[2018] UKFTT 564 (TC)

TC06738

Appeal numbers: TC/2017/03081
TC/2017/03077
TC/2017/03080

PROCEDURE – appeals against decisions/ C18 Notices in respect of anti-dumping duty/customs duty/VAT – application for disclosure of documents and information – application allowed in part – application for stay of proceedings pending the outcome of another case – stay granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

UNIVERSAL CYCLES LIMITED **Appellants**
BRANDS HOLDINGS LIMITED
SPORTSDIRECT.COM RETAIL LIMITED

- and -

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Taylor House, London on 13 September 2018

Valentina Sloane instructed by Reynolds Porter Chamberlain LLP, for the Appellants

Owain Thomas QC and Isabel McArdle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. Following an investigation by the European Anti-Fraud Office ("OLAF") the Respondents ("HMRC") decided that each of the Appellants was liable to anti-dumping duty, customs duty and import VAT in respect of bicycles which had been imported from Sri Lanka between 2009-2011 on the basis that the bicycles were in fact of Chinese rather than Sri Lankan origin. The amount demanded from Universal Cycles Limited ("Universal") is just under £8m, from SportsDirect.com Retail Limited ("SportsDirect") is almost £11m and from Brands Holdings Limited ("Brands Holdings") is approximately £4.4m.

2. Each of the Appellants has appealed against HMRC's decision.

3. There are currently two applications before the Tribunal.

- HMRC have applied for directions requiring the Appellants to provide disclosure of certain information and documents.

- The Appellants have applied for the appeals to be stayed pending the decision of the Court of Appeal in respect of an appeal against the decision of the Upper Tribunal in *Revenue and Customs Commissioners v F.M.X. Food Merchants Import Export Co. Ltd* [2015] UKUT 669 TCC.

4. Both applications are opposed by the other party.

The Disclosure Application

Background Facts

5. OLAF carried out an investigation between 2011-2014 into the import of bicycles from Sri Lanka to the EU. It concluded that there had been large scale evasion and that bicycles which had a Chinese origin had been falsely declared as having Sri Lankan origin. Universal Cycles was identified as one of the importers.

6. The SportsDirect group acquired a 79% interest in Universal Cycles in December 2007. It acquired the remaining shares in January 2009.

7. Brands Holdings and SportsDirect are also members of the SportsDirect Group.

8. As a result of the OLAF report, in January 2016, HMRC started to investigate the import of bicycles by the SportsDirect Group.

9. Following their initial meeting with the SportsDirect Group, HMRC wrote a letter on 2 February 2016 requesting a significant amount of information in relation to the import of the bicycles. This is broadly the same information as HMRC now is asking the Tribunal to order the Appellants to disclose which comprises the following:

- Details of any instructions given by the Appellants to any customs agent(s) representing them including details of how these instructions were issued and by whom. This includes relevant documentary evidence i.e. written instruments, contracts and internal correspondence etc.

- A list of the customs agents used by the Appellants during the period 2004 to 2012 i.e. name, address and VAT/EORI number.

- Details and corresponding documentary evidence of any pre-production visits, undertaken by the Appellants or their agents, to City Cycles and dealings that they may have had with the relevant customer Quality Assurance teams. This would include details of when any visits took place and of any follow up visits taken up.

- A breakdown of the make and models of bicycles imported from Sri Lanka for each year relevant to the current appeal i.e. 2004 to 2012 (excluding 2011 if the list already provided by SportsDirect is accurate).

- The corresponding Product Specification Sheet for each of the makes and models included in the above breakdown.

- Details and corresponding evidence of whose responsibility it was to determine where the parts/Completely Knocked Down Kits listed in the Product Specification Sheets were sourced from and detail of who compiled those Sheets.

- Details as to the reason for selecting the supplier(s) in question i.e. the TIANJIN FUSHIDA GROUP ("FSD") in China and relevant documentary evidence i.e. contracts, internal correspondence etc.

- Details and corresponding evidence of when Peter Toogood ceased his employment with Universal Cycles Limited as Technical Manager and details of who succeeded him in that role.

- Information and corresponding evidence regarding when Messrs Terry Pritchard (Managing Director) and David Markscheffel (Director) left Universal Cycles Limited and who succeeded them.

- Details and corresponding evidence regarding whether or not the Product Specifications Sheets were provided to the Person(s) instructing the customs agent(s) or making the declarations for the importations of bicycles from Sri Lanka made between 2004 and 2012.

- Details and corresponding evidence of any 'good faith' arrangements that were operated by the Appellants.

- Details and corresponding evidence of any contracts in place during the period 2004 to 2012 between the Taiwanese buyer, ACCTEL LIMITED and the Appellants or any agents purporting to act on their behalf.

- Details and corresponding evidence regarding whether or not any other buyers were used by the Appellants in connection with the importations of bicycles from Sri Lanka between 2004 and 2012.

- Details and corresponding evidence of visits by the Appellants to Acctel Limited's offices.

- Details and corresponding evidence of any visits by the Appellants to FSD or the TIANJIN AIMETE BICYCLE CO. LTD ("AMT") in China.

- Details and corresponding evidence of any internal/external audits of customs procedures undertaken between 2004 and 2012 by the Appellants or their agents.

- Details and corresponding evidence of any due diligence checks (in particular surrounding checks with regard to customs compliance and import/export procedures) that were carried out by the SportsDirect Group (Sports Direct International Holdings Limited) when it acquired ownership of Universal Cycles Limited in 2008.

10. The Appellants (through their solicitors) provided a substantive response to HMRC's letter of 2 February on 27 April 2016. The Appellants drew attention to the fact that there is normally a three year time limit for enforcing a customs debt which can only be displaced if there has been an act which is liable to give rise to criminal court proceedings (see further below). As far as the disclosure of information is concerned, the Appellants stated that they were willing to assist HMRC in its investigation but that it would not be sensible to devote extensive resources to enquiries in the light of the time limit relating to customs debts.

11. On 19 July 2016, HMRC wrote to the Appellants' solicitors informing them that, in their view, they had a 10 year period for enforcing the relevant customs debts as a result of acts liable to give rise to criminal court proceedings. On the same day in order to protect their position as far as time limits was concerned, HMRC issued "right to heard letters" to each of the Appellants which started the process for collecting the debts which were said to be due.

12. However, at the same time, HMRC explained that they intended to continue their investigation and to work collaboratively with the Appellants in order to establish the relevant facts.

13. The Appellants' solicitors wrote to HMRC on 5 September 2016 stating that, in their view, the right to be heard letters issued in July 2016 were defective. This correspondence said nothing about HMRC's outstanding request for information.

14. HMRC accepted that the July 2016 right to be heard letters were defective and, on 19 December 2016, issued new right to be heard letters. In a separate letter of the same date, HMRC repeated their request for the first two pieces of information which they had originally requested on 2 February 2016 although did not mention any of the other information which had been requested (none of which had, at that stage, been supplied). Unfortunately, copies of the new right to be heard letters were not before the Tribunal.

15. The Appellants' solicitors responded to HMRC's correspondence of 19 December 2016 on 20 January 2017. This included some information and documents addressing HMRC's first point in their original request for information (which was designed to enable them to establish who was the declarant (the person liable for the duty) in respect of each relevant import.) None of the other information requested by HMRC was provided in these responses.

16. HMRC issued its formal decision letters to each of the Appellants notifying them of the liability to anti-dumping duty/customs duty/import VAT on 9 March 2017 together with accompanying C18 demand notes requiring payment of the duty.

17. The Appellants filed notices of appeal against the decision letters on 7 April 2017.

18. In June 2017, the Appellants applied to the High Court for a judicial review. Permission for a judicial review was granted on the basis of departure by HMRC from its published guidance and failure to give any reasons for such departure. Permission was however denied in respect of a further ground which was that HMRC's decisions in relation to the anti-dumping duty/customs duty/import VAT were out of time. This refusal was decided at a hearing on 24 January 2018. At the same time, the remaining issues in the judicial review proceedings were stayed pending the outcome of the appeal to this Tribunal.

19. The Appellants sought permission to appeal against the High Court's decision to refuse permission for judicial review in respect of the final ground but this was refused by the Court of Appeal.

20. In the meantime, the First-tier Tribunal issued directions on 30 January 2018, presumably having been notified of the outcome of the judicial review application on 24 January 2018. As part of this, each party was directed to provide a list of documents on which they intended to rely by 26 February 2018.

21. HMRC however wrote to the Appellants' solicitors on 14 February 2018 repeating its request for the information originally requested in February 2016. This was refused by the Appellants on 26 February 2018 and, as a result of this, HMRC applied to the Tribunal on 14 March 2018 for directions requiring the Appellants to provide specific disclosure and/or further and better particulars being, in substance, the information they had originally requested in February 2016 other than the information mentioned at paragraph [15] above which had already been supplied.

22. The current position is that no lists of documents have been exchanged pending the hearing of this application.

The Tribunal's powers in relation to disclosure of documents and information

23. The starting point in a case which has been assigned to the complex category (as these appeals have) is disclosure of documents in accordance with rule 27 of the Tribunal Rules. This requires each party to provide copies of the documents which it intends to produce and on which it intends to rely in the proceedings. This is reflected in the directions issued by the Tribunal on 30 January 2018.

24. It is however common ground that the Tribunal has power to order disclosure of documents or the provision of information which goes beyond this. In particular, rule 5(3)(d) of the Tribunal Rules authorises the Tribunal to require a party to provide documents or information.

25. It is also common ground that the Tribunal's powers in this respect must be exercised in accordance with the overriding objective set out in rule 2 of the Tribunal Rules which is to enable the Tribunal to deal with cases fairly and justly. This includes:-

- dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; and
- avoiding delay, so far as compatible with proper consideration of the issues.

The nature of the appeals

26. In order to provide context for the disclosure application, it is helpful to explain in a bit more detail the nature of the appeals in question and the powers of the Tribunal in respect of those appeals.

27. As already explained, the Appellants' have appealed against HMRC's decision that they are liable for anti-dumping duty/customs duty/import VAT in relation to the import of bicycles from Sri Lanka but which HMRC say are of Chinese origin.

28. These liabilities arise under EU law and are governed by various EU regulations.

29. The Community Customs Code (Regulation No. 2913/92/EEC)(CCC) and the Union Customs Code (Regulation No. 952/2013/EU)(**UCC**) are, in particular, relevant.

30. The UCC has replaced the CCC. The CCC is however still relevant in relation to "substantive" matters as these are governed by the regulations in force at the time the relevant events took place and all of the imports in question in these appeals occurred between 2009-2011 when the CCC was still in force.

31. Articles 22(6) and 29 of the UCC requires customs authorities to communicate the grounds on which they intend to base their decision before taking a decision which would adversely affect a person. This is the reason for the "right to be heard" letters referred to above which preceded HMRC's decisions.

32. The Appellants set out a number of grounds for their appeals. The main grounds which are relevant to this application are set out below.

Time limits

33. There is some dispute as to whether the time limits for enforcing any customs debt in this case is governed by the CCC or the UCC. In both cases, the default time limit is three years. However, this can be extended if the customs debt is the result of an act which was liable to give rise to criminal court proceedings.

34. In this context, HMRC have referred to section 167 Customs and Excise Management Act 1979 (**CEMA**) and in particular section 167(3) which provides for a strict liability offence if a person delivers to HMRC a document which is untrue in any material particular. HMRC however also say in their statement of case that they have reserved their position as to whether or not section 167(1) might apply. This is the case where a person knowingly or recklessly delivers a document to HMRC which is untrue in any material particular.

35. The Appellants argue that the liability for the customs debt is not the result of the presentation of any misleading information to HMRC. They also argue that, even if it was, the strict liability offence in section 167(3) CEMA does not represent "criminal court proceedings" which, they say, requires an element of mens rea.

Origin of the bicycles

36. The Appellants contend that the bicycles were of Sri Lankan origin in accordance with Article 24 of the CCC and that this is not affected by Article 25 of the CCC which ignores any processing which has the sole object of circumventing EU rules as there is no evidence to support the proposition (including, in particular, the OLAF report) that any processing which took place in Sri Lanka had this as its "sole" object.

Identity of the declarant

37. Brands Holdings and SportsDirect argue that they are not liable for any customs debt as they were not the "declarant" within the meaning of the CCC. Instead, they say they were acting on behalf of Universal Cycles.

Good faith

38. The Appellants refer to Article 220(2)(b) of the CCC. This prohibits an amount of duty from being recovered where it was not originally charged due to an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment and that person had acted in good faith and complied

with all the relevant provisions in relation to the customs declaration. The Appellants say that they did act in good faith and complied with all the requisite provisions and that the mistake was the issue of the form A certificates of origin by the customs authorities of Sri Lanka which could not reasonably have been detected by the Appellants.

39. The Appellants specifically put HMRC to proof of the fact that the certificates of origin were based on incorrect information provided to the Sri Lankan authorities by the exporter.

The Tribunals' powers

40. The Appellants' right of appeal to the Tribunal arises under section 16 Finance Act 1994. Both parties agree that, in accordance with section 16(5) Finance Act 1994, the Tribunal has a full appellate jurisdiction which includes the power to quash or vary HMRC's decision as well as a power to substitute their own decision for any decision which is quashed. One consequence of this is that the Tribunal has a full fact finding jurisdiction – i.e. it must reach its decision based on all of the facts of the case and not just on the basis of those known to HMRC at the time they made their decision.

41. In accordance with section 16(6) Finance Act 1994, the burden is upon the Appellants to show that their grounds of appeal are established.

HMRC's submissions

42. Although the Appellants do not deny that the material requested by HMRC is relevant to the appeals, Mr Thomas identified its relevance by reference to the Appellants' grounds of appeal as follows:-

- information related to the processing/origin of the bicycles;
- evidence of the Appellants' good faith (or otherwise) and therefore HMRC's ability to enter a debt into its accounts;
- material relevant to the question as to whether the Appellants knew or were reckless as to any untrue statements in the documents provided to HMRC;
- evidence as to who was the declarant in relation to each import and therefore the person liable for any duty.

43. Mr Thomas submits that disclosure of the information which has been requested will narrow the issues between the parties, thus allowing the appeals to be dealt with more efficiently. He accepts that, following receipt of the information, HMRC may need to request leave to amend its statement of case.

44. The Appellants were criticised by Mr Thomas for showing a lack of cooperation. He emphasised the fact that the information had originally been requested in February 2016 and that, apart from some information about the identity of the declarants,

nothing had been provided over the following two and a half years, thus forcing HMRC to make decisions based on incomplete information; this included the important question as to whether the Appellants had acted recklessly and so might have committed an offence under section 167(1) CEMA.

45. Mr Thomas was at pains to point out that HMRC have always reserved their position on this point. He accepts that, in their letter dated 19 December 2016, HMRC stated that they do not allege that the Appellants acted knowingly or recklessly in making an untrue declaration. However, he says that this must be read in context. HMRC had identified that (assuming the bicycles did in fact have a Chinese origin) there was no doubt that a strict liability offence had been committed under section 167(3) CEMA and that "this conclusion is made irrespective of whether you knew or [were] reckless as to the falseness of the forms A". HMRC were therefore ambivalent on this point.

46. Mr Thomas also refers to HMRC's decision letters which were issued in March 2017. These state (at paragraph 24) that:-

> "The act of making or signing or causing to be made or signed or delivering or causing to be delivered to customs any document which is untrue in any material particular, whether knowingly and recklessly or otherwise, gives rise to an offence which renders the offender liable to criminal court proceedings under section 167(3) of the Customs and Excise Management Act 1979".

47. Although the specific reference is to section 167(3) CEMA, Mr Thomas asserts that there is a clear implication that HMRC were not excluding the possibility of knowing or reckless behaviour.

48. Mr Thomas also makes the point that, at the very outset of its investigation (in HMRC's letter of 2 February 2016), the Appellants were put on notice that "all possible options remain open, including criminal, civil evasion, post clearance demand (C18) or no action."

49. In addition, Mr Thomas drew support from the comments of Sir Ross Cranston in the judicial review application at [28]:

> "28 However, I accept the submissions of Mr Thomas QC on behalf of the HMRC, that the Art. 103.2 issue is not a pure issue of law in the present case. Although HMRC raise points which did seem to select out section 167(3) of the 1979 Act as the basis of its case against the Claimants, it gave enough indications that it was not ruling out the possibility that section 167(1) might apply. Because the claimants failed to provide information, HMRC was in the dark as to aspects of what had happened with these bicycles, in particular the claimants' involvement in the provision of the false information. HMRC's ambivalence about matters in, for example, its FTT statement of case is thus understandable and supports the need for fact finding."

50. Mr Thomas QC submits that the respondents are entitled to form a view as to the merits of the arguments pursued by the Appellants in the light of all of the relevant

evidence and to contest or otherwise the arguments which the Appellants seek to run on that basis. He went on to suggest that it is difficult to see how the Tribunal can reach a decision in these appeals without all of the material which has been requested being disclosed.

51. On the day before the hearing, the Appellants filed a witness statement made by Mr Robert Waterson, the solicitor leading the team acting on behalf of the Appellants.

52. This reveals that the SportsDirect Group acquired a majority interest in Universal Cycles in 2007 and acquired the remaining shares in January 2009. Mr Thomas QC made the point that SportsDirect therefore had full control over the company during the period of the imports in question (2009-2011) and should therefore be expected to have the information requested.

53. He accepted that some of the requests for information go back to 2004 but not all of them. In his view it is telling that Mr Waterson does not say that the documents which are requested do not exist or that SportsDirect itself does not have them. Instead, it refers only to Universal Cycles.

54. In addition Mr Thomas drew attention to the fact, the witness statement does not state what action has actually been taken by SportsDirect to try and track down the information which has been requested. For example, although it states that certain individuals are not "readily contactable" it does not give any details as to what efforts have been made to contact those individuals.

55. In short, Mr Thomas QC submits that any difficulties the Appellants may have in providing the information which had been requested can either be overcome or, if they cannot be overcome, the reasons for this can be explained.

56. There is some suggestion in Mr Waterson's witness statement that the documents which had been requested do not exist. Mr Thomas QC expressed himself to be sceptical about these claims. He referred for example to the witness statement of Rachel Stockton, SportsDirect's head of customs and VAT, which was prepared for the purpose of the judicial review proceedings which states that she has "been able to locate a large amount of the importation documentation relevant to the importations at issue".

57. In terms of timing, Mr Thomas QC submits that disclosure should be made at this stage in the proceedings in order to enable witness statements to be prepared to the best effect. It would in his view be less efficient to wait for the witness statements to be filed and then running the risk of requiring supplementary disclosure.

The Appellants' submissions

58. Ms Sloane takes issue with Mr Thomas's allegation that the Appellants have failed to cooperate with HMRC. It was for example in her view reasonable for the Appellants to raise the issue of limitation periods before providing the information which HMRC had requested. In addition, in September 2016, the Appellants showed

themselves willing to undertake the necessary investigations if HMRC could tell them precisely what allegations they were making.

59. Immediately following this, HMRC issued the revised "right to be heard letters" and, another letter on the same day made it clear that they were not alleging that the Appellants had acting knowingly or recklessly. HMRC did not repeat their request for information which, Ms Sloane argues, is entirely consistent with their acceptance that the Appellants did not act knowingly or recklessly.

60. Ms Sloane also makes a point that HMRC could have sought the information they required using its statutory powers but did not do so. Instead, they based their decision on the information they already had.

61. Ms Sloane therefore submits that it is inappropriate and indeed an abuse of the Tribunal's process to seek to obtain information through the Tribunal's power to order disclosure of documents or information when, in reality, they are simply continuing their investigations. Instead, Ms Sloane suggests that the right course for HMRC is to use their investigatory powers and to issue new "right to be heard letters" and then take a new or additional decision based on any further grounds they consider relevant.

62. Ms Sloane also takes issue with the nature and the scope of HMRC's request.

63. The first objection is that for many of the requests, there is no date range. Where there is a date range, this covers a period of eight years from 2004-2012. This is unduly onerous in Ms Sloane's view, particularly as the first five years predates the SportsDirect Group's full control over Universal Cycles.

64. The second issue highlighted by Ms Sloane is that the request is not just a request for documents but also for information which would normally constitute evidence provided in the form of a witness statement with exhibits.

65. Thirdly, some of the requests relate to commercial matters, for example the request for details as to the reason for selecting a particular supplier. This is unlikely to be written down and will require the Appellant to attempt to interview individuals who may no longer work within the business.

66. Finally, Ms Sloane points out that the requests are not confined to information held by the Appellants but also include information held by third parties such as agents acting on behalf of the Appellants.

67. Turning to Mr Waterson's witness statement, Ms Sloane suggests that Mr Thomas has misunderstood the purpose of the witness statement. It is not intended to explain what documents may or may not exist but rather to illustrate the difficulties that would be faced by the Appellants if the Tribunal were to order disclosure of the relevant material. The witness statement shows that the SportsDirect Group did not have control over Universal Cycles for much of the period for which information is requested, that the original management have left the business, that few documents were passed over to SportsDirect and that individuals who have now left the company may not be easy to contact.

68. In relation to Mr Thomas's reference to Rachel Stockton's witness statement, Ms Sloane points out that the witness statement deals only with the formal import documentation which would be presented to HMRC and only for the period of the relevant imports (2009-2011). It does not therefore cover most of the documentation which HMRC are seeking which is of a much wider nature.

69. The Appellants accept that they do have some limited information but beyond that, a large investigation would be required, as already stated by the Appellants in their letter of September 2016.

70. Ms Sloane also commented on the timing of any disclosure. She makes the point that the Appellants have the burden of proof and so will need to put forward all of the evidence on which they rely in order to discharge that burden. If HMRC are not happy with the material disclosed, they can seek further disclosure at that stage (i.e. after the witness statements have been served).

71. In support of this, Ms Sloane referred to the decisions in *National Grid Electricity Transmission plc v ABB Limited (and Others)* [2012] EWHC 869 and *Syngenta Limited (and Others) v Chemsource Limited (and Another)* [2012] EWHC 1507. Both of these cases dealt with requests for further information rather than disclosure of documents. However, in both cases, the court took the view that no order for further information should be made until witness statements had been served.

72. One of the reasons given for this in *Syngenta* [at 76] was the speculative nature of the issue to which the information related. Ms Sloane suggested that HMRC's allegation of recklessness is also speculative and is therefore another reason why disclosure should not be ordered at this stage.

73. Ms Sloane therefore submits that HMRC should wait until they see the Appellants' evidence and then decide whether further information/documents are needed.

74. Finally, Ms Sloane referred to the Appellants' application for a stay (as to which, see further below). Should FMX succeed, it is likely that HMRC's decisions in this case will be ineffective and any disclosure exercise would be otiose. It would therefore, she submits, be disproportionate for the Tribunal to order further disclosure at this stage.

Decision on disclosure

75. There is no doubt that (at least as far as documents are concerned), the starting point is rule 27 of the Tribunal Rules. However, this is specifically subject to any direction to the contrary and the Tribunal must consider in appropriate cases whether it can deal with a case fairly and justly without the disclosure of further material (see the comment of the *Upper Tribunal in HMRC v Smart Price Midlands Limited and Hare Wines Limited* [2017] UKUT 0465 [at 44]).

76. I have come to the view that, in this case, it is necessary for the Tribunal to order further disclosure in order to ensure that the appeals are dealt with fairly and justly.

77. In many tax cases, HMRC will have all of the relevant information from the investigations it carries out before any decisions are made. Likewise, it most tax cases, the taxpayer will be in possession of most, if not all, of the relevant information. In such circumstances, the default position in rule 27 of the Tribunal Rules is entirely appropriate.

78. However, there will also be situations, particularly those which are complex and fact sensitive, where one party or the other does not have all of the information necessary to enable there to be a fair hearing or where the Tribunal does not have all of the information it needs to deal with the appeal justly. *Smart Price* is a good example of a case where the Appellant could not be expected to fight its appeal without seeing information known only to HMRC. Conversely, the situation in *HMRC v Ingenious Games LLP and Others* [2014] UKUT 62 is an example of a situation where HMRC could only defend its position effectively if it had access to material held by the taxpayer.

79. In these appeals, it is clear that the Appellants in their grounds of appeal are taking positions which HMRC cannot be expected to challenge effectively without access to information which is likely to be held by the Appellants. As identified by Mr Thomas, this includes material relevant to the question as to whether the bicycles did in fact have a Sri Lankan origin, whether the Appellants knew or were reckless as to any irregularities and whether they acted in good faith. As the Upper Tribunal noted [at 42] in *Ingenious Games*:-

> "42 It should be noted that disclosure by a party of such material adverse to its own case or supportive of its opponents case (assuming the disclosure is relevant and proportionate) would be a usual incident of litigation in ordinary civil cases, so as to ensure that each party has a fair opportunity of presenting its case by reference to all material relevant to the issues in the proceedings and so as to ensure that the court or tribunal dealing with that litigation is properly informed about the matters in dispute so as to resolve the litigation fairly as between the parties."

80. Whilst I accept, as observed by the Court of Appeal in *E Buyer UK Limited v HMRC* [2018] 1 WLR [at 94], that "the 2009 rules were made for important as well as simple cases" and that "the plain fact is that the procedure is different in the F-tT", I do not understand those comments as evidencing any intention to restrict the First-tier Tribunal's discretion to direct wider disclosure in appropriate cases.

81. The material sought by HMRC is plainly relevant to the appeals and will enable HMRC to present its case effectively as well as assisting the Tribunal in dealing with the appeals fairly and justly.

82. The remaining question therefore is whether it is disproportionate to direct the Appellants to provide the disclosure sought by HMRC.

83. The first point to make is that there are significant amounts of money involved in these appeals (over £20m in total). Although that does not, on its own, mean that it is right to order disclosure, it is a factor to take into account.

84. I accept that carrying out the investigations necessary to provide the information which has been requested by HMRC will be a significant undertaking for the Appellants. However, Ms Sloane acknowledged that this is an exercise which the Appellants will in any event have to carry out in order to prepare its own evidence and, in particular, its witness statements. This is therefore in my view more of a timing issue as far as the effort and costs for the Appellants is concerned. It may be that, as foreshadowed by Mr Waterson's witness statement, some of the information turns out not to be available. However, as suggested by Mr Thomas this is something which can be explained by the Appellants if appropriate.

85. Should disclosure be ordered, this may cause some delay. However, given that these matters have been ongoing for over two and a half years, that there was a delay of eight months due to the Appellants' application for judicial review and that there will be further delay as a result of the stay which I have granted pending the decision in *FMX*, I do not see this as a significant factor in the context of the overall proceedings.

86. The Appellants have complained about the scope of HMRC's requests for information in terms of the dates covered, the fact that HMRC are seeking not only documents but also information, that the request should relate to commercial matters and that the information which HMRC is asking for is not confined to information held by the Appellants.

87. I do have some sympathy with these criticisms, particularly bearing in mind that the duty in question relates only to imports which took place between 2009-2011 and that SportsDirect only acquired a majority interest in Universal Cycles in December 2007.

88. As far as timing is concerned, there is in my view a distinction to be drawn between disclosure of documents on the one hand and requests for information on the other. It is appropriate and, in my view, more efficient for any documents which are requested to be disclosed as part of the normal documentary disclosure exercise. However, I agree with Ms Sloane that it is, in general, more appropriate for requests for further information to follow the disclosure of documents and the exchange of witness statements.

89. The Appellants say that HMRC should have used its statutory powers to obtain the information which it now seeks during the course of its investigation and before it issued the "right to be heard" letters and decision letters. There is some force in this. Mr Thomas's response to this was that it is the Tribunal which now has jurisdiction in

relation to the appeals and that it must exercise its powers on the basis of the overriding objective to deal with the appeals fairly and justly.

90. HMRC clearly had evidence (in particular the OLAF report) on which to base their decisions. They may not have had all of the information which they would have liked but they believed that they were under time pressures and felt that they had sufficient. It seems to me that this does not preclude HMRC seeking further information in the context of these appeals and that it is not disproportionate for the Tribunal to order disclosure simply because HMRC could have used its statutory powers at an earlier stage.

91. The Appellants also complained that it is an abuse of process for HMRC to seek information designed to provide evidence as to whether the Appellants acted knowingly or recklessly in providing inaccurate information to HMRC. However, as pointed out by Mr Thomas QC, the Appellants have, in their grounds of appeal, stated that they acted in good faith and it is in those circumstances I consider it entirely appropriate for HMRC to seek information which might cast doubt on that assertion.

92. In addition, it will be up to the Tribunal at the substantive hearing to decide whether HMRC's reference to the strict liability offence in section 167(3) CEMA and the fact that the offence of providing untrue information knowingly or recklessly in section 167(1) CEMA was not specifically referred to has any impact on the validity of the decision letters and/or the relevant time limits. Depending on the Tribunal's conclusions in relation to this and other aspects of the appeals, it may well be necessary for the Tribunal to have before it evidence as to whether the Appellants acted knowingly or recklessly in relation to the information provided to the customs authorities. It is not therefore an abuse of the Tribunal's process for HMRC to seek documents/information which are relevant to this aspect as part of the Tribunal proceedings.

93. In the circumstances I direct as follows:-

- HMRC should recast the list of information in respect of which it requests disclosure so that it is a request only for documents and not for information which is not contained in a document. This may include documents under the control of the Appellants and therefore extend to documents held by their agents.

- The request should be limited to documents relating to the period from 1 January 2008 to 31 December 2012 – i.e. after the date on which the SportsDirect group acquired a majority interest in Universal Cycles.

- The parties should attempt to agree the request for disclosure of documents and the timing of disclosure and to incorporate these in agreed draft directions to be submitted to the Tribunal or, if agreement is not possible, HMRC and the Appellants should submit separate draft proposed directions.

94. No action is of course to be taken in relation to the above directions during the period of the stay granted below.

Stay of proceedings

95. The Appellants have applied for the proceedings to be stayed pending the decision of the Court of Appeal in *FMX*. HMRC objects to the stay.

96. *FMX* is listed to be heard by the Court of Appeal on 10 or 11 October 2018.

97. The question which the Court of Appeal has to determine is whether the extended time limit for recovery of a customs debt resulting from an act liable to give rise to criminal court proceedings in accordance with Article 221 of the CCC applies in the UK given that no specific domestic provisions have been enacted which extend the time limit. The First-tier Tribunal found in favour of FMX that the three year time limit cannot be extended in the UK. The Upper Tribunal allowed HMRC's appeal and effectively held that there is no time limit in these circumstances.

98. Ms Sloane short point is that if the Court of Appeal finds in favour of FMX, HMRC will be out of time for collecting the unpaid duty as the decision notices were issued more than three years after the last relevant import.

99. Mr Thomas argues that, as the Appellants have not accepted that the CCC as opposed to the UCC applies to the question of time limits, the Court of Appeal decision cannot determine the current appeals. By this he means that even if HMRC win in the Court of Appeal in *FMX*, it would be open to the Appellants to argue that the UCC applies and that the Court of Appeal decision does not provide any authority on the interpretation of the relevant time limits in the UCC.

100. Mr Thomas also makes the point that if a stay is ordered in relation to the proceedings in the First-Tier Tribunal, there will be a stay both in the High Court as far as the judicial review proceedings are concerned as well as in the First-tier Tribunal which he argues would be undesirable.

101. In any event, Mr Thomas says that, by the time there is a substantive hearing of the appeals, the Court of Appeal decision in *FMX* will be known and so can be taken into account.

102. Mr Thomas QC's final point is that, even if FMX were to win in the Court of Appeal, HMRC would be likely to appeal that the Supreme Court and, unless the stay is extended to await the outcome of that further appeal, the time will just be wasted.

103. Despite these points, it would in my view be disproportionate to require the parties to undertake an expensive and time consuming disclosure exercise where there is an imminent Court of Appeal hearing which could dispose of these appeals in their entirety. Whilst the outcome of the Court of Appeal hearing is of course unknown and there are a number of possible decisions which the Court of Appeal could reach, it is worth risking a delay of a few months in order to know the outcome of that appeal.

104. I therefore direct that the proceedings in all three appeals should be stayed until 35 days after the release of the decision of the Court of Appeal in *FMX*.

Costs

105. The Appellants have asked for their costs in relation to the application for the stay. They have also asked for their costs of the hearing on the basis that, had HMRC agreed to the stay, the hearing in relation to disclosure would have been unnecessary.

106. As mentioned above, these appeals have been allocated to the complex category and the Appellants have not opted out of the costs regime in accordance with rule 10(C)(ii) of the Tribunal Rules.

107. In my view, there was a strong case for a stay to be ordered and I therefore award the Appellants their costs on the standard basis (to be assessed if not agreed at the end of the appeals) in relation to the application for the stay.

108. I am however conscious that HMRC applied for disclosure in March 2018 and so have waited for this hearing for six months. The Appellants only applied for the stay and for an adjournment of the hearing on 4 September 2018 – i.e. only very shortly before the date scheduled for the hearing. As pointed out by HMRC, it would have been open to the Appellants to seek a stay and an adjournment at a much earlier stage. I do not therefore think it is appropriate to award the Appellants their costs of the hearing.

109. Although I have granted HMRC's application for disclosure in part, I have also refused part of the application and restricted the class of documents to be disclosed. In my view it is therefore appropriate for the costs of the disclosure application to be costs in the case.

110. 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.

ROBIN VOS
TRIBUNAL JUDGE

RELEASE DATE: 28 SEPTEMBER 2018