[2019] UKUT 0260 (TCC)

Appeal number: UT/2018/0048

EXCISE DUTY/PROCEDURE – appeals against revocations of approvals relating to duty-paid and duty-suspended alcohol - application to add further grounds of appeal - principles applied in determining such an application considered - application refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) WHITTALLS WINES LIMITED **Appellants**
(2) EUROPEAN FOOD BROKERS LIMITED

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 26 June 2019

Kieron Beal QC and David Bedenham, Counsel instructed by Rainer Hughes, for the Appellant

Stephen Nathan QC, Isabel McArdle and Gideon Barth, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the decision on the application by Whittalls Wines Limited ("WWL") and European Food Brokers Limited ("EFBL") ("the Appellants") to add five further grounds of appeal to their appeal, for which permission has been granted, against the decision of the First-tier Tribunal ("FTT") reported at [2018] UKFTT 0036 (TC) ("the Decision").

The FTT decision

2. The Appellants operated in the wholesale alcoholic beverages sector, dealing in both duty-paid and duty-suspended alcohol. The Decision concerned their appeals, brought under section 16 of the Finance Act 1994 ("section 16") against six decisions taken by HMRC under the legislation concerning duty-suspended alcohol. Those decisions were, in summary:

(1) To revoke WWL's approval to operate as a registered owner of duty-suspended goods pursuant to section 100G(5) of the Customs and Excise Management Act 1979 ("CEMA").

(2) To revoke WWL's approvals to operate three warehouses pursuant to section 92(7) CEMA.

(3) To revoke EFBL's approval to operate as a registered owner of duty-suspended goods pursuant to section 100G(5), and

(4) To revoke WWL's approval as an authorised warehousekeeper pursuant to Regulation 18(1) of the Warehousekeepers and Owners of Warehoused Goods Regulations 1999 ("WOWGR").

3. In a decision extending to some 312 pages, the FTT dismissed the appeals.

4. As the FTT stated at [3]:

> "Putting the voluminous evidence to one side, at the heart of determining these complex appeals lies a simple question:
>
> Were the decisions of Her Majesty's Revenue & Customs ("HMRC"), that the Appellants were not fit and proper persons to own and warehouse duty suspended alcohol and therefore to revoke their approvals to do so, ones that could reasonably have been arrived at and proportionate?"

5. The Appellants' grounds of appeal before the FTT were summarised at [37] as follows:

> "**Outline of the Appellants' grounds of appeal**
>
> 37. The Appellants' three grounds of appeal dated 14 July 2016 can be summarised as follows:

1. Each decision was one which the Commissioners could not reasonably have arrived at; that is to say, a decision which was so unreasonable that no Board of Commissioners, properly constituted, could have reached. The Appellants raise the following arguments in support of their position:

(i) much of the factual background underlying the decisions was not founded on evidence or founded on evidence so weak it could not reasonably support the findings of primary facts relied on;

(ii) facts and matters proved do not support the 'Evaluative Conclusions';

(iii) the 'Evaluative Conclusions' do not support the outcome.

They further allege that:

(iv) the Commissioners failed to take into account, or give adequate weight to, relevant matters.

Finally, they allege that:

(v) the Commissioners were pre-disposed to the Evaluative Conclusions using them as an evaluative tool with which to accept, reject, discount, explain and otherwise weigh the material before them.

2. The decisions constitute a disproportionate interference with the Appellants' rights under Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1").

3. The decisions were disproportionate, as imposition of conditions could have addressed any reasonable concerns."

6. The FTT briefly summarised its decision and the reasons for it as follows:

"5. The Tribunal is satisfied that the answer to the question above is 'Yes'. HMRC's decisions, that the Appellants were not fit and proper persons to own and warehouse duty suspended alcohol and therefore to revoke their approvals to do so, were ones that could reasonably have been arrived at and were proportionate. The Tribunal is further satisfied that the facts upon which HMRC rely as reasons in support of their decisions have been established on the balance of probabilities, and to a high degree at that.

…

10. The Tribunal is satisfied that the decisions and reasons relied upon by HMRC have become more powerfully evidenced by the findings of fact it has made. Put another way, the justification for HMRC's ultimate conclusion that the Appellants were not fit and proper persons to hold approvals to trade in duty suspended alcohol was fortified during the course of the evidence presented at trial. More simply, the basis for revocation became stronger as a result of the evidence heard at trial than it was at the time HMRC made the revocation decisions."

Permission to appeal

7. On 27 March 2018 the Appellants applied to the FTT for permission to appeal against the Decision. By a decision released on 24 April 2018 the FTT (Judge Rupert Jones) granted the Appellants permission to appeal on each of the ten grounds contained in their application. In summary those grounds were as follows:

(1) Ground 1: "Erroneous prescription of the requirements of due diligence". In evaluating the due diligence by the Appellants, the FTT wrongly prescribed the checks which were reasonable and proportionate.

(2) Ground 2: "Failure to take into account all the Appellants' due diligence evidence". This related to the evidence of their due diligence on warehouses to which their good were sent; on hauliers used by them to transport duty-suspended goods, and on their "extra-group" customers.

(3) Ground 3: "Without basis rejection of Global/Bridgewell due diligence". This related to due diligence files for certain customers.

(4) Ground 4: "Contradictory conclusions". The FTT reached contradictory conclusions in the Decision in relation to the due diligence material regarding Global and Bridgewell.

(5) Ground 5: "Failure to carry out the proportionality exercise properly". In considering the proportionality of HMRC's decisions, the FTT failed to make essential findings of fact on the likely impact of the revocations on the Appellants' businesses.

(6) Ground 6: "Material misunderstanding of commercial confidentiality". The FTT interpreted commercial confidentiality too narrowly and this misconception polluted the FTT's findings as to truthfulness.

(7) Ground 7: "Mistaken equiparation of officer knowledge with HMRC knowledge". The FTT made critical findings of truthfulness of the Appellants' key personnel on the basis of the knowledge of individual officers whereas it should have considered the collective knowledge of HMRC.

(8) Ground 8: "The temporal standpoint error". The FTT lost sight of the dates at which it was necessary to determine fit and proper status.

(9) Ground 9: "Failure to consider all less intrusive measures". The FTT applied the incorrect principles in rejecting the imposition of conditions as a less intrusive measure than revocation.

(10) Ground 10: "Wholesale reproduction of HMRC's submissions as the judge's conclusions". This called into question the FTT's independence and impartiality.

Application to add further grounds of appeal

8. On 23 May 2018 the Appellants applied for permission to appeal on five further grounds. HMRC objected to the application.

9. In summary, the five additional ground are as follows:

(1) Additional Ground 1: The requirement that the owners of duty-suspended goods be approved by HMRC is a breach of Articles 34 and 35 of the Treaty on the Functioning of the European Union ("TFEU").

(2) Additional Ground 2: The "fit and proper person" requirement is an unlawful additional implementation of the Excise Directive and Regulation (EC) No 684/2009 ("the EMCS Regulation").

(3) Additional Ground 3: The FTT erred in law in assessing the proportionality of the revocations because it did not carry out the assessment by reference to the discrete criteria established in applying the EU law test of proportionality.

(4) Additional Ground 4: The FTT failed to take into account all relevant considerations when conducting the requisite EU law analysis of the proportionality of the revocations.

(5) Additional Ground 5: The Decision infringed other general principles of EU law, including the protection of legal certainty; the principle of non-discrimination, and the effective protection of EU law rights.

Two jurisdictional issues

10. Before considering the application, I will deal briefly with two issues relating to this Tribunal's jurisdiction.

11. The first is that until a relatively short time before the hearing, HMRC had urged this Tribunal to revoke (or "consider whether it wishes to allow…to be argued") certain of the grounds of appeal for which the FTT had already given permission. In effect, this was a challenge to the existing permission to appeal, on the basis that the relevant grounds were "not sustainable". Since HMRC withdrew this request by the time of the hearing I need not consider it. However, I would observe that I am aware of no jurisdiction on the part of this Tribunal to do what HMRC were initially seeking.

12. The second issue is that, for the avoidance of doubt, I consider it clear that the application to add further grounds of appeal was properly made to this Tribunal, and did not fall to be made initially to the FTT. Some confusion appears to have been generated by the obiter comments of Lord Tyre in *Revenue & Customs Commissioners v Earlsferry Thistle Golf Club* [2014] UKUT 0250(TCC). In that case, the learned judge took the view that a particular argument could not be admitted by the Upper Tribunal because leave to admit it had not been sought from the FTT, and Rule 21(2) of the Upper Tribunal Rules has the effect that a person may apply to the Upper Tribunal for permission to appeal against an FTT decision only if they have first applied to the FTT and been refused. However, Rule 21(2) does not apply in a situation such as this application. In *Earlsferry* the issue was whether the party which had not been granted permission to appeal by the FTT could challenge an element of the FTT decision. Where, as here, permission to appeal has been given, there is nothing to prevent this Tribunal from granting permission, if it so decides, to add new grounds of appeal. I respectfully agree with the statement to this effect by Judge

Berner in *Hills v Revenue and Customs Commissioners* [2016] UKUT 266 (TCC), at paragraph 27:

> "Where permission to appeal has been given, whether by the First-tier Tribunal or the Upper Tribunal, an application in this Tribunal for further grounds to be permitted to be advanced is not properly regarded as a fresh application for permission to appeal, and does not require to be made in the first instance to the First-tier Tribunal. Nothing in *Earlsferry* runs counter to that basic proposition. I would add too that a similar analysis would apply on an application for permission to appeal in this Tribunal; once such an application has properly been made (for example, where the First-tier Tribunal has refused permission) any new ground of appeal which the applicant wishes to raise may properly be considered by this Tribunal, without first having to have been subject to an adverse decision below**."**

The parties' submissions in summary

13. For the Appellants, Mr Beal submitted that each of the new grounds plainly raised an arguable point of law; each ground raised an important point of law; the Appellants would be prejudiced if they were not allowed to put forward in full their real case, and the grounds raised pure points of law which would require no further evidence to be brought by HMRC. HMRC were wrong to assert that these were "new" points which ought to have been raised before the FTT but were not, because all the points were either in issue before the FTT or arose directly from the terms of the Decision.

14. For HMRC, Mr Nathan submitted that none of the grounds raised arguable points of law. None of them was placed in issue before the FTT, even though they could and should have been argued before the FTT. The real background to the application is that the Appellants lost heavily before the FTT on the facts, and were now seeking to try late in the day to undercut that loss by a series of EU-based attacks which would give them a second bite of the cherry. HMRC would be heavily prejudiced if permission to proceed with these new grounds were to be granted. They are not pure points of law but would have and would still require HMRC to produce evidence in resisting the grounds. The Appellants fell well short of discharging the heavy burden on them to satisfy the Tribunal that these new arguments should be admitted.

15. Mr Nathan further argued that in any event certain of the grounds fell outside the jurisdiction of the FTT as being matters which were only susceptible to judicial review. There could consequently be no error of law in the Decision in the FTT failing to consider them.

Principles to be applied in considering the application

16. The FTT having granted permission to appeal, under Rule 23 of the Upper Tribunal Rules the Appellants must file a notice of appeal which includes the grounds on which the Appellants rely. Rule 5(3)(c) of the Upper Tribunal Rules allows the

Tribunal to permit or require a party to amend a document, which would give this Tribunal discretion to grant this application.

17. I consider that in deciding whether to exercise that discretion, two questions arise. The first is whether the ground sought to be adduced raises an arguable point of law in relation to the FTT decision. If and only if the answer is "yes" does the second question arise, which is whether it is appropriate in all the circumstances to exercise the discretion to allow the additional ground to be adduced.

18. The first question must in my view be addressed and answered even though the application is not an application for permission to appeal. It would be entirely illogical if the substantive test was different. In particular, I can see no justification for applying some lower standard in granting an amendment to grounds of appeal than to granting permission to appeal. As is well established, an arguable point of law means that the argument must stand a "real" as distinct from "fanciful" prospect of success, and must carry some degree of conviction.

19. In relation to the principles to be applied in considering, at the second stage, whether to exercise the discretion, I was referred by both counsel to several decisions. Some were more relevant than others. I do not propose to deal with all of them, since in my opinion two decisions neatly encapsulate the general principles to be applied.

20. The first authority, to which I was not referred, is the decision of this Tribunal in *Astral Construction Limited v Revenue & Customs Commissioners* [2015] UKUT 0021 (TCC), at [27] to [33]. In that case, this Tribunal analysed the relevant authorities and derived a number of principles, which can be summarised as follows:

> (1) A party will not normally be allowed to argue a new point on appeal if there is a possibility of "any injustice occurring by reason of the fact that, if it had been raised at trial, it might have affected the conduct and in particular the evidence or its evaluation in those proceedings": *Lowe v Machell Joinery Ltd* [2011] EWCA Civ 794; *Jones v MBNA International Bank* [2000] EWCA Civ 514. As it was put by Henderson J (as he then was) in *Tankjoukian v Revenue & Customs Commissioners* [2012] UKUT 361 (TCC) at [58]: "…where the conduct of the trial below either would, or might, have been significantly different if the new point had been taken…the balance will nearly always come down [against the grant of permission]".
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> (2) A court should allow a new point to be argued on appeal only "if it is satisfied beyond doubt…that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial…": *The Tasmania* (1890) 15 App Cas 223, per Lord Herschell at 225.
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> (3) Although permission to raise a new point should not be given lightly, a party will normally be allowed to raise for the first time on appeal a pure point of law on which no further evidence could have been called, if the other party has had enough opportunity to meet it, has not acted to his detriment on the faith of the earlier omission to raise it, and can be adequately protected in costs:

Pittalis v Grant [1989] 1 QB 605 per Nourse LJ at 611; *Paramount Export Ltd (in liquidation) v New Zealand Meat Board* [2004] UKPC 45, per Lord Hoffman at [47], and *Crane (t/a Indigital Satellite Services) v Sky In-Home Limited* [2008] EWCA Civ 978 per Arden LJ at [22].

(4) There is a general principle that litigation should be "resolved once and for all" and it will not generally be just "if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis": *Jones v MBNA* per May LJ at [52].

21. After the hearing of this application, the relevant principles have been restated by the Court of Appeal in *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337. Snowden J, who gave the leading judgment, stated as follows:

> "23. Surprisingly, however, [the White Book] notes do not refer to the most authoritative and frequently applied statement of the approach of an appellate court to the question of whether to permit a new point to be taken on appeal. That statement appears in the judgment of Nourse LJ in *Pittalis v Grant* [1989] QB 605 at page 611,
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> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *Macdougall v. Knight* (1889) 14 App. Cas. 194 and *The Tasmania (1890)* 15 App. Cas. 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch.D. 419, 429, per Sir George Jessel M.R.:
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> > "the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."
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> Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."
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> 24. The same principles were applied to interlocutory decisions in *Rana v Ealing LBC* [2018] EWCA Civ 2074, where Underhill V-P stated,
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> > "Those observations were made in the context of an appeal from a decision following a trial, but the underlying principles are the same where the appeal is from an interlocutory decision, though of course such a decision is less likely to depend on disputed evidence."
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> 25. The principles were also recently restated by Haddon-Cave LJ in *Singh v Dass* [2019] EWCA Civ 360 at [15]-[18],

"15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29])."

26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.

27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As Peter Gibson LJ said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as May LJ also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.

28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court: see e.g. *Preedy v Dunne* [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime."

22. I would add two further points in relation to the principles to be applied. The first is that in deciding whether to exercise its discretion to permit an application such as this, this Tribunal must take into account the overriding objective. Secondly, the decision must take into account all the relevant facts and circumstances, including the reasons why the new grounds were not included in the application for permission to appeal.

23. What is set out above relates only to applications to this Tribunal. The considerations in relation to an application to the FTT to adduce new grounds are not the subject of this decision.

Additional Ground 1

24. The first additional ground is that the requirement contained in the WOWGR regime for approval of owners of duty-suspended alcohol breaches Articles 34 and 35 TFEU by impeding the free movement of goods, a restriction which is not justified under Article 36.

25. Is this an arguable point of law such that it stands a realistic and not merely fanciful prospect of success in the appeal for which permission has been granted? In reaching a view on this, I need not and should not conduct a "mini-trial".

26. Mr Beal submitted that the effect of the revocation of EFBL's approval under Regulation 5(1) of WOWGR as a registered owner was that EFBL could no longer hold or trade alcohol (other than wine) in duty suspense, and that inability severely restricted its ability to participate in intra-community trade. Mr Beal stated that "in the majority of the other Member States of the EU (if not all of them), there is no registration regime for owners of alcoholic goods". The Excise Directive permits only the regulation of warehousekeepers and premises. In additionally regulating owners, WOWGR imposes an unjustified restriction on the free movement of alcohol between the UK and other Member States. He cited in support of his argument the decision in ANETT (*Asociacion Nacional de Expendedores de Tabaco y Timbre* (*ANETT*) [2012] EUECJ Case C-456/10). Mr Beal anticipated that the determination of this additional ground might require a reference to the CJEU for a preliminary ruling.

27. At first blush, this might appear in principle to be an arguable point of law. However, in determining whether the argument stands a realistic prospect of success, two issues fall to be considered. Is there jurisdiction, and does the argument stand a realistic prospect of success?

28. Would this ground fall within the jurisdiction of the FTT or this Tribunal? The appeals in this case were brought under section 16 in respect of specified HMRC decisions. Does the FTT's jurisdiction (or this Tribunal's on an appeal) extend to a challenge not to the reasonableness of those decisions but to the underlying validity of the regime under which those decisions were made?

29. In *Euro Trade and Finance Ltd v Revenue & Customs Commissioners* [2016] UKFTT 279 (TC), the FTT considered the compatibility of the provisions in the

WOWGR regime which allow the imposition of conditions with Articles 34 and 35 TFEU. There is no indication in the decision that the question of jurisdiction to consider this issue was considered. Although the decision was overturned on other grounds by the Upper Tribunal (at [2019] UKUT 23 (TCC)), again the question of jurisdiction was not discussed.

30. However, I consider that some doubt as to the jurisdiction of the FTT over this issue arises from the decision of Underhill LJ to grant the applicant permission to apply to the Court of Appeal for judicial review in relation to certain aspects of the WOWGR regime in the Seabrook Warehousing litigation. This concerned amongst other issues the compatibility with the TFEU of the WOWGR provisions obliging overseas traders in duty-suspended goods to appoint a UK-established duty representative. The recent decision of the Court of Appeal in the judicial review proceedings, reported at [2019] EWCA Civ 1357, describes the basis of Underhill LJ's decision as follows, at paragraph 15:

> "15. As I have already said, Holman J refused Seabrook permission to apply for judicial review on 13 October 2017. His reason for so doing was that he regarded Seabrook's rights of appeal to the FTT as providing an adequate alternative remedy, on the basis that the lawfulness of the underlying regulations and Excise Notice 196 could properly be considered and ruled upon by the FTT, even though it would not have power to make declarations to that effect. On Seabrook's application for permission to appeal against that ruling, Underhill LJ took a different view. He expressed his "strong provisional view" that the relevant appeal jurisdiction conferred by section 16 of the Finance Act 1994 was not broad enough to embrace Seabrook's challenges to the lawfulness of the underlying legislative regime, as opposed to the requirements of Excise Notice 196 which in his view the FTT would have jurisdiction to rule upon…"

31. It is essential to understand the context in which Underhill LJ reached this "strong provisional view". As the learned judge explained in his decision (which he published) he did not have to decide the jurisdictional question. In effect, in deciding whether to grant permission to apply for judicial review when the court below had refused it, all he had to decide was whether it was *arguable* that the FTT would not have jurisdiction. In my opinion, it is also arguable that the FTT would have jurisdiction, and I do not see this as incompatible with Underhill LJ's provisional view. Without deciding this issue, I therefore proceed on this basis to consider the degree to which the argument in Additional Ground 1 stands some realistic prospect of success.

32. Given the period of time over which the WOWGR regime has been in force, it is not surprising that there have been challenges to various aspects of it based on EU law, including Articles 34 and 35. Unfortunately for the Appellants, the reported decisions offer little support for the argument in this case.

33. *R (oao HT & Co (Drinks) & anor v HMRC* [2015] EWHC 659 (Admin) concerned an application to the High Court for injunctive relief and for permission to

judicially review an HMRC decision to revoke WOWGR status. In refusing the applications, Cobb J stated as follows, at paragraph 54:

> "54. *Article 15(1)* of the *2008 Directive* provides for each Member State to determine its own rules concerning the "production, processing and holding of excise goods" subject to the Directive. It is therefore for national systems of Member States to make judgements about the precise structures and systems that should be put in place to serve the objective of protecting the public revenue by detecting and controlling fraud under the *2008 Directive*. The *2010 Regulations* have introduced a penalty system enabling HMRC to seize goods, assess for excise duty and issue a penalty where there is evidence of wrongdoing.
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> 55. For the purposes of this application, I reject the Claimants argument that the *1999 Regulations* are *ultra vires* the *2008 Directive*. It seems to me that the *1999 Regulations* contain a regulatory regime which is entirely consonant with the objectives of the *2008 Directive*; moreover, Parliament has also provided a statutory mechanism under the *2007 Act* for those who are aggrieved to bring their complaints before a tribunal. Even if there were merit in this regard (which there is not), any judicial review claim in this regard should have been made sooner than February 2015. Finally, I note, in passing, that these two instruments have co-existed for nearly five years, without apparent challenge."

34. In the FTT's decision in *Euro Trade*, which considered a challenge to supplier conditions imposed under WOWGR, relevantly for Additional Ground 1 the FTT commented as follows, at paragraph 182:

> "*WOWGR registration*
>
> 182. In so far as it was the appellant's case that the registration of traders in duty suspended goods was not a proportionate means of controlling trade in duty suspended goods, we reject it. Firstly, we reject it as the appellants have never clearly articulated their case on this and occasionally expressly stated that it was not a part of their case. Secondly, we reject it as, even though HMRC have the burden of proving this and even if it is the most strict test which applies (the least restrictive measure of equal effectiveness possible), we think that registration of traders in duty suspended goods must meet that criteria. Without registration, it would be impossible to exert any meaningful control whatsoever over trade in duty suspended goods with a view to preventing inwards and outwards diversion fraud."

35. The above comment in *Euro Trade* is *obiter* so I place no great weight on it in determining whether the argument in this case carries a realistic prospect of success. While HMRC placed considerable weight on *HT&Co* in submitting that Additional Ground 1 was not arguable, I am not entirely convinced that it is necessarily dealing with the precise arguments raised by Mr Beal. I also note that in reaching his decision Cobb J began by accepting HMRC's proposition (also found in *Greenhalls Management Ltd v HMRC* [2005] 1 WLR 1754) that holding and dealing in excise

goods is "a right not a privilege": see [35] of the decision, but in *Seabrook Warehousing* the Court of Appeal strongly disapproves that proposition, describing it as "fanciful": paragraph [58].

36. However, I consider that the Court of Appeal decision in *Seabrook Warehousing*, delivered after the hearing of this application, casts serious doubt on whether Additional Ground 1 has a realistic prospect of success. The narrow issue before the Court relevant to this application was neatly summarised in the heading to paragraph 52 of the decision as this: "Do the duty representative requirements of WOWGR infringe the EU law principle of non-discrimination and/or any of the fundamental freedoms, and (if so) does the infringement satisfy the test of proportionality?". In a detailed and careful analysis, the Court concluded that Regulation 9(2) of WOWGR, and the imposition of a duty point under Regulation 21(1)(b), are lawful because they satisfy the EU test of proportionality, applying for that purpose the stricter approach which asks whether the same result could have been achieved by less restrictive means, rather than the less intensive test of manifest disproportionality: see [126]. While the narrow issue so determined is different to the Appellants' detailed challenge in this case, the court could not have reached its decision other than on the basis that the WOWGR regime, and the registration requirements at its heart, was also legal. This is borne out by, in particular, [101], [110] and [118], which are all in substance considering the WOWGR regime as a whole, as was much of the evidence supplied by HMRC to establish proportionality.

37. I have concluded on this basis that the Appellants have not established that Additional Ground 1 raises a point of law which has a realistic prospect of success. That is sufficient for me to refuse the application to add this additional ground. However, in case I am wrong, or in case this decision is appealed, I now turn to the second stage of the process which I set out above, namely whether (assuming for this purpose that the point is arguable) I should exercise my discretion to permit the application.

38. Applying the principles summarised above, the first question is whether the new ground would either necessitate new evidence, or, had it been run before the FTT, would have resulted in the hearing being conducted differently with regards to evidence at the hearing. If the answer to either question is "yes", then it is clear from the guidance summarised by this Tribunal in *Astral Construction* and by the Court of Appeal in *Notting Hill Finance* that I should not generally admit the ground.

39. Mr Beal submitted that the argument in Additional Ground 1 was not in fact new and had been before the FTT. He said that both the argument and the potential need for a CJEU reference were highlighted in the Appellants' opening submissions. I do not accept this. The opening submissions did contain a bare assertion that WOWGR must be implemented in a way which represented a proportionate derogation from Articles 34 and 35, but at no stage was a failure to do so one of the Appellants' grounds of appeal. HMRC in their opening submissions opposed the addition of any argument to this effect, and the Appellants made no application to amend their grounds to include it and did not raise the argument in their closing submissions. Doubtless that is why the Decision does not address the argument.

40. The Appellants submit that the legality of the WOWGR registration requirements for owners is a pure question of law, the determination of which requires no additional evidence. I do not accept that argument. Of course, it does raise questions of law, but in practice the main battleground in relation to such an argument would be the issue of proportionality, however that is tested. In attempting to win that battle HMRC would seek to persuade the tribunal that the practical risks of duty evasion and avoidance were of such a scale that the registration requirements challenged by the Appellants in Additional Ground 1 were a proportionate response. That process would inevitably involve the production and evaluation of evidence. That is how the issue was approached in *Seabrook Warehousing*. Interestingly, part of HMRC's evidence in *Seabrook* was before the FTT in this case (namely the unchallenged written evidence of Mr Mountford), but additional evidence was produced, and the court placed most weight on the evidence of Ms Agatha-Jones (see [110] of the decision) in reaching its conclusions as to proportionality at [110] to [126].

41. I therefore conclude that since the argument would be highly likely to entail additional evidence and/or a difference in approach to evidence from HMRC, I would not generally exercise the Tribunal's discretion to admit the new ground even if it stood a reasonable prospect of success. For the reasons discussed below, I consider that that approach is consistent with the overriding objective and the other circumstances of this case, with the result that this additional ground should not be admitted.

Additional Ground 2

42. The second additional ground is that, since the EMCS Regulation is intended to provide a complete and self-contained regime for the operation of the duty suspense system, the requirement imposed by HMRC for a person using the system to be a "fit and proper" person is an unlawful imposition of an additional national law requirement not stipulated in the EMCS Regulation or the Excise Directive.

43. Mr Beal submitted that properly discharged duty-suspended movements of goods, such as those in this case, cannot lawfully be challenged on the basis of an additional requirement as to "fit and proper" status. The EMCS system is intended to be a "maximum" harmonising measure in this area, and that requirement is therefore unlawful. According to Mr Beal, this ground "could well require a reference" for a preliminary ruling.

44. Mr Nathan submitted that this ground was again an issue to be tested not before the FTT but only by way of judicial review, for the same reasons as Additional Ground 1. As to its merits, the ground was, said Mr Nathan, completely unarguable. The Excise Directive gives Member States a wide margin of appreciation as to how they choose to regulate the production, holding and processing of excise goods in their own territories. The EMCS Regulation lays down the system for the computerised procedures for movement of goods in duty suspense; it does not and does not purport to reduce or remove that wide margin.

45. As to whether or not this ground would fall within the jurisdiction of the FTT and this Tribunal, as with the preceding ground I have considered the position on that basis that, without deciding the issue, it is arguable that it would.

46. Is this ground an arguable point of law as that term is amplified at [18] above? In a narrow sense, the ground stands independently of Additional Ground 1. It is based not on the TFEU freedoms but on the lawfulness under the EMCS Regulation and the Excise Directive of the requirements of Excise Notice 196 (made pursuant to regulations introduced pursuant to sections 100G and 100H of the Customs and Excise Management Act 1979). However, in assessing whether this ground is arguable, I agree with Mr Beal's characterisation of the ground in his skeleton argument as "in the same category as Additional Ground 1…a particularised example which forms part of the broader challenge…to the imposition of an additional domestic law requirement".

47. Considered as such, for essentially the same reasons as those given above in relation to Additional Ground 1, I am not persuaded that this ground stands a realistic prospect of success. The existence of fraud based on exploitation of the EMCS system and its vast scale were referred to in the Decision as not being in dispute ([49)], and [56] of the Decision states that it appeared to be common ground that these matters were very serious risks against which traders and warehousekeepers must be expected to guard, including by carrying out appropriate due diligence. In *Seabrook Warehousing*, the Court of Appeal considered the proportionality of the due diligence requirements in the Excise Notice (which form a core element of fit and proper status as set out in the Notice) and had no hesitation in concluding that they clearly satisfied the principle of proportionality: see paragraphs 148 to 150 of the decision. While not addressing the narrow issue particularised in Additional Ground 2, in view of the accepted risks and the reasoning in *Seabrook Warehousing*, I find it hard to see how this ground would stand a realistic prospect of success.

48. Again, in case I am wrong, or this decision is appealed, I have considered whether, if the ground did raise an arguable point of law, I should exercise my discretion to permit it to be added.

49. The ground is clearly not one which was before the FTT. I consider it likely that if it had been, it would have resulted in HMRC producing additional evidence, and/or taking a different approach to the evidence before the FTT. In *Seabrook Warehousing*, the evidence produced by Ms Agatha-Jones for HMRC included evidence as to the risks of fraud resulting from the EMCS system: see paragraphs 36 and 37 of the decision. It is no answer to suggest, as did Mr Beal, that in such an event HMRC could apply to this Tribunal to adduce the additional evidence, because the very need to do so (and to satisfy the requirements of *Ladd v Marshall* [1954] EWCA Civ 1) goes towards sufficient prejudice on the basis of the authorities to justify permission to add the ground being refused. Again, for the reasons below, I see nothing in the other circumstances of this case which would justify a departure from that general conclusion. Permission to add this additional ground is therefore refused.

Additional Grounds 3 and 4

50. Since Additional Ground 4 is parasitic on Additional Ground 3, it is convenient to consider both grounds together.

51. Additional Ground 3 is that the FTT erred in law in not applying the appropriate EU law test of proportionality to the revocation decisions. Additional Ground 4 is that the FTT failed to take account of all relevant considerations in applying that EU test.

52. As described above, the existing permission to appeal includes as a ground that the FTT failed to carry out the assessment of proportionality properly. Additional Ground 3 asserts that in addition the FTT erred in the proper legal test to be applied to the proportionality assessment. The FTT applied the test set out in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39. That test is relevant to the proportionality of a measure when reviewed for compatibility with Article 1 of the First Protocol to the European Convention on Human Rights ("A1P1"). That was an error because EU law requires that proportionality be assessed by reference to a different and more stringent test: see *R (Lumsdon) v Legal Services Board* [2015] UKSC 41.

53. In considering whether Additional Ground 3 raises an arguable point of law, two issues arise. First, is it arguable that the EU assessment of proportionality differs from the assessment to be applied for A1P1 purposes? Second, if so, did the FTT fail to consider that different basis of assessment?

54. In relation to the first issue, its is clear that the proportionality of a revocation decision is context-sensitive and can fall to be assessed on a number of different bases, some more "intensive" (in EU parlance) than others. The recent decision of the Supreme Court in *Secretary of State for Work and Pensions v Gubeladze* [2019] UKSC 31 confirms this and discusses the different approaches in detail. So, in principle Additional Ground 3 raises an arguable point of law.

55. In relation to the second issue, Mr Beal criticises the FTT for not applying the more stringent tests which he says are appropriate. That criticism is not justified. In the first place, the Appellants' pleaded case before the FTT concentrated explicitly on proportionality for A1P1 purposes, so it is entirely understandable that both HMRC's response and the FTT's considerations were focussed on that issue. Secondly, in any event, the FTT was clearly aware of the different bases of assessing proportionality, and its analysis of that question took this into account: see, for instance, paragraphs [61], [1341], [1351], [1365] and [1636]. Reading the Decision as whole, I consider that the FTT's essential conclusion can be summarised as this: in view of the FTT's damning findings of fact as to the honesty and credibility of a number of key individuals, the revocation decisions were proportionate whatever the intensity with which that issue was assessed.

56. However, that does not mean that Ground 3 does not identify an arguable error of law in the Decision, because certain of the grounds of appeal for which the FTT has already given permission might conceivably (I put it no higher than that) go to those findings of fact. So, I have concluded that Ground 3 just scrapes past the hurdle of arguability, when considered in the context of the existing permission to appeal.

57. However, I consider it likely that HMRC would have sought to adduce additional evidence if this ground had explicitly been part of the Appellants' pleaded case before the FTT (as opposed to being dealt with in relatively short order by the FTT in the passages I have referred to above). Indeed, the Appellants' submissions in relation to Additional Ground 3 reinforce this conclusion, because a greater intensity in the assessment of proportionality must logically place HMRC under a weightier burden to establish that the revocations were proportionate. Again, that is borne out by the course of the proceedings in relation to this issue in *Seabrook Warehousing*.

58. On the basis of the principles I have referred to earlier, I therefore refuse permission to add Additional Ground 3, and the parasitic Additional Ground 4, to the existing permission to appeal.

Additional Ground 5

59. This asserts that the revocations infringed "other general principles of EU law". In particular, the FTT failed to take into account the compatibility of the revocations with (1) the principle of legal certainty, (2) the principle of equality and the interrelated requirement of non-discrimination, and (3) the requirement of effective protection of EU law rights.

60. Even if these grounds raise points of law which have a reasonable prospect of success (as to which for the reasons which follow I need express no view) they are new points, not before the FTT, which I consider might require HMRC to produce additional evidence. Apart from a passing reference to the principle of legal certainty in the Appellants' opening submissions before the FTT, the points grouped together under Additional Ground 5 were absent from the Appellants' grounds of appeal, written opening submissions and written closing submissions.

61. The Appellants' application makes it clear that argument (2) is fact-specific and relies on the position of other taxpayers, so the need for evidence is self-evident. In relation to the other arguments, Mr Nathan stated that HMRC would be likely to have responded to these points with evidence addressing the policy decisions which led to WOWGR and how those decisions interpreted and complied with the relevant EU principles. As an example, he pointed out that the unchallenged witness statement of Mr Mountford relied on by HMRC before the FTT as justifying the due diligence requirements was short, at only three pages, and would have been expanded if these additional arguments had been argued at first instance.

62. Referring back to the principles summarised at [20] and [21] above, I bear in mind the general principle set out in *Jones v MBNA* that litigation should be "resolved once and for all", and the low threshold referred to in *Pittalis v Grant* that "evidence could have been adduced [before the lower tribunal] which by any possibility would prevent the [new] point from succeeding". In terms of the "spectrum" referred to by the Court of Appeal in *Notting Hill Finance*, I am satisfied that the points raised in Additional Ground 5 should not be admitted. Given the stakes for HMRC in relation to the additional grounds—effectively the legality of the WOWGR regime—it is not

unreasonable to assume that HMRC would defend their position rigorously and with ample evidential support.

Other factors

63. I have considered whether any other material factors, or the overriding objective, weigh in favour of granting the application.

64. The reasons why the grounds sought to be added were not included in the original hearing before the FTT or the application to the FTT for permission to appeal should be taken into account. In principle, reasons such as the emergence of a materially important new decision subsequent to the relevant date, or the instruction of an adviser by a litigant in person might carry some weight (I put it no higher than that) in the overall evaluation. In this case, the reason was that the Appellants instructed a different leading counsel, Mr Beal, who took the view that the additional grounds could usefully be added. While I have placed no great weight on this issue, consistently with decisions such as *Secretary of State v Rance* [2007] IRLR 665 and *Kumchyk v Derby City Council* [1978] ICR 1116 I consider that a change of representative, any lack of skill in an advocate or a change in tactics is not normally a factor in favour of granting permission.

65. I have also considered the likely impact on the substantive hearing if the additional grounds were admitted. I have accepted the likelihood, for the reasons set out above, that HMRC would call evidence in defending the additional grounds, and I asked counsel what impact they considered the additional grounds might have on the trial, on the assumption that additional evidence was admitted. Mr Beal estimated that it might lengthen the hearing by one to two days, and Mr Nathan estimated two to three days. In an appeal against a 312-page decision, any additional impediment to a timely listing arising from available dates and the need to accommodate further witnesses further militates against granting permission.

66. I acknowledge that the effect of refusing permission is to deny the Appellants the ability to pursue these arguments in the appeal. However, for all the countervailing reasons set out above I consider that permission to adduce those new arguments should be refused.

67. Accordingly, permission is refused.

THOMAS SCOTT
UPPER TRIBUNAL JUDGE

RELEASE DATE: 28 August 2019