[2016] UKFTT 0404 (TC)

TC05158

Appeal number: TC/2015/04407

EXCISE DUTY – penalty for dishonesty s 8 FA 1994 – whether actions of appellant were dishonest: held, yes - whether penalty should be reduced: held, no – appeal dismissed.
CUSTOMS DUTY & VALUE ADDED TAX - penalty for dishonesty s 25 FA 2003 – whether actions of appellant were dishonest: held, yes - whether penalty should be reduced: held, no – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

CLEAVE MORGAN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
LESLIE BROWN

Sitting in public at City Exchange, Leeds on 24 May 2016

The Appellant in person

Mr Andrew Scott, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr Cleave Morgan ("the appellant") against two penalties totalling £812 imposed on him by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") on the basis that he had dishonestly sought to evade excise duty, customs duty and VAT.

2. For Mr Morgan's benefit we explain that we have found against him and that he now has to pay the penalty that HMRC have been seeking from him. As we and HMRC explained to him at the hearing, if he feels that he is unable to pay the penalty all at once he should contact HMRC's Debt Management and Banking Unit to find out if a payment plan can be arranged. This Tribunal cannot decide that.

The evidence & the witnesses

3. We had a standard bundle of documents prepared by HMRC. But it was only when we arrived at the Tribunal building in Leeds on the morning of the hearing that we were given the bundle, as it had been sent by HMRC to Leeds. The normal requirement is that such bundles are sent to the Tribunal central offices in Birmingham, and the Tribunal then sends the bundles to the judge and member well in advance of the hearing to allow pre-reading.

4. We had a witness statement and oral evidence from Officer Martin Little, the Border Force officer who intercepted the appellant on his arrival at Manchester Airport. Officer Little was cross-examined by Mr Morgan. The cross-examination was conducted on his behalf by Mr Scott, who in the best traditions of the Bar, was assisting Mr Morgan put his case as effectively as it could be put. Despite the rigorous cross-examination, we had no difficulty in accepting Officer Little as a conscientious officer and truthful witness.

5. We also had a witness statement and oral evidence from Ms Samantha Easton of HMRC. Ms Easton was also cross-examined by Mr Morgan. This cross-examination was also conducted on his behalf by Mr Scott. Ms Easton was not the officer who conducted the HMRC enquiry, nor was she one of the two HMRC officers who interviewed the appellant during the enquiry. The main thrust of her oral evidence was to state that had she been required to make the decision about penalties that her colleague, Mr Scopelliti, had made, she would have come to the same decision. We accept Ms Easton's evidence as truthful.

6. Mr Morgan also gave evidence and was cross-examined by Mr Scott. We think that, as a result of a loosely phrased or perhaps misreported question at an interview, the appellant has constructed a version of events which did not happen. He was adamant that he had been intercepted at the baggage carousel, not in the green channel. Officer Little's evidence was that to his knowledge this had never happened and he was emphatic that it did not happen to Mr Morgan. We accept Officer Little's evidence on this point. At first we thought from what Mr Morgan said at one point that he did not realise what a carousel was and may have thought it was the table in

the green channel on which his luggage was placed. But it became clear from later answers that he did know what a carousel was, and we find that he was being untruthful on this matter.

7. We also found other matters where Mr Morgan was inconsistent and at times unbelievable. In particular he told the HMRC officers at the interview that he had requested that he had been given a harsh fine for a first offence and that "I wouldn't mind if it was my third or fourth time" [Quote from HMRC Notes of Meeting with the appellant on 19 September 2014]. When he was asked at the interview about previous times he had been stopped he said he could not remember them. We do not believe that he could not remember these occasions on which he had had tobacco or cigarettes seized which would have cost him thousands of pounds to replace.

8. As a result we did not find Mr Morgan a truthful witness, and in relation to any disputed matter we prefer and accept the evidence of the officers concerned.

The facts

9. There were as we have noted a number of matters where the appellant's account of what happened differs from that of HMRC's officers. We deal with them later in this decision, and here we set out our findings of what facts were not in dispute.

10. In the early morning of 17 November 2013 the appellant arrived at Terminal 1 at Manchester Airport on a flight from Banjul in the Gambia.

11. He entered the Green Channel after picking up his hold baggage. There he was asked by Officer Little a number of questions including if he knew his allowances. (His bag had we were told been covertly X-rayed by the Border Force who therefore were aware of the contents). The appellant stated that he knew he had "far too many" cigarettes.

12. 6000 cigarettes were found and they and his luggage were seized. The appellant was handed the standard documents about seizure.

13. Border Force have no trace of any application to contest the seizure.

14. On 1 July 2014 HMRC wrote to the appellant informing him of their enquiry into the events at Manchester Airport and intimating that they were considering imposing a penalty for dishonestly seeking to evade duty and tax.

15. The appellant asked for an interview which was conducted by two officers of HMRC at Huddersfield Police Station.

16. An assessment of penalties for seeking to evade excise duty, customs duty and VAT was made and issued on 22 October 2014.

17. The appellant notified an appeal to the Tribunal on 20 July 2015.

The law

18. Article 2 of the Traveller's Allowance Order 1994 provides:

> "(1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order … contained in his personal luggage."

The relevant part of the Schedule to the Order is:

Tobacco products	200 cigarettes …

19. The law on the evasion of excise duty that HMRC included in their Statement of Case and bundle and on which they rely is s 8 Finance Act ("FA") 1994:

> "**Penalty for evasion of excise duty**
>
> (1) Subject to the following provisions of this section, in any case where—
>
> (a) any person engages in any conduct for the purpose of evading any duty of excise, and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded."

20. But what they did not point out was that section 8 was repealed by paragraph 21(d)(i) Schedule 40 FA 2008, something that appears in the list of changes to FA 1994 appended to the copy of section 8 in the bundle. That list also shows that there are savings from the effect of paragraph 21 in the Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 SI 2009/511.

21. Article 4 of the Order provides:

> "… paragraph 21 of Schedule 40 to the Finance Act 2008 repeal[s] the following provisions only in so far as those provisions relate to conduct involving dishonesty which gives rise to a penalty under Schedule 41 to the Finance Act 2008—
>
> …
>
> (b) in the Finance Act 1994—
>
> (i) section 8 (penalty for evasion of excise duty), …
>
> …
>
> …"

22. An examination of Schedule 41 FA 2008 shows that the only feasible candidate for a provision of the Schedule that might apply in this case is paragraph 4 "Handling goods subject to excise duty". An example of conduct that gives rise, in HMRC's

view, to a paragraph 4 penalty is given in their Compliance Handbook at CH91600. This involves a person bringing in 3,200 duty paid cigarettes from France and selling them to workmates. That conduct seems to be similar to the appellant's in this case but from CH91200 we can see that it is HMRC's view that:

> "[t]here is no liability to a wrongdoing penalty [under paragraph 4] where goods have been seized at importation from outside the EU. This is a consequence of the ECJ judgement in Dansk. In these cases the person may be liable to a civil evasion penalty, under section 8 of the Finance Act 1994."

"Dansk" simply means "Danish" in Danish but it appears that the case being referred to is Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ("*DTL*"). The second paragraph of the *dispositif* in that case says:

> "The third subparagraph of Article 5(1) and Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that goods seized by the local customs and tax authorities on their introduction into the territory of the Community and simultaneously or subsequently destroyed by those authorities, without having left their possession, must be regarded as not having been imported into the Community, with the result that the chargeable event for excise duty on them does not occur."

23. *DTL* is authority for the proposition that excise duty cannot be charged where goods are confiscated and destroyed on entry to the EU. This is because they are deemed not to have been imported so no chargeable event arises. Paragraph 4 Schedule 41 FA 2008 therefore does not apply in the circumstances of this case because the goods have not been imported, and so are not handled after an excise duty point as required by paragraph 4. Thus s 8 FA 1994 does apply to a case such as this.

24. The law relating to evasion of customs duty and import VAT is in s 25 FA 2003:

> **"Penalty for evasion**
>
> (1) In any case where—
>
> (a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded."

This differs from s 8 FA 1994 only in immaterial particulars.

25. In relation to excise duty penalties, ss 8(4) and (5) and 16 FA 1994 provide for the powers of the tribunal on an appeal and for the burden of proof. Section 8(4) and (5) says:

> "(4) Where a person is liable to a penalty under this section—
>
> (a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
>
> (b) an appeal tribunal, on an appeal relating to a penalty reduced by the Commissioners under this subsection, may cancel the whole or any part of the reduction made by the Commissioners.
>
> (5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—
>
> (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;
>
> (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty.

26. Section 16(5), (6) and (7) FA 1994 says:

> "**Appeals to a tribunal**
>
> …
>
> (5) In relation to other decisions [*of which charging penalties under s 8 FA 1994 is one*], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.
>
> (6) On an appeal under this section the burden of proof as to—
>
> (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
>
> …
>
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.
>
> (7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter."

27. In relation to customs duty and import VAT sections 29 and 33 provide for the powers of the Tribunal and the burden of proof:

> "**29 Reduction of penalty under section 25 […]**
>
> (1) Where a person is liable to a penalty under section 25 […]—

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

33 Right to appeal against certain decisions

(2) Where HMRC give a demand notice [*in relation to a penalty*] to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of—

(a) their decision that the person is liable to a penalty under section 25 […], or

(b) their decision as to the amount of the liability.

…

(6) The powers of an appeal tribunal on an appeal under this section include—

(a) power to quash or vary a decision; and

(b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section—

(a) the burden of proof as to the matters mentioned in section 25(1) […] lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established."

Submissions

28. The appellant's grounds of appeal were:

(1) He could not read or write and did not understand the paperwork or what was being said

(2) He was told that the penalty would be between £150 and £300 only and that he could pay weekly.

29. For HMRC Mr Scott accepted that the burden of proof was on HMRC to show that the penalties had been incurred. He submitted that the actions and statements made by the appellant showed beyond doubt, let alone on the balance of probabilities, that the appellant had been dishonest and that the actions were carried out for the purpose of evading the duties.

30. As to the level of penalty the mitigation for disclosure and co-operation (50% rather than the maximum of 80%) was entirely reasonable in the light of the facts, and was determined on the basis of the considered opinion of the HMRC officer, and concurred in by Ms Easton. It would also have been approved by the officer's manager.

Discussion

31. The question for our decision is whether the appellant was dishonest. We think that decisions about the deemed consequences of a seizure (such as *HMRC v Jones and Jones* [2011] EWCA Civ 824 and *HMRC v Race* [2014] UKUT 331 (TCC)) are of little if any relevance to that question. As a result of the failure by the appellant to contest the seizure of the cigarettes and, we assume, his baggage, they are duly condemned as forfeit. That means that the importation of the cigarettes was not lawful as duty was not paid at the point of entry into the UK from outside the EU. But it does not mean that the appellant was necessarily dishonest or was seeking to evade the duty and Mr Scott did not contend otherwise.

32. In this case the Statement of Case refers to the decision in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, a decision of the Privy Council, ("*Barlow Clowes*") which many tribunals have found to be the appropriate place to look for the meaning of dishonesty in a case such as this, which is a civil case unlike *R v Ghosh* [1982] 1 QB 1053 which is usually cited by HMRC (and is also cited in this case).

33. Analysing *Barlow Clowes* in *Krubally N'Diaye v HMRC* [2016] UKFTT 0380 (TC), Judge Redston said:

> 45. At [59] [Arden LJ] said that in *Barlow Clowes* the Privy Council had considered the authorities and found that:
>
> > "it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour."
>
> 46. In other words, the second of the two steps in *Ghosh* does not apply. Although *Barlow Clowes* was a decision of the Privy Council, Arden J said it "gave guidance on" the earlier decision of the House of Lords in *Twinsectra*, which had been interpreted as requiring that a person needed to realise that his conduct was dishonest. She then endorsed the *Barlow Clowes* approach, see [68]-[69] of the decision.

> 47. However, the subjective is not entirely banished. In *Abou-Ramah* at [66], Arden J first summarises *Barlow Clowes* and then says:
>
> > "On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has 'a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.'"
>
> 48. At [68(iv)] Arden LJ said that the test as formulated in *Abou-Ramah* applied "in the context of civil liability (as opposed to criminal responsibility)." We have therefore adopted the *Barlow Clowes* test for dishonesty rather than the two-step approach provided for in *Ghosh.*
>
> 49. The test we apply to Ms Krubally N'Diaye's case is therefore primarily objective: was her behaviour dishonest according to normally accepted standards of behaviour? We also need to consider what she actually knew at the time, not what a reasonable person in her position would have known or appreciated.
>
> 50. Ms Choudhury did not disagree with this analysis, although she submitted that 'it was important not to overstate the subjective element.'"

34. In *Brookes v HMRC* [2016] UKUT 0214 (UT) the Upper Tribunal (Newey J) noted that at First-tier Tribunal level two cases had been discussed, *Ghosh* and *Barlow Clowes* and that the tribunal had said that they said the same thing about the test for dishonesty but found *Ghosh* more helpful. Newey J said that it was a misconception that they set out the same test, and counsel for HMRC had added that it was HMRC's view that the correct test was in *Barlow Clowes.* This case reinforces our view that we should, as we have done, apply the *Barlow Clowes* test.

35. In this case we consider that by normally accepted standards of behaviour the attempted importation of 5,800 cigarettes by going through the green channel is dishonest. (We say 5,800 not 6,000 as 200 cigarettes, the duty-free allowance, were not liable to duty)

36. In accordance with the civil cases (ie not *Ghosh*) that is almost enough. But the civil cases say that there is a subjective element involved in establishing dishonesty even if it is not necessary to enquire into the appellant's own standards of dishonesty. We must consider what the appellant knew at the time of his arrival in the UK, not what a reasonable person in his position would have known or appreciated.

37. We first turn to those matters which remained in dispute.

38. The appellant maintained that he was intercepted at the carousel. As we have said at §6 we do not believe him on this point and we accept Officer Little's evidence that he was intercepted in the green channel.

39. The appellant accepts that he in effect put his hands up to a vastly excessive number of cigarettes. He said he did that because he always intended to pay the duty and was taken into the green channel when he wanted to go to the red channel to declare the cigarettes. Since we have already said that he was not intercepted at the carousel we find that it was the appellant's unfettered choice to go through the green channel and that he did not intend to declare the goods.

40. We consider that he only confessed to the cigarettes when he realised that the officer would discover them.

41. The appellant did not deny that at the interview with HMRC he had strongly implied, unprompted, that this was the first occasion on which he had been stopped with cigarettes or other tobacco. When asked about two other previous occasions he claimed not to remember them. As we have said, we do not believe that he could not remember these other occasions.

42. In cross-examination the appellant accepted that he was a fairly frequent traveller outside the EU. He denied under cross-examination that he knew his exact allowances, but we find that whether that was so or not, he did know that the quantities with which he was involved on these three occasions was far in excess of his true allowance.

43. We find on the basis of these findings that the appellant knew that what he was doing was wrong and he was therefore subjectively dishonest as well as being dishonest by normal standards of behaviour (the objective test).

44. Since there could be no other reason for his dishonest conduct on the facts than evasion of duty and tax, we hold that the penalties under s 8 FA 1994 and s 25 FA 2003 were correctly imposed.

45. We add that we also have no doubt that the appellant was made aware of the case against him so as to satisfy the requirements of Article 6 of the European Convention on Human Rights. We say this because it was apparent to us from the appellant's inability to read the card with the oath that statements he had made to HMRC about his inability to read at all well and that his brother helped him with reading were correct. He confirmed to Mr Scott that he was dyslexic. When the officers at the interview asked the appellant whether he understood the documents that been given to him about the HMRC enquiry he had said "no". The officers reported that they had explained carefully to the appellant what the issue was and the notes of interview reported that he had said that after the explanation he understood.

46. The final question is whether the penalty is set at the right amount and whether we should intervene to vary it, as we have the right to do under s 8(4) FA 1994 and s 29(1) FA 2003. The starting point for the penalties is the amount of duty that would have been payable but for the seizure. In this case there was a Schedule showing how the duty had been calculated and we could see no grounds for saying that the calculation was wrong. In particular we had no evidence from the appellant about the

UK price of the cigarettes concerned that would cast doubt on the figure of £5.86 per pack of 20 used in the excise duty calculations.

47. We have considered the reductions made by HMRC of 50% in arriving at the penalty. We agree that the disclosure was not unprompted, so that no greater reduction than 80% would be due in any case. We might, had we been making the decision, have given somewhat more by way of mitigation for disclosure and we might have given somewhat less for co-operation than HMRC did, but we cannot see that the figure of 50% was in any way unreasonable in the circumstances, and we therefore do not vary the amount of the penalty.

48. We also mention in this connection that by virtue of s 8(5)(a) and s 16(7) FA 1994 and s 29(3)(a) FA 2003 we are not permitted to take into account "insufficiency of funds" (ie lack of money) in deciding whether to reduce a penalty and we have not done so.

49. We add this. Mr Morgan explained to us that his main reason for attending the Tribunal was to get the penalty reduced, as he maintained that he had been told that he would face a fine of no more than £300. He also wanted to pay any fine by instalments as he was not earning much and was going into hospital. We accept the evidence of Officer Little that he had said nothing to the appellant about the level of the penalty as that was not his responsibility and he had no knowledge of what the penalties were, although he had a rough knowledge of the amount of duty that would be involved. We also accept that had anything been said at the interview in Huddersfield it would have been recorded, and that it was highly unlikely that the officers would have said anything of the sort. They were recorded as telling the appellant that if he had difficulty paying he should contact "DMB" (Debt Management and Banking in HMRC). That is what we would expect HMRC officers who are part of compliance teams not collection teams to limit themselves to saying about payment.

Decision

50. In accordance with s 16 FA 1994 we uphold the assessment of the penalty under s 8 FA 1994 of £651.

51. In accordance with s 33 FA 2008 we uphold the assessment of the penalty under s 25 FA 1994 of £161.

52. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 9 JUNE 2016