *Fairford Group Plc* is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in *AC Ward & Sons v Caitlin Five Limited* [2009] EWCA Civ 1098. The parties to this

appeal did not suggest that any of these principles were inapplicable to strike out applications.

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a fanciful prospect of success: *Swain v Hillman* [2001] 1 All ER 9;
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': *Swain v Hillman*;
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.""

Finance Act 1994

6. Section 16 of the Finance Act 1994 states

16. Appeals to a tribunal.

……..

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

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

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, [a review or further review as appropriate]9of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by [a review or further review as appropriate]9 , to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

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

(6) On an appeal under this section the burden of proof as to—

(a) the matters mentioned in subsection 1(a) and (b) of section 8 above,

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AA), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 197910 (use of fuel substitute or road fuel gas on which duty not paid), shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

End use authorisation

7. Article 211 of the Union Customs Code, Regulation (EU) No 952/2013("**UCC 211**") states

> "1. An authorisation from the customs authorities shall be required for the following:
>
> (a) the use of the inward or outward processing procedure, the temporary admission procedure or the end use procedure;
>
> (b) the operation of storage facilities for the customs warehousing of goods, except where the storage facility operator is the customs authority itself.
>
> The conditions under which the use of one or more of the procedures referred to in the first subparagraph or the operation of storage facilities is permitted shall be set out in the authorisation.
>
> 2. The customs authorities shall grant an authorisation with retroactive effect, where all of the following conditions are fulfilled:
>
> (a) there is a proven economic need;
>
> (b) the application is not related to attempted deception;
>
> (c) the applicant has proven on the basis of accounts or records that:
>
> (i) all the requirements of the procedure are met;
>
> (ii) where appropriate, the goods can be identified for the period involved;
>
> (iii) such accounts or records allow the procedure to be controlled;
>
> (d) all the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation of the customs declarations concerned;
>
> (e) no authorisation with retroactive effect has been granted to the applicant within three years of the date on which the application was accepted;
>
> (f) an examination of the economic conditions is not required, except where an application concerns renewal of an authorisation for the same kind of operation and goods;
>
> (g) the application does not concern the operation of storage facilities for the customs warehousing of goods;
>
> (h) where an application concerns renewal of an authorisation for the same kind of operation and goods, the application is submitted within three years of expiry of the original authorisation.
>
> Customs authorities may grant an authorisation with retroactive effect also where the goods which were placed under a customs procedure are no longer available at the time when the application for such authorisation was accepted.

3. Except where otherwise provided, the authorisation referred to in paragraph 1 shall be granted only to persons who satisfy all of the following conditions:

(a) they are established in the customs territory of the Union;

(b) they provide the necessary assurance of the proper conduct of the operations; an authorised economic operator for customs simplifications shall be deemed to fulfil this condition, insofar as the activity pertaining to the special procedure concerned is taken into account in the authorisation referred to in point (a) of Article 38(2);

(c) where a customs debt or other charges may be incurred for goods placed under a special procedure, they provide a guarantee in accordance with Article 89;

(d) in the case of the temporary admission or inward processing procedure, they use the goods or arrange for their use or they carry out processing operations on the goods or arrange for them to be carried out, respectively.

4. Except where otherwise provided and in addition to paragraph 3, the authorisation referred to in paragraph 1 shall be granted only where all of the following conditions are fulfilled:

(a) the customs authorities are able to exercise customs supervision without having to introduce administrative arrangements disproportionate to the economic needs involved;

(b) the essential interests of Union producers would not be adversely affected by an authorisation for a processing procedure (economic conditions).

5. The essential interests of Union producers shall be deemed not to be adversely affected, as referred to in point (b) of paragraph 4, except where evidence to the contrary exists or where the economic conditions are deemed to be fulfilled.

6. Where evidence exists that the essential interests of Union producers are likely to be adversely affected, an examination of the economic conditions shall take place at Union level."

Exceptional circumstances

8. Article 22(4) UCC provides that, except where otherwise specified in the decision or in customs legislation, a decision shall take effect from the date on which the applicant receives it. However, in relation to decisions as regards authorisation with retroactive effect to which Article 211(2) UCC applies, Article 172 of Commission Delegated Regulation (EU) 2015/2446 ("**Article 172**") provides as follows:

"l. Where the customs authorities grant an authorisation with retroactive effect in accordance with Article 211(2) of the Code, the authorisation shall take effect at the earliest on the date of acceptance of the application.

2. In exceptional circumstances, the customs authorities may allow an authorisation referred to in paragraph 1 to take effect at the earliest one year...before the date of acceptance of the application.

3. If an application concerns renewal of an authorisation for the same kind of operation and goods, an authorisation may be granted with retroactive effect from the date on which the original authorisation expired.”