Neutral Citation Number: [2025] UKUT 00080 (TCC)
UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Applicant: Antelope Transport Limited	**Tribunal Ref: UT/2024/000062**
Respondents: The Commissioners for His Majesty's Revenue and Customs	

APPLICATION FOR PERMISSION TO APPEAL

Oral reconsideration hearing: 13 February 2025

DECISION NOTICE

JUDGE THOMAS SCOTT

1. This was an oral hearing to consider the application of Antelope Transport Ltd (the "Applicant") for permission to appeal against the decision of the First-tier Tribunal (Tax Chamber) (the "FTT") released on 8 April 2024 ("the Decision").

2. The FTT refused permission to appeal in a decision dated 29 May 2024 (the "PTA Decision"). I refused permission on paper in a decision released on 5 September 2024.

3. The hearing was attended by Mr Danny McNamee of McNamee McDonnell Solicitors as representative of the Applicant and Ms Charlotte Brown of Counsel as representative of HMRC.

When can an appeal be made?

4. An appeal to this Tribunal can be made only on a point of law: section 11 of the Tribunals, Courts and Enforcement Act 2007. It must be shown that it is arguable that the FTT made a material error of law in reaching its decision. "Arguable" means that the argument stands a realistic as opposed to fanciful prospect of success.

5. Findings of fact by the FTT cannot be the subject of an appeal to this Tribunal unless they are such that no person acting judicially and properly instructed as to the relevant law could have made that finding, because, for instance, the finding failed to take account of relevant evidence or took account of irrelevant evidence or was perverse: *Edwards v Bairstow* [1956] AC 14. In relation to any challenge based on *Edwards v Bairstow* the staged approach in *Georgiou v Customs & Excise Commissioners* [1996] STC 463 should be followed, as applied in this Tribunal in *HMRC v Stoke by Nayland Golf & Leisure* [2018] UKUT 308 (TCC).

The Decision

6. References below in the form FTT[x] are to paragraphs of the Decision.

7. The Applicant appealed to the FTT against an excise duty assessment for £680,221.00 issued under Regulation 13(2) of the Holding Movement and Duty Point Regulations 2010 (the "HMDP Regulations") and a wrongdoing penalty for £408,132.60 issued under Schedule 41 of the Finance Act 2008 (the "Penalty"). The assessment and Penalty were upheld following a departmental review.

8. In summary, one of the Applicant's vehicles was intercepted by Border Force Officers at the Coquelle freight terminal, carrying goods documented as timber. The Officers discovered 2.3 million cigarettes, concealed within pallets of timber. The cigarettes were seized because they were outside the European system of duty suspension and duty had not been paid on them. The vehicle and trailer were also seized pursuant to sections 139 and 141(1)(a) of the Customs and Excise Management Act 1979 ("CEMA") because they were used for the carriage of goods liable to forfeiture. Border Force sent details of the seizure to the Applicant, who was advised that any challenge to the legality of the seizure in the Magistrates Court should be made within one month of the date of the seizure. No challenge was made to the legality of the seizure and hence the cigarettes were deemed to have been duly condemned as forfeited to the Crown by the operation of paragraph 5 of Schedule 3 to CEMA.

9. The FTT was presented with extensive grounds of appeal. These comprised written grounds submitted by the Applicant's previous solicitors prior to the hearing and also oral submissions by Mr McNamee. The grounds were summarised at FTT[19]-[20] as follows:

> 19. The Appellant's grounds of appeal submitted by the previous solicitors are as follows:
>
> > 19.1 The decision-maker and reviewer have misinterpreted and misapplied the relevant legal provisions relying on jurisprudence that is subject to appeal and nondeterminative.
> >
> > 19.2 The decision-maker and reviewer have incorrectly and improperly relied on EU law and caselaw dated 10 June 2021 when it was procedurally improper to do so in the light of the departure of the United Kingdom from the EU.
> >
> > 19.3 The reviewer has relied on what he terms a "basket of evidence" which makes no reference at all to evidence that favours the Appellant

– his decision therefore on who is the "liable party" is procedurally fatally flawed.

19.4 The reviewer, in concluding that the wrongdoing was deliberate and concealed, has failed entirely to follow due process by including the points raised on this issue by the Appellant.

19.5 This ground was omitted in the copy before the Tribunal and neither party was able to assist the Tribunal.

19.6 The Excise Duty Assessment has been miscalculated as a matter of law and fact.

19.7 The interpretation of special circumstances has been unfairly restrictive.

19.8 The Excise Wrongdoing Penalty has been miscalculated as a matter of law and fact.

19.9 The decision maker and reviewer have acted in procedurally incorrect and unlawful fashion formulating decisions that have no evidential basis and conducting inadequate investigations into the areas in dispute including inadequate inquiries with other involved parties.

19.10 The decision maker and reviewer have unfairly relied on weak circumstantial evidence to make improper findings of fact.

19.11 The decision maker and reviewer have unfairly relied on suspicion to make improper findings of fact.

19.12 The decision maker unfairly and procedurally improperly used the under caution interviews of another party against the Appellant without giving the Appellant an equal opportunity for interview under caution, in breach of the procedural requirement of ECHR.

19.13 The decision maker and reviewer have acted unfairly, have failed to take into account relevant considerations, have taken into account irrelevant considerations, have acted unreasonable, disproportionately and have both fettered their discretion.

20. In addition to these grounds (which were submitted by the Appellant's previous solicitors) Mr McNamee put forward the following arguments:

20.1 The Appellant was not holding the Goods under the terms of HMDP Regulations as defined within the case of *R v Taylor* [2013] EWCA Crim 1151. Essentially the Appellant was acting as a freight forwarder and the person with the de jure and de facto control of the Goods was Burgess Road Haulage Limited.

20.2 Nothing in the case of *The Commissioners for Her Majesty's Revenue and Customs v Martyn Glen Perfect* [2022] EWCA Civ 330

(*Perfect*), as relied upon by HMRC, could fix the Appellant with liability.

20.3 Assessing the carrier for the duty runs contrary to the International Carriage of Goods by Road which Mr McNamee claimed was brought into domestic law by the Transport Act 1965. Article 11 of the convention states:

> "1. For the purposes of the Customs or other formalities which have to be completed before delivery of the goods, the sender shall attach the necessary documents to the consignment note or place them at the disposal of the carrier and shall furnish him with all the information he requires. 2.The carrier shall not be under any duty to enquire into either the accuracy or the adequacy of such documents or information …"

20.4 While Mr McNamee accepted that the concealment demonstrated a highly sophisticated attempt to smuggle the Goods, the professionalism of the concealment should have been considered as a point in favour of the Appellant as this was the reason why neither the Appellant nor Mr Burgess could have been aware of the presence of the contraband within the consignment.

10. The FTT's decision was set out at FTT[95]-[98] as follows:

95. Applying the four tests in *Dawsons UT* we find as follows:

95.1 Physical possession was with the Appellant's employee who was acting under the Appellant's control and direction;

95.2 The Appellant owned and operated the lorry and trailer transporting the goods and therefore had de facto and legal control of the Goods;

95.3 The excise duty point arose at Coquelles when the Goods were seized; and

95.4 The Goods were being held at Coquelles.

96. HMRC only became aware that the Appellant was the owner of the lorry and trailer upon receipt of the Appellant's then solicitor's letter dated 1 November 2019. The assessment dated 8 January 2020 was issued within the twelve month time limit required by the legislation.

97. The photographic evidence of the damage to the Cargo appears to show gaps between each plank. While this aspect of the photograph was not explored at the hearing the Tribunal finds it strange that each plank does not sit snuggly on the plank below…The Tribunal notes that Mr Tinnelly in his witness statement at paragraph 12 states that Mr Burgess informed him that he could see "straight through the bales and in between each plank". In view of the exceedingly large number of cigarettes found hidden in the Cargo the Tribunal is unable to accept the veracity of this statement as it must have been

impossible to see through the bales which Mr Tinnelly accepts already contained the Goods.

98. Answering the thirteen grounds of appeal we find as follows:

98.1 Neither Officer Westoe nor the Review Officer misinterpreted or misapplied the relevant legal provisions.

98.2 Neither Officer Westoe nor the Review Officer incorrectly or improperly applied EU law and caselaw.

98.3 The Review Officer was correct to rely on the "basket of evidence" and his review as to who is the "liable party" is not procedurally flawed.

98.4 The Review Officer was correct to conclude that the wrongdoing was deliberate and concealed and did not fail to follow due process.

98.5 As neither party was able to explain this paragraph the Tribunal makes no comment.

98.6 The Excise Duty Assessment has not been miscalculated either as a matter of law or fact.

98.7 The interpretation of special circumstances is not unfairly restrictive.

98.8 The Excise Wrongdoing Penalty has not been miscalculated either as a matter of law or fact.

98.9 Neither Officer Westoe nor the Review Officer have not acted in a procedurally incorrect and unlawful fashion. Their decisions are based on the evidence and carried out adequate investigations and inquiries.

98.10 Neither Officer Westoe nor the Review Officer relied on evidence which was neither weak nor circumstantial.

98.11 Neither Officer Westoe nor the Review Officer relied on suspicion or improper findings of fact.

98.12 Both Officer Westoe and the Review Officer were entitled to rely on the under caution interview evidence and were not required to give the Appellant an equal opportunity for interview under caution.

98.13 Neither Officer Westoe nor the Review Officer acted unfairly, did not fail to take into account relevant considerations, did not take into account irrelevant considerations, did not act unreasonably or disproportionately and did not fetter their discretion.

The appeal against both the assessment and penalty is accordingly dismissed.

Grounds of appeal

11. In the hearing, Mr McNamee renewed his application for permission to appeal on two grounds. They can be summarised as follows:

Ground 1

12. Ground 1 asserts that the FTT erred in law in its interpretation of Regulation 13 HMDP, because it "failed to recognise that the liability to pay tax under the Regulation requires evidence, or acceptance from the Appellant, that the goods were for delivery or used within the UK, not that they are simply physically possessed within the UK". It is said that the FTT failed to understand that excise duty is a tax on consumption. It is said that the FTT made a finding on this issue "without any evidence", giving rise to an *Edwards v Bairstow* error of law. It is further said that "there was overwhelming evidence that the goods were to be delivered into the Republic of Ireland".

Ground 2

13. Ground 2 relates to the FTT's decision not to reduce the Penalty. It seeks to challenge what is described as the FTT's "speculative conclusion that the driver Mr Burgess's evidence that he could not see through the bales of planks lack[ed] veracity". It is said that this finding "falls completely outside the wide discretion any Judge has to make findings of fact based upon the evidence". Other arguments put to the FTT are relied on to support the assertion that the FTT erred in law in not reducing the Penalty.

Ground 1: Discussion

14. By this ground, it is asserted that the FTT erred in law by not understanding that the duty assessment under Regulation 13 required a finding by the FTT that the cigarettes were held in the UK "in order to be delivered or used in the United Kingdom".

15. In my written refusal of permission, the first concern I raised in relation to this ground was one of procedural fairness, namely whether the argument had been properly put in the FTT hearing, so that HMRC could respond with evidence to challenge it if they chose. Notwithstanding that the FTT described and determined over 15 grounds of appeal, this was not mentioned in the Decision as one of them.

16. Mr McNamee accepted that this argument was not raised in the grounds of appeal, or in his opening submissions to the FTT. He said that it only emerged as a possible issue during cross-examination of HMRC's witness, when he said it became apparent that HMRC thought it was sufficient for duty liability that the cigarettes had been delivered in the UK. Mr McNamee said that he then raised the point in his oral closing submissions that it was necessary for the FTT to determine that the cigarettes were held in the UK in order to be delivered or used in the UK. When the FTT queried the raising of this line of argument, Mr McNamee explained that it had occurred to him overnight, prompted by HMRC's witness evidence. HMRC said that the FTT did not consider it further, on the basis that it had not been pleaded and the evidence had been heard by that stage.

17. I consider that in these circumstances it is not arguable that the FTT erred in law by not considering and determining this issue. Raising a point for the first time in oral closing submissions where that point is not a pure point of law and the opportunity to present evidence has passed is procedurally unfair. While the question of whether the argument under Ground 1 is correct in law is a pure question of law, any determination of whether on the facts the relevant goods were held in order to be delivered or used in the UK would have turned entirely on the facts and evidence. In this appeal, there were many arguments raised by the Applicant, but this point was not raised in either party's pleaded case, and by raising it only in closing submissions and after evidence had been considered, the Applicant deprived HMRC of any practical opportunity to marshal their arguments and present their evidence. While the FTT could have sought further written submissions from the parties on the question of law, the time for evidence and fact-finding was during the FTT hearing and had passed.

18. I would refuse permission for this to be raised as new point on appeal, because it would clearly have required evidence and resulted in the trial being conducted differently. I would, therefore, refuse permission under Ground1. However, I have also considered Mr McNamee's other arguments in relation to Ground 1.

19. The second element of Mr McNamee's argument was that the evidence that the cigarettes were not in fact held in the UK in order to be delivered or used in the UK was "overwhelming", because it was quite clear that they were intended to be delivered to Ireland. This meant, he argued, that the FTT could not have found to the contrary, had they considered the issue.

20. I need not consider this point in any detail, because it is accepted by both parties that the FTT did not consider and weigh the evidence on this specific issue, or make a finding of fact on it, for the reasons I have explained. However, reading the Decision in its entirety, and taking into account all the evidence, I do not consider that the evidence on this point was overwhelming, or even conclusive in terms of the burden of proof to the ordinary civil standard.

21. I turn now to whether Ground 1 is arguable as matter of law.

22. Ground 1 is that no charge to duty (or associated penalty) could have arisen under Regulation 13 without it being established by the FTT as a fact (or conceded by the Applicant) that the cigarettes satisfied the requirement in Regulation 13(1) that they were held in the UK "in order to be delivered or used in the United Kingdom".

23. I remain of the view that this point is not arguable because it seeks to reopen a fact deemed to arise by paragraph 5 of Schedule 3 to CEMA.

24. Regulation 13(1) in its entirety states as follows (emphasis added):

> (1) Where excise goods already released for consumption in another Member State are **held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom**, the excise duty point is the time when those goods are first so held.

25. A failure to pay duty for which a liability exists, because a duty point has arisen, is necessary for a liability to forfeiture to arise under Regulation 88.

26. In this case, the cigarettes were seized as liable to forfeiture and no challenge to the legality of that seizure was made in the Magistrates Court within one month of seizure, as required by paragraph 3 of Schedule 3 of CEMA.

27. In such a circumstance, paragraph 5 of Schedule 3 deems the cigarettes to have been duly condemned as forfeited.

28. As explained in *HMRC v Jones* [2011] EWCA Civ 824, it then becomes necessary to establish the "deemed facts" arising as a result of paragraph 5.

29. Mr McNamee argued that any such deeming took effect only *in rem* and not *in personam*. He said that this meant that the fact deemed to arise from paragraph 5 was that the goods (in this case the cigarettes) were liable to forfeiture, but not that a duty point had actually arisen for which liability could attach to the Applicant. Mr McNamee said that if this were not the case then "the FTT would have nothing to decide in a duty case like this". He also said that Ground 1 must be correct because excise duty was a tax on consumption.

30. I consider that in light of various binding authorities this argument has no realistic prospect of success.

31. It is clear from *HMRC v Race* [2014] UKUT 331 (TCC), in a passage approved by the Court of Appeal in *HMRC v European Brand Trading Limited* [2016] EWCA Civ 90, that the fact that an appeal is against an assessment to excise duty rather than an appeal against non-restoration makes no difference to the deemed facts arising. The liability to duty (and therefore forfeiture if the duty is unpaid) described in Regulation 13 requires that the goods are "held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom". It is well established that where paragraph 5 applies an appeal against an assessment to duty cannot be made on the basis that the goods are not "held for a commercial purpose in the UK", because paragraph 5 has deemed the goods to be so held. There is no good reason, and Mr McNamee provided none, why it should nevertheless remain open to appeal against the assessment on the basis that the remaining element of liability in Regulation 13 (delivery or use in the UK) is not satisfied.

32. The argument that Ground 1 is correct because excise duty is a tax on consumption was rejected by the Court of Appeal in *General Transport Service SPA v HMRC* [2020] EWCA Civ 405, a case in which the goods were destroyed before any consumption could take place. In that case, the Court of Appeal said at [61]:

> …while I accept that excise duty is a tax on consumption, it does not follow that it is only payable when goods are consumed. Article 33 of the Excise Duties Directive is crystal clear about when goods become chargeable to duty. There is to my mind nothing unfair about an outcome in which goods are liable to forfeiture in circumstances where a liability for duty and a penalty also arise. As the Upper Tribunal observed in *Kevan Denley v HMRC* [2017] UKUT 340 (TC) at paragraph 74, these are all consequences prescribed by law.

33. In *General Transport*, while the Court noted that the "deemed duty" point had been conceded by counsel for the appellant (at [63]), it cast considerable doubt on the position taken by the Upper Tribunal on that issue, at [64]-[66]. I regard the position as correctly described in *Kevan Denley v HMRC* [2017] UKUT 0340 (TCC). In *Denley*, which concerned an appeal against an assessment to duty arising under Regulation 13 and an associated penalty, the Upper Tribunal considered *Jones*, *Race* and *European Brand*, and rejected an argument by the taxpayer which rested on the same proposition as Ground 1 as to the limited effect of paragraph 5 in relation to liability to unpaid duty. The Upper Tribunal recorded the competing arguments at [43]-[46] and firmly rejected the taxpayer's argument at [47].

34. As to Mr McNamee's point that paragraph 5 has effect in relation to the cigarettes *in rem*, that proposition finds support in the decision of Lightman J in *Fox v Customs & Excise Commissioners* [2002] EWHC 1244 (Admin). However, as the Upper Tribunal stated in *Carl Hodson v HMRC* [2017] UKUT 439 (TCC), at [25]:

> Thirdly, Lightman J was not concerned with the effect of paragraph 5 of Schedule 3 on the jurisdiction of the FTT. Fourthly, if and to the extent that *Fox* is inconsistent with *Jones*, it must be taken to have been overruled by *Jones*.

35. In any event, as explained in *Hodson* (at [28]):

> More importantly, in our judgment, the reasoning in *Jones* and the subsequent authorities does not depend on the appellant to the FTT being the owner of the goods. Rather, it depends upon the absolute and unqualified terms of the deeming provision in paragraph 5 of Schedule 3, and upon the legal consequences of that deemed state of affairs. Just as proceedings for condemnation and forfeiture are proceedings *in rem* against the goods, the deeming provision in paragraph 5 has effect *in rem* with respect to the goods. Once the deeming provision applies, it is not open to the FTT to entertain any case by any party which is inconsistent with it, regardless of that party's standing or interest in the matter…

36. In conclusion, I refuse permission to appeal on Ground 1 both because the argument was not raised in a procedurally fair manner before the FTT and would have required further evidence, and because the proposition is not arguable in law.

Ground 2: Discussion

37. In the oral hearing, Mr McNamee argued in relation to Ground 2 that it was clear as a matter of law that a party with no actual knowledge could not be fixed with a wrongdoing penalty, and that "there was no evidence of wrongdoing whatsoever on behalf of the Appellant", and that the FTT's conclusion as to knowledge of the driver Mr Burgess was an *Edwards v Bairstow* error of law. In particular, it was based on an irrational conclusion at FTT[97] as follows (emphasis added):

> The photographic evidence of the damage to the Cargo appears to show gaps between each plank. While this aspect of the photograph was not explored at the hearing the Tribunal finds it strange that each plank does not sit snuggly on the plank below.(page 56). The Tribunal notes that Mr Tinnelly in his witness

> statement at paragraph 12 states that Mr Burgess informed him that he could see "straight through the bales and in between each plank". **In view of the exceedingly large number of cigarettes found hidden in the Cargo the Tribunal is unable to accept the veracity of this statement as it must have been impossible to see through the bales which Mr Tinnelly accepts already contained the Goods.**

38. Mr McNamee said that the FTT's reasons for upholding the Penalty were "contained within paragraph 97". That is not an arguable position when the Decision is considered in its entirety. Mr Burgess' evidence dealt largely with whether he was an employee of the Applicant, and he did not give live evidence in the hearing. In relation to the Penalty, matters recorded in the Decision and taken into account by the FTT included the following:

(1) The background facts set out at FTT[3]-[11].

(2) HMRC's submissions at FTT[28]-[30]:

> 28. The Respondents contended that the Appellant's behaviour was deliberate and concealed. The Goods were present in large quantities and were well-concealed to avoid detection (they were found in cardboard boxes hidden within planks of timber) which is indicative of a sophisticated smuggling operation. The Respondents also relied on the evidence set out below which points overwhelmingly to the Appellant being involved in a deliberate attempt to deliver excise goods without payment of UK excise duty:
>
> > 28.1 The due diligence conducted by the Appellant was cursory, despite the Appellant never having traded with TF Fionnradharc Ltd (the purported consignee) before.
> >
> > 28.2 TF Fionnradharc Ltd did not exist at the address to which the Appellant was meant to be delivering the Goods in Dublin and does not appear to be a genuine business. Basic due diligence checks would have established that the delivery address provided was not a genuine place of business.
> >
> > 28.3 The emailed instructions purportedly received from TF Fionnradharc Ltd lacked detail and did not include a corporate logo or any contact details for the company.TF Fionnradharc Ltd does not operate from the premises listed on the CMR (Carrickedmond Business Park).
> >
> > 28.4 Mr Burgess confirmed at interview that a trailer swap was planned when he arrived back in the UK and there was another set of licence plates in the vehicle with registration numbers FJ05 ZKE and 131LH901. The Appellant has failed to offer a plausible explanation for this. Mr Burgesss also admitted to driving without the tachograph card being inserted. It is submitted that this is indicative of excise diversion fraud as it seeks to disguise any movement of trailers.
> >
> > 28.5 Hooymeijer Stevedoring B.V and Burger Logistics Services Ltd denied having any knowledge of the Goods or any dealings with the Appellant, Mr Burgesss or Tinnelly European Transport.

> 28.6 The Appellant was involved in another seizure arising out of similar circumstances where a large quantity of excise goods was seized from a vehicle operated by the Appellant.
>
> 29. The Respondents classified the disclosure given by the Appellant as prompted. While the Appellant did co-operate with the Respondents' enquiries, the disclosure was necessarily made after the UKBF had discovered the Goods. A disclosure is only "unprompted" where the taxpayer notifies the Respondents of their liability before any action is taken.
>
> 30. The standard amount of the penalty where the act is deliberate and concealed is 100% of the PLR (paragraph 6B, Schedule 41 to the Finance Act 2008). The penalty issued to the Appellant has been calculated at 60% of the PLR.

(3) The list of factors taken into account by HMRC as set out at FTT[28] was further supplemented at FTT[73] and [74].

39. I consider that even if one assumes that the FTT's conclusion at FTT[97] was irrational, there was ample evidence to justify the FTT's conclusion to uphold the Penalty. It was comfortably within the range of decisions reasonably open to the FTT on all the evidence, and the contrary is not arguable with any realistic prospect of success.

40. Mr McNamee repeated various other arguments in relation to the Penalty which were dealt with in the Decision, and which do not identify any arguable error of law.

41. I refuse permission for Ground 2 as it identifies no arguable error of law.

Decision

42. For the reasons given, I remain of the view that no arguable error of law in the Decision has been identified, and permission to appeal is refused.

Signed: **Date: 05 March 2025** **Judge Thomas Scott**
Issued to the parties on: 05 March 2025