[2017] UKFTT 824 (TC)

TC06219

Appeal number: TC/2016/05338

PROCEDURE – application for permission to appeal out of time allowed HMRC's strike out application dismissed– appellant's wasted costs application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

The Wine & Spirit Import Company Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 23 June 2017

Geraint Jones QC, instructed by Rainer Hughes Solicitors for the Appellant

Richard Evans, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant seeks permission to notify its appeal to the tribunal seven weeks out of time. The appeal is against an HMRC review decision of 12 July 2016 which upheld HMRC's refusal of the appellant's applications for approval as a Registered Owner of Goods (refused on 11 February 2015) and as a Warehousekeeper and General Storage and Distribution Warehouse (refused on 30 November 2015).

2. This decision concerns three applications: (1) the appellant's application for permission to appeal out of time mentioned above (2) HMRC's application to strike out the appeal on the grounds the appeal has no reasonable prospect of success and 3) the appellant's application for the costs of a previous hearing which took place on 7 April 2017 which, it maintains were wasted costs, or costs incurred as a result of HMRC's unreasonable conduct.

Evidence and background facts

3. On behalf of the appellant, I heard oral evidence from James Nash, the appellant's director, and on behalf of HMRC, from Andrew Cousins, who was one of the HMRC officers who, in the summer of 2016, had corresponded and met with Mr Nash in relation to various matters relating to excise related licenses and approvals. Both witnesses provided witness statements which exhibited various notes and correspondence. They were cross-examined by the opposing party and I found both to be credible witnesses of fact. From their evidence, the documents before me, and the chronology set out in HMRC's skeleton which was accepted by the appellant, I found the following.

4. The appellant was set up by Mr Nash, who is also a director and a shareholder of Lowfield Logistics Ltd, a company which had made applications to HMRC for excise-related approvals prior to the period relevant to the appellant's applications. Mr Nash explained in his evidence, his background as the force behind the development in the UK of "single-serve" pre-filled wine glasses that are now commonly sold in UK supermarkets. His interest, in setting up a bonded warehouse that his companies could use to store goods he had manufactured before they were shipped to end customers, stemmed in broad terms, from a desire to improve the cashflow situation around the time at which duty was paid.

5. On 13 August 2015 HMRC received the appellant's application for approval to be registered as (i) a Registered Owner of Goods, (ii) a General Storage and Distribution Warehouse ("GSDW"), and (iii) a Warehousekeeper ("WOWGR").

6. Following a visit to the appellant on 15 October 2015, and on 28 October 2015, a request to the appellant for evidence and details of the charges for the services the appellant intended to provide, HMRC, on 30 November 2015, refused the appellant's application as (i) it had not demonstrated a genuine business need, (ii) the business

plan had certain credibility issues as to financial projections which were unsupported, (iii) a comprehensive audit trail of finances had not been provided, and (iv) the previous company (The Wine and Spirit Export Company Ltd.) had been dissolved with an outstanding VAT liability which concerned a civil penalty imposed due to outstanding input tax discrepancies.

7. On 7 December 2015 the appellant requested that HMRC reconsider their decision on the basis of further information provided pursuant to a request HMRC made on 3 December 2015. HMRC refused to change their decision on 17 December 2015 and on 7 January 2016 they sent a further request for outstanding information, stating the deadline as 21 January 2016.

8. On 11 February 2016 HMRC sent the Appellant a letter setting out the grounds for refusing the application. These were the same grounds as set out in the 30 November 2015 decision with the addition of a ground based on the ground that the appellant's previous warehouse approval was revoked due to non-compliance issues. A further letter was sent to say there was no business need for approval. Within both of these letters, the time limits in which to request a review or appeal to the Tribunal were clearly stated. The appellant was also directed to fact sheet HMRC1 entitled "HMRC Decisions – What to do if you disagree." The appellant's representative requested a review on 29 February 2016 but this was not treated by HMRC as a formal request because HMRC were not satisfied the representative had been appointed. This issue was resolved on 22 March 2016 when Mr Nash sent in a signed letter of authority along with a formal request for review.

9. On 5 May 2016 the application in respect of Lowfield Logistics Ltd was refused in a decision given by HMRC Officer Russell.

10. On 24 May 2016 the appellant e-mailed Jim Harra, the then director-general of Business Tax at HMRC, setting out Mr Nash's entrepreneurial background, his proposals, the fact his new company had had various applications turned down, and his feeling that the only avenue left was to take legal steps to get the decision overturned. He asked Mr Harra to look into his case.

11. It does not appear that Mr Nash received a reply, but on 25 May 2016, Mr Cousins from HMRC called Mr Nash in order to explain the application process and other options. I set the following exchanges of correspondence out in more detail given the parties' focus on them at the hearing and in their submissions: On 27 May 2016, Mr Cousins followed up a conversation on the preceding Wednesday (25 May 2016) and suggested a meeting date in the week commencing 13 June 2016.

12. On 3 June 2016 Mr Nash replied (copying in his solicitor) as follows:

> "The letter of 5th May, says that we have 30 days to dispute Mrs Russell decisions, please confirm that we will not be prejudiced by meeting you on 13th June with fall outside the 30 day time limit. For the avoidance of any doubt we wish to meet HMRC to provide any further information to reconsider their decision being option 1 on the letter of their 5th May 2016.

13. Mr Nash replied the same day:

> "During our phone conversation(25 May), the purpose of the proposed meeting was to explain to you the different types of approvals and in general terms what evidence you would need to demonstrate.
>
> You did not advise me that it was to consider further information regarding the decision advise to you by Mrs Russell in her letter dated 5 May 2016.
>
> If you wish to submit information to be considered, then this should be submitted to Officer Russell as option 1 of her letter. This will be considered and you will be advised of her decision in writing in due course."

14. The letter of 5 May referred to in Mr Nash's enquiry and Mr Cousins' reply related to the decisions on the applications made in relation to Lowfield Logistics.

15. Mr Cousins' letter then went on to explain the further steps that could be taken (an independent review of Mrs Russell's decision, her 5 May 2016 decision, or an appeal to the tribunal). It stated the relevant time limits for requesting such reviews and also stated that there were time limits for appeals to the tribunal.

16. Mr Nash says that on getting the 3 June 2015 e-mail from HMRC the appellant took the view that, as HMRC wanted to meet with them, he thought HMRC might have changed their mind in refusing the application and that therefore he did not appeal or take any further action at that stage. On 3 June 2016 Mr Nash proposed a meeting which took place on 13 June 2016.

17. Mr Nash and Mr Cousins have different accounts of the meeting. Mr Nash's evidence was that Mr Cousins had suggested that the application could be revisited, that HMRC had recommended that the appellant should reapply for a new license and movement guarantee and that he had requested the appellant reapply for both a Trade Facility and Movement Guarantee. Mr Nash says that Mr Cousins "gave very strong signals that none of it was a problem; implying that we could sort it all out together to resolve the refusal of the application". Mr Cousins takes issue with all of these matters. His evidence recounted what he recalls was said and attached copies of the note he had made. I deal with the relevance of their different accounts in the discussion section of this decision.

18. The same day, Mr Cousins e-mailed Mr Nash outlining Mr Cousins' understanding that the appellant would submit an application for a Trade Facility warehouse and that Mr Nash would submit a new application for a Movement Guarantee.

19. Mr Nash replied on 22 June 2016 indicating he was working on: making the above applications (the appellant in fact the same day applied for a Trade Facility warehouse and authorised warehouse-keeper license), and taking various other steps such as getting his accountant to sort out his "old VAT" in order to keep his record clean. On 29 June 2016 HMRC (another officer Mr John Macbride) asked for further

information in relation to the appellant's authorised warehouse-keeper and trade facility applications.

20. Meanwhile, on 12 July 2016, HMRC concluded their review of the 30 November 2015 and 11 February 2016 decisions on the appellant's applications. The review upheld the decisions to refuse the applications of the appellant for approval as a registered owner, GSDW and WOWGR. Under the heading "What happens next" the letter set out that if the appellant wanted to appeal to the tribunal it would have to write to the tribunal within 30 days of the date of the letter. A copy of this letter was also sent to the appellant's solicitor, Rainer Hughes. No appeal was notified within the relevant time limit which expired on 11 August 2016.

21. Returning to the appellant's further applications which were then still pending, there then followed some correspondence in which HMRC explained (on 1 August 2017 and 8 August 2017) that the matter was being allocated to a new officer. That was Officer Surinder Singh who e-mailed Mr Nash on 12 August 2016 regarding a visit on 17 August to carry out a compliance check. Around 22 to 24 August 2016 there was a flurry of further correspondence between Officer Singh, Mr Nash and Mr Nash's general manager, Mr Ged Shannon, in relation to various matters including guarantees, insurance and supplier, investor and manufacture details. On 23 August 2016, Mr Nash sent Mr Singh various information: correspondence regarding a share sale from 2014 from another company and copy correspondence from a large supermarket, details of drivers for Lowfield logistics, investor details, manufacturers and details of discussions that had taken place as to the matter of outstanding VAT. Mr Nash's view at this time was that everything was fine with the progress of the applications.

22. On 24 August Officer 2016, Officer Singh said he would take a look at the information and get back to the appellant once he had returned from being away. He also asked for further information – on the proposed large supermarket customer, the provenance of funds, and queried whether one application or two was being made.

23. It appears that Mr Nash became exasperated around this time with the lack of progress being made and the detail and scope of the verifications sought. This manifested in an e-mail of complaint from Mr Nash to Mr Harra at HMRC on 6 September 2016 about the level of checks HMRC were making, and Mr Nash's perception that HMRC's officers lacked appropriate industry knowledge in relation to the appellant's proposed customers.

24. On 3 October 2016, Officer Singh issued his decision refusing the applications he had been dealing with. Mr Nash instructed his solicitors to appeal the earlier review decision which is the subject of the current application. On 5 October 2016 the appellant accordingly lodged a notice of appeal which was acknowledged by the tribunal on 13 October 2016. The Notice of Appeal requested permission to appeal out of time and in the attached grounds mentioned that the appellant would provide the Tribunal with a full witness statement detailing the reasons behind the late appeal but that the appellant's broad position was that they were in communication with HMRC throughout the period post-dating the 30 day appeal period and that HMRC

had indicated that they would be meeting with the appellant in order to further discuss the application. The ground referred by way of example to the e-mail dated 3 June 2016 (set out at [12] above).

25. Lowfield Logistics Limited did not re-apply for a movement guarantee or appeal Officer Russell's decision of 5 May 2016 to refuse its original application.

Law

26. Under s16(1B) of the Finance Act 1994 the time limit for bringing an appeal is 30 days from the date of the decision. Under the Rule 20(4) of the Tribunal Rules[1], unless the tribunal gives permission, it must not admit appeals outside the applicable statutory time limit.

27. There was no disagreement that the appeals were lodged out of time. Nor was there any dispute on the questions which were relevant to consider when a tribunal was faced with an appeal notified out of time. In relation to extensions of time, the Upper Tribunal's decision in *Data Select Ltd. v Commrs for HMRC* [2012] UKUT 187 (TCC) suggested that, as well as considering the overriding objective and all the circumstance of the case, as a general rule, a tribunal should ask itself the following questions:

> "(1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay (4) what will be the consequences for the parties of the extension of time? and (5) what will be the consequences for the parties of a refusal to extend time."

28. As regards the relevance of the merits of the substantive appeal, both parties agreed with the proposition that these were not relevant unless the tribunal could see, without much investigation, that they were either very strong or very weak (*R oao Dinjan Hysaj v Secretary of State for the Home Department* [2014] EWCA Civ 1633 at [46] and *HRR Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd* [2014] UKSC 64 at [30]). However, as addressed in more detail below, Mr Jones, for the appellant, submits that the current application is one where the merits are obviously very strong and therefore should be taken into account.

Discussion

29. I take the parties' arguments on the above questions in turn before moving on to consider my views on them, and how they are to be balanced in order to achieve a fair and just outcome.

30. As regards the purpose of the time limit, Mr Evans, for HMRC, submits the purpose of the time limit is to ensure procedural fairness and finality. Mr Jones, for the appellant sought to draw a distinction between party on party disputes and disputes such as this involving a person appealing against a state body, whereas

[1] The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

HMRC's position was that fairness required the rules to apply to everyone whether they were a private individual, corporate, or a state body.

31. The length of delay, as is accepted, is just under two months (the period between 11 Aug 2016 and 5 October 2016). Mr Jones highlights that once the appellant's alternative applications had been refused on 3 October 2016 it moved swiftly, filing its notice of appeal on 5 October 2016. Mr Evans submits the length of time is not insignificant, and in essence was long enough for HMRC to be entitled to assume the matter had concluded.

Reason for delay – good explanation?

32. The appellant's case is that the reason for delay was bound up with its expectation that the other applications it had made (i.e. the ones following the 13 June 2016 meeting for trade facility and movement guarantee) would be successful. They did not realise their optimism about the applications was misplaced until they were turned down and it was only then that the appellant realised it should appeal the earlier GSDW, WOWGR and registered owner decisions. That was a state of mind encouraged by HMRC officers to the effect the appellants' businesses and associated companies could achieve their objective through making different applications. It was, Mr Jones submits, inevitable that HMRC would turn down the appellant's later applications if the earlier decisions remained on record as refused. It could well be seen how the appellant proceeded in the way it did. The period of time for how long HMRC took to deal with the second tranche of decisions was out of the appellant's control. It was open for HMRC to have revisited the earlier decision and reach a fresh one and in any case they were able to give pointers and encouragement without necessarily reconsidering the decision. If there was any error it was in not appealing on a protective basis by sending in a pro-forma notice of appeal and then amending it later.

33. HMRC's case is that no good explanation for the delay has been provided. Regarding the appellant's reliance on the e-mail sent ahead of the meeting on 13 June 2016, this, they highlight, preceded the review decision and therefore could have no effect on the relevant period of delay. The appellant's stance, HMRC argues, would entail allowing an appellant to use the appeal process at its own convenience – whether it would be wasteful of the appellant's labour and costs was not relevant. The appeal rights and time limits were clearly stated in the review decision given in July 2016 which was sent not only to the appellant but also copied to the appellant's solicitors. More specifically as regards the appellant's reliance on the impression given about the June 2016 meeting, this reliance was misplaced; the purpose of the meeting was to discuss different applications and the evidence required. No representations were given that HMRC would revisit the application that had already been made. As regards the appellant's reliance on the letter of 5 May 2016 this matter involved a separate company, Lowfield Logistics Ltd. Mr Cousins' e-mail clearly set out the right to review and right of appeal and the fact there were time limits.

Consequences for parties if an extension permitted or not permitted

34. If the application to appeal out of time were refused, it follows the appellant would not be able to pursue their substantive appeal. The consequence, according to Mr Jones, is that it will forever be on record that the appellant's WOWGR and other applications were refused, blighting later applications and causing prejudice to the appellant's commercial development and reputation. By contrast there is, he submits, no prejudice to HMRC, a large state organisation with huge resources, in the appeal proceeding. In line with his argument above on the relevance of finality to appellant v. state disputes, he highlights the state does not suffer the same detriment to quality of life in terms of lack of finality that a non-state litigant does. He points out that the nature of the dispute is not one which centres on the reliability and on witness evidence becoming stale because of the length of time that has passed.

35. HMRC argue that if the extension of time were refused the appellant would not be precluded from submitting a further application and that the submissions in relation to commercial and reputational prejudice are mere assertion. If the extension were granted then HMRC would have to seek to defend an appeal that was settled – HMRC should be permitted to rely on the finality granted by the time limit. Public bodies do not have infinite resources.

36. The level of prejudice will of course be informed by the prospects of success. But, as indicated above, while both parties agree a detailed enquiry into merits is not appropriate, Mr Jones submits that this not prevent the tribunal engaging with matters of law. Furthermore this is, he suggests, a case where it can readily be seen without detailed examination of the facts, that the appellant has a very strong case.

37. I agree however with Mr Evans that there is no indication from the approach suggested in *Hysaj* and *Apex Global Management* that the guidance there, to steer away from a merits analysis, did not apply just as much to matters of law. The guidance stems from a general concern to avoid such analysis where it would require a detailed enquiry. Mr Jones refers to the appellant's grounds which explain that HMRC's refusal of WOWGR because GSDW had been refused was wholly unreasonable. In relation to the GSDW decision HMRC wrongly applied the WOWGR criteria. The failure to mention or otherwise deal with proportionality also rendered the decision unreasonable. (Mr Jones' answer to the absence of any mention of that failing in the grounds of appeal was that it did not matter as it was so obvious that a tribunal hearing the matter would be bound nevertheless to consider the point[2]). But, in my view, the mere fact criteria or conclusions used in one sort of application have been applied or used as a basis for another decision is not necessarily unreasonable; it will depend on examining and enquiring into the extent to which the policy considerations underlying the need for approval or license overlap. As regards proportionality, this will require a consideration not just of the decision but the decision-making approach and will need to be viewed in the light of the evidence given. As Mr Jones' skeleton points out, "free-standing issues of law" will only be capable of determination after a full fact-finding exercise has been undertaken. The

[2] Termed "*Robinson* obvious" (*R v Secretary of State for the Home Department, ex p Robinson* [1997] 3 WLR 1162)

flaws that he sought to highlight, would require deeper analysis in order to be able to conclude they should be determined in the appellant's favour. Contrary to the appellant's submissions, I do not agree therefore that the merits are ascertainable at this point to be very strong and that they therefore ought to be taken into account.

Tribunal's views and balancing the factors

38. In furtherance of his submission that there was a good explanation for the delay Mr Jones highlights Mr Nash's subjective view that there was no need to appeal. I am not persuaded that amounts to an especially good explanation but the particular reasons for the delay are a matter, in my view, that should be taken into account in exercising the tribunal's discretion. Mr Cousins and Mr Nash came away from the meeting thinking different things. I accept from Mr Nash's perspective he was more focussed on moving his business forward with approvals rather than the niceties of what particular decision to challenge. The meeting that took place on 13 June 2016 was not irrelevant as HMRC suggest but provides context for evaluating Mr Nash's subsequent behaviour and in particular it explains why, in his mind at least, he did not think to instruct his solicitors to file an appeal against an earlier decision. I agree however with HMRC that this line of thinking was not necessarily a sound basis for deciding not to appeal the earlier decisions sooner. It was not inevitable subsequent decisions would fail, if challenged on appeal to a tribunal, as a tribunal could take its own view on the significance, if any of HMRC's earlier decisions and any failure by the appellant to appeal those. But, I accept Mr Nash genuinely assumed he needed to appeal those older decisions on this basis. Up until the rejection of the pending applications he had not turned his mind to the consequences of not appealing the earlier decisions as he was hopeful regarding the later ones.

39. As to the analysis on the parties' respective prejudice I disagree with the distinction Mr Jones drew in relation to appellant v. state type dispute. While Morgan J in *Data Select* (at [37]) made the point that general comments from the case law stressing the importance of finality of litigation were not directly applicable where the application concerned an intended appeal against a determination by HMRC, and where there had been no judicial decision, he went on to make the point that the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled applied just as much to an appeal against a determination by HMRC as it did to appeals against a judicial decision. That acceptance does not fit with the argument that state parties are as a matter of course to be treated differently. Nevertheless, there is no reason to elevate an expectation that time limits will be complied with to an entitlement which supersedes a consideration of the relevant factors. The purpose behind the time limit must be taken account of, but it is not conclusive. The level of prejudice will depend on the facts and while HMRC criticise the appellant for only making assertions as to prejudice the same could be true of the actual prejudice HMRC has suffered in this particular case. I also do not think significance can be attached to HMRC's argument that the appellant's prejudice is limited because it can apply for fresh decisions. It overlooks the fact that Parliament has accorded a right of appeal against the relevant decisions made irrespective of whether further applications are made.

40. The explanation for the delay, which is based on the appellant's subjective view that it would not prove necessary to appeal is not an especially good explanation. But, it reveals this was not a case where there was no engagement between HMRC and the taxpayer in the general subject area of the relevant decisions such that dealings in relation to the previous decisions that had been made would cease to be relevant. There is nothing to suggest that, beyond the inconvenience that arises in any appeal made outside of the time limit, HMRC will suffer significant prejudice on the facts of this case. Taking account of all the above, and in particular that the length of the delay of seven weeks was not particularly long, that it resulted in limited prejudice to HMRC and that there was an explanation for the delay which involved engagement with HMRC on similar subject matter such that it could not have been assumed the issue of approvals was no longer live, in my judgment, it is fair and just that the appellant should be granted permission to notify its appeal to the tribunal out of time. HMRC's strike out application on the basis the appeal was notified late is accordingly dismissed.

HMRC's Strike-out application – reasonable prospects of success

41. Under Tribunal Rule 8(3)(c) where the tribunal considers there is no reasonable prospect of the appellant's case or part of it succeeding, it may strike the appeal out.

42. HMRC's application to strike-out referred to the Court of Appeal's decision in *Swain v Hillman* [2001] 1 All ER 91 which concerned the approach to be taken in relation to summary judgment in the courts. This was one of the authorities the Upper Tribunal referred to in *HMRC v Fairford Group plc and another* [2015] STC 156 where it provided guidance on the exercise of the power under Rule 8(3)(c) as follows:

> "[41] 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."

43. Mr Evans submits that as regards the refusal of GSDW, the refusal of WOWGR, and refusal of registered owner of goods the appellant's grounds of appeal do not properly address the reasons why the application was refused by HMRC. He took me to the refusal letters and HMRC's review decision highlighting various points which had factored in the decision-making, such as failure to pay a VAT liability, and with the credibility of the business plan. These were, Mr Evans emphasises, all relevant

factors, and refusal of WOWGR naturally followed from the refusal of the GSDW application. The third refusal was about registered owners of goods and there were no reasonable prospects of success largely for the same reasons as for the other two refusals. As to the appellant's arguments on legal principles such as proportionality and whether the "fit and proper" requirement complied with principles of legal certainty, these were not mentioned in the grounds of appeal and were not so obvious as to require the tribunal to consider them. The particular case-law the appellant had referred to on proportionality related to seizures of property and it could not be assumed the principles would apply the same way in relation to the approval decisions in this case.

44. Mr Jones says the application on the basis of no reasonable prospects of success is misconceived and premature. It seeks in effect to proceed on the basis that there cannot be any challenge to the facts asserted by HMRC and/or any findings based thereon. This, he submits, is wrong in law and in fact (as it cannot be made good until the nature of the factual disputes between the parties are discerned which will only be possible once disclosure takes place and witness statements are exchanged). Mr Jones refers to Judge Jonathan Richards' summary in *Charles Miller Ltd. v Home Office* [2015] UKFTT 0556 (TC) of Pill LJ's acknowledgment in *Balbir Singh Gora v C&E Comms* [2003] EWCA Civ 525 in relation to the supervisory jurisdiction:

> "…that the Tribunal could decide for itself primary facts and then go on to decide whether, in the light of its findings of fact, the decision of restoration was reasonable. Thus, the Tribunal exercises a measure of hindsight and a decision which in the light of the information available to the officer making it could well have been quite reasonable may be found to be unreasonable in the light of the facts as found by the tribunal".

45. I have already touched on some of the criticisms the appellant makes of HMRC decisions on WOWGR and GSDW (see [37] above). Mr Jones developed his submissions pointing out that the logic of denying a WOWGR because of a failure to get a GSDW was particularly flawed given it was possible have a WOWGR and hold goods at duty suspended warehouse operated by third parties. In addition to the question of whether domestic or European principles of proportionality are met proportionality the appellant also refers to other freestanding issues of law which it submits were only capable after fact finding – e.g. whether the fit and proper person requirement met principles of legal certainty under European law.

46. In relation to the tribunal's fact-finding jurisdiction, Mr Evans, referring to the FTT's decision in *Mr Mohammad Imran Malik (Trading as Cool Drinks) v HMRC* [2017] UKFTT 308 (TC) submits the tribunal has moved away from a wide-ranging enquiry into facts, and that when exercising its supervisory jurisdiction the tribunal was limited to finding facts which arose by the time the challenged decisions were effected.

47. In *Malik* the FTT set out at [13(5)] of its decision in relation to the Tribunal's supervisory jurisdiction that:

> "In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of HMRC was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected".

48. I agree with Mr Jones' view that *Malik* does not mark any departure from Judge Richards' summary of the effect of *Gora.* There is no inconsistency between the two; both clarify that subsequent to the officer's decision, facts may be found by the tribunal which relate to the period before and at time of decision, but which were not in the information made available to the officer.

49. Mr Evans referred to the Court of Appeal's decision in *ICI Chemicals* [2007] EWCA Civ 725 to support his submission that strike out proceedings such as those in issue here could deal with points of law. However, it must be acknowledged that the court was referring there to short points of law where the court had all the evidence necessary for a proper determination. As the appellant highlights, this is not such a case. The facts underpinning HMRC's decisions such as the appellant's business credibility, whether it had demonstrated a genuine business need, whether a full audit trail was provided are all matters of dispute upon which it will not be possible to reach a view until disclosure has taken place and witness statements have been served.

50. I concluded earlier, in relation to the permission to appeal out of time application, that this was not a case where it could be said, without a detailed examination, that the arguments were very strong so as to thereby feature in a merits analysis for the purposes of that application. But, along the spectrum of prospects of success there is ample space between the point where grounds are not necessarily very strong, and the point where the grounds stand no real prospect of success and are fanciful. Where the facts underpinning the decisions under appeal are in dispute and there is the potential, upon hearing the evidence for relevant findings of fact to be made, and where it has not been possible to conduct a closer examination of the policy concerns underlying the relevant regulatory regimes, I am unable to be satisfied that the appellant's arguments stand no real prospects of success and therefore that the threshold for strike-out is made out. I therefore refuse HMRC's application to strike-out (and reach this view without needing to consider whether the appellant's arguments on infringement of the legal principles of proportionality and legal certainty lack sufficient merit).

51. HMRC's application to strike out is dismissed.

Appellant's application for wasted costs / HMRC's unreasonable conduct

52. The appellant applies for its cost of, and occasioned by, the strike out application pursued by HMRC at a hearing which took place previously on 7 April 2017. That application sought to strike out the appellant's appeal 1) on the grounds it was out of time and 2) on the grounds the appeal lacked reasonable prospects of success. The appellant submits, for the reasons discussed in more detail below that the application was wholly misconceived and premature, that any reasonably competent lawyer would know that, and that accordingly HMRC should be liable for wasted costs or on

the basis that in pursuing the strike-out on the grounds it put forward, HMRC acted unreasonably.

53. The background to the hearing which took place before me on 7 April 2017 was as follows. The appellant's notice of appeal dated 5 October 2016 was acknowledged by the tribunal on 13 October 2016. As set out above, it indicated a witness statement would be served in support of the appellant's application for permission to appeal out of time. The case was categorised as standard. On 9 December 2016, HMRC made the strike out application copying the appellant's solicitors at the same time. On 6 January 2017 the Tribunal sought representations from the appellant. No representations were received. A hearing notice, referring to the Respondents' application to strike out being listed on 7 April 2017, was sent to the parties on 11 February 2017. In the appellant's case this was sent both the appellant's last notified address and to the appellant's solicitor. Upon notification by the appellant's solicitor of the appellant's new address a further hearing notice was sent out on 7 March 2017. The notice directed the parties to agree a bundle and to provide outline arguments to each other and the tribunal seven days before the hearing. Various correspondence took place between the appellant's solicitor and HMRC's solicitor in relation to the bundles for the hearing. HMRC filed their skeleton with the tribunal on 4 April 2017 and the appellant filed its skeleton argument on 5 April 2017. At the hearing, following submissions from the parties in relation to the listing and ordering of various applications and issues before the tribunal, I issued directions in relation to the listing of the current applications and the filing of witness statements in relation to the appellant's application to appeal out of time.

54. Rule 10 of the Tribunal Rules provides so far as is relevant:

> **"10.**—(1) The Tribunal may only make an order in respect of costs …
>
> (a) under section 29(4) of [*The Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007")*] (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings;"

55. Section 29(5) TCEA 2007 defines "wasted costs" as any costs incurred by a party:

> "(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative; or
>
> (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it is unreasonable to expect that party to pay."

56. Mr Jones' submissions referred to *Ridehalgh v Horsefield* [1994] Ch 205 pointing out the order for wasted costs is usually made if a party by its legal advisers has acted in a manner in which either no reasonable lawyer could or should have advised it or acted negligently.

57. As regards the "out of time" basis referred to in the strike-out application, Mr Jones' point was that this was wholly misconceived as, unless and until permission to appeal out of time had been granted (pursuant to the application made which had not yet been listed or determined) there was no appeal on foot that HMRC could apply to strike out. He submits that any reasonably competent lawyer would know that an application to strike out an appeal which was not yet on foot would be premature, and bound to fail. As to the second basis of strike out (no reasonable prospects of success), any reasonably competent lawyer would know the outcome of an appeal under s16(4) Finance Act 1994 would turn on findings of fact (and would appreciate these would not be discernible until evidence exchanged) or issues of law. He referred by analogy commentary in the White Book to CPR52.18.3 on striking out a notice of appeal and the case of *Turner v Haworth Associates* [2001] EWCA Civ 370 relating to a notice of appeal from an order of a district judge that was struck out by a circuit judge on the grounds it was frivolous, vexatious and an abuse of process. The commentary makes the point that the appeal, due to its date of commencement, was not subject to a permission requirement (that was introduced later) and that if the appeal had commenced after the relevant date, that neither the district, nor the circuit judge, would have given permission to appeal "…and thus no question of striking out would have arisen". In essence, Mr Jones submits the commentary recognises, that as is the case with an appeal out of time, unless and until an appeal is on foot, there is no appeal to be stuck out. HMRC had misread the hearing notice and wrongly assumed the tribunal had listed an application for permission to appeal out of time on Friday 7 April 2017. The hearing need not have taken place but for the identified negligence.

Discussion and conclusion

58. For the reasons below, I am not persuaded HMRC acted improperly, unreasonably or negligently, or that they conducted the proceedings unreasonably so as to trigger the issue of costs on the bases the appellant seeks. The appellant's applications for costs in relation to the 7 April 2017 hearing must be rejected.

59. In relation to the first ground of strike out, as Mr Evans points out, there have been a number of decisions where the tribunal has struck out an appeal on the basis it was out of time having considered whether permission to appeal ought to have been granted[3]. Those tribunals were able to bypass the logical conundrum presented by an application to strike out an appeal on the basis it was out of time even though the appeal was not yet on foot and get on with tackling the underlying issue of substance, namely whether the tribunal's discretion should be exercised to grant permission or not. The White Book commentary Mr Jones refers to provides oblique support at best, and in any case would not preclude the tribunal from reconciling and sensibly case-managing the applications before it, to focus the substance of what was in issue, namely the out of time issue.

[3] *Burns v HMRC* [2014] UKFTT 1053 (TC) at [14], *Chawdery v HMRC* [2016] UKFTT 637 (TC) at [39], *Bala v HMRC* [2017] UKFTT 847 (TC) at [22], *Howes v HMRC* [2014] UKFTT 886, *Ashraf v HMRC* [2016] UKFTT 453 (TC) at [58] and *Royal Liverpool Golf Club* v HMRC [2015] UKFTT 0382 (TC) at [1] and [48].

60. As to the particular facts, the appellant had indicated in its notice of appeal that it would put forward witness evidence. It was not unreasonable in those circumstances, and in the absence of any indication from the appellant as to their view that the strike out application was logically flawed, premature and invalid, for HMRC to have assumed, having received the hearing notice that the hearing would deal with permission to appeal out of time and not to have queried the matter further. The fact no witness statement was served by the appellant in support until after the Tribunal's directions at the 7 April 2017 hearing would not have disabused HMRC of the purpose of the hearing as it would be a matter for the appellant whether it chose to rely on evidence in furtherance of its application for permission to appeal out of time. I mention in passing that if it were the case, as suggested, that a reasonably competent legal representative ought to have known there was no point lodging a strike out application when permission to appeal had not been granted, then it might be expected that the appellant's legal representative would raise the point with either the tribunal and/or HMRC as soon as they were notified of the hearing rather than two days before the hearing, when their counsel's skeleton argument was filed.

61. As regards the second element of the strike out application, it does not of course follow from the fact I have found against HMRC on their strike-out application that they acted in a way which meets the threshold for considering an award of wasted costs or costs founded on HMRC's unreasonable conduct. The fact that the appellant was taking issue with a number of facts underlying the HMRC decisions and indeed a more developed picture of the appellant's challenge has only become clearer with the clarification of the appellant's case which took place in the course of hearing these applications. While it might be that, with the benefit of hindsight, HMRC would have been wise to reflect further on whether to pursue a strike-out on the grounds of lack of reasonable prospects of success, I cannot say that based on the information provided in the appellant's grounds of appeal that HMRC, by pursuing the application, crossed the threshold into acting improperly, negligently, or unreasonably.

62. The appellant's application for costs is refused.

63. 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.

64. Further directions for the case management of the appeal are issued to the parties separately.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 6 NOVEMBER 2017