[2017] UKFTT 74 (TC)

TC05592

Appeal number: TC/2015/03687

EXCISE DUTY – CUSTOMS DUTY – civil evasion penalties – whether appellant dishonest – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEHZAD BEHZADFAR **Appellant**

- and -

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

TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC
MRS GAY WEBB

Sitting in public at Alexandra House, Manchester on 31 October 2016

The Appellant in person assisted by his daughter

Rupert Davies (Counsel), instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Behzad Behzadfar ("the Appellant") appeals against a decision by the Respondents dated 17 July 2014 assessing a penalty of £2,012 for the dishonest evasion of customs duty and excise duty ("the Penalty"). The appeal notice was dated 8 July 2015. The appeal is made pursuant to section 16(1B) Finance Act 1994. This provides for the appeal to be made to the Tribunal within 30 days of the date of the document notifying the decision. Section 16(1F) provides that an appeal can be made after the end of the 30 day time limit if the Tribunal gives permission. HMRC did not object to the appeal being out of time and we therefore gave permission for the appeal to proceed.

2. We had documentary evidence provided by the Respondents setting out the course of events leading to the appeal. The Appellant either does not speak English or does not speak it well enough to represent himself. He was therefore assisted by his daughter who translated for her father and put her father's case to the Tribunal on his behalf. We heard evidence from Mr Matthew Newbould, the customs officer who made the seizure, and Ms Amy Kowalczuk, the reviewing officer who imposed the Penalty. In the light of that evidence we make the following findings of fact.

The Facts

3. The Appellant was stopped by officer Newbould in the Customs Green Channel at Manchester Airport on 3 November 2012 on his arrival into the United Kingdom on a flight from Dubai. Officer Newbould asked the Appellant a series of questions in which he confirmed ownership of his baggage, knowledge of its contents and knowledge of the current prohibitions and restrictions on the import of various goods into the United Kingdom. Officer Newbould then searched the Appellant's luggage and detected 12,500 undeclared cigarettes. Officer Newbould seized the cigarettes as liable to forfeiture as they exceeded the Appellant's duty free allowance.

4. The Appellant was issued with a Seizure Information Notice ENF 156, Warning Letter ENF 162, Notice 1 and Notice 12A and officer Newbould explained them to the Appellant. The Appellant initially claimed to have had no previous encounters with customs but then admitted to having had goods seized from him on a previous occasion. There was some suggestion that the Appellant may have used another daughter (not the daughter assisting him at the hearing) to carry the tobacco goods through customs on a previous occasion. At the hearing the Appellant denied that that was so and we make no finding to that effect. It is clear that on 3 November 2012 only the Appellant was concerned in the seizure.

5. The Warning Letter ENF 162 stated that the seizure was without prejudice to any further action that might be taken including the UK Border Agency sharing the information with the Respondents, who might decide to issue an assessment for the

evaded duty and a wrongdoing penalty. Accordingly, on 5 February 2013, the Appellant's case was referred to the Respondents and on 31 October 2013 officer Kowalczuk began to consider whether the Appellant should be issued with a civil evasion penalty under section 25(1) of the Finance Act 2003. She wrote on that date to the Appellant notifying him that she was enquiring into the circumstances of the seizure to ascertain whether there had been any dishonest conduct. The letter, in a standard form, invited his co-operation in the enquiry. It offered a meeting and set out the information HMRC required should the Appellant prefer to deal with the matter in correspondence. The letter enclosed various public information notices designed to assist the Appellant in understanding his rights and dealing with the matter. It asked for a reply within 30 days.

6. Officer Kowalczuk received no response to her letter. Accordingly, on 6 December 2013 she decided to charge the Appellant a civil evasion penalty based on the information available to her. The Appellant was carrying 62 times the amount of cigarettes allowed to be brought in to the UK from a non-EU country. The Appellant had travelled from a third country on previous occasions and could therefore be expected to know the limit allowed. Her evidence was that he had been the subject of three previous seizures by the UK Border Force. She therefore concluded that the Appellant's actions were deliberate and dishonest.

7. As the Appellant had not responded to her letter of 31 October 2013 and had offered no co-operation with her enquiry, officer Kowalczuk decided not to recommend any reduction in the penalty and her decision was endorsed by two other officers. On 11 December 2013 she issued a notice of penalty assessment to the Appellant informing him that the Respondents were charging a civil evasion penalty of £3,516 with no reduction for disclosure or co-operation. The penalty was required to be paid by 11 January 2014. The notice included a typographical error because it referred the Appellant's entry into the UK through the green channel at Manchester Airport on 3 November 2013 instead of 2012.

8. Given that officer Kowalczuk's first letter regarding her enquiry was written on 31 October 2013 it was an obvious typographical error. However, it was apparently the case that subsequent to his entry on 3 November 2012 the Appellant had travelled abroad again and on his return to Manchester Airport on that later occasion had been stopped and searched. On that later occasion he was found not to be carrying any tobacco. Whether or not that was by coincidence on 3 November 2013 or at some other time in 2013, on 15 December 2013 the Appellant replied to the penalty assessment notice pointing out that he had no tobacco with him on 3 November 2013 but that he did have some tobacco on 3 November 2012 "for the first and last time".

9. If this was intended to indicate that this was the first time that the Appellant had been stopped and goods had been seized, then his letter would conflict with the evidence given by both officers. Officer Newbould indicated that the Appellant admitted to a previous seizure after the cigarettes had been detected and that the records available to him indicated previous seizures. Those records would also have been available to officer Kowalczuk, whose evidence was that the Appellant had been the subject of three previous seizures. We only have details of one previous seizure,

that of 29 November 2009 (see paragraph 14 below). That suffices, however, for us to conclude that, whatever the letter was intended to suggest, this was not the first time that the Appellant had been stopped and goods seized.

10. Officer Kowalczuk replied to the Appellant on 24 December 2013 confirming that the penalty assessment notice should have referred to 3 November 2012. She also noted that this was not the first time that goods had been seized from the Appellant. She asked if he was prepared to co-operate and asked for the information that she had originally requested by 13 January 2014. The Appellant replied on 10 January 2014 saying that the tobacco seized was for his own use and that he did not know that the amount involved was illegal. He said that he had abided by the law since the seizure and that in the circumstances the Penalty was unfair.

11. Officer Kowalczuk responded on 29 January 2014 with a revised penalty assessment notice allowing a 10 per cent reduction for co-operation, producing a reduced penalty of £3,067 to be paid by 1 March 2014. The revised notice crossed in the post with a letter from the Appellant of 27 January 2014 which officer Kowalczuk received on 31 January 2014. In this letter the Appellant said that he had responded to officer Kowalczuk's original letter of 31 October 2013 and that he had just noticed from her letter of 24 December 2013 that she had not received it. The Appellant said that he had not kept a copy of his original reply and proceeded to provide the information that officer Kowalczuk had originally sought.

12. Given that he had already replied on 10 January 2014 to officer Kowalczuk's letter of 24 December 2013 and given the brevity of the officer's letter – a single page with its longest paragraph asking for the information requested on 31 October 2013 – we find it difficult to believe that he only realised on 27 January 2014 that his previous letter, if actually sent, had not been received. The letter of 27 January may have been a belated recognition that more and better information needed to be provided if the penalty was to be reduced. In the event officer Kowalczuk replied on 4 February 2014 noting that the Appellant's reply was out of time, being received after 13 January 2014, and that she was therefore unable to take it into account. The Appellant objected on 11 February 2014 on the basis that his original reply to the 31 October information request had been sent in time even though it was never received.

13. Whether or not that is true, officer Kowalczuk responded on 6 March 2014 with a revised penalty notice, allowing a 20 per cent reduction (out of a maximum 40 per cent) for both disclosure and co-operation. This was seen and approved by two other officers. The revised penalty was £2,012 payable by 6 April 2014. The Appellant replied on 13 March 2014 saying that the decision was unfair and asking for further reconsideration. A new officer who had taken over the case replied on 31 March 2014 refusing further reconsideration and on 7 April 2014 the Appellant sought an internal review of the decision.

14. The Appellant's case was reviewed and on 30 May 2014 the revised penalty imposed on 6 March 2014 was upheld. The review decision pointed out that the Appellant had travelled outside the European Union on five occasions since 2008 to at least three different countries. The Appellant should therefore have been familiar

with his duty free allowance for cigarettes. It noted that he had been stopped with 12,500 Bahman cigarettes on 29 November 2009 and the cigarettes had been seized. In the circumstances the review officer concluded that the Appellant had deliberately attempted to evade payment of the duty and taxes on the cigarettes and that the Penalty was correctly charged.

15. On 6 June 2014 the Appellant replied to the review officer seeking to clear up the misunderstandings that had occurred. The letter referred back to the 'misunderstanding' about the date of the seizure. This had, however, been resolved in the previous correspondence and the Appellant's letter did little more than refer back to and repeat past correspondence and maintain his assertion that he was honest, that "everyone should get one chance at a warning" and that the penalty was unfair. He also complained about the time taken to raise the issue of a penalty (being almost a year after the event).

16. The Respondents replied on 17 July 2014 to the Appellant's latest letter and that was followed by further correspondence on 13 August 2014 (Appellant), 22 August 2014 (HMRC), 17 September 2014 (Appellant) and 16 October 2014 (HMRC). This further correspondence in our view adds little to the case because the Appellant essentially repeats the points that he had made previously and the Respondents seek to explain why those points do not affect the decision that has been made, that there can be no second review and that the only course open to the Appellant is to appeal to the Tribunal. Eventually, in an undated letter received by the Respondents on 6 May 2015 the Appellant asked for the necessary appeal forms. On 7 May 2015 the Respondents directed the Appellant to the Tribunal website and explained that he was out of time to appeal and would have to explain the reason for the late appeal to the Tribunal.

17. The Appellant's notice of appeal was received by the Tribunal on 23 July 2015. As already indicated in paragraph 1 above, the Respondents did not object to the appeal being out of time and we therefore gave permission for the appeal to proceed.

The Law

18. Under the relevant Acts and Regulations excise duty is payable on certain types of goods, including tobacco, which are imported to the United Kingdom. If the duty charged is not paid the goods are liable to forfeiture under section 49(1) of the Customs and Excise Management Act 1979 ("the 1979 Act").

19. Schedule 3 to the 1979 Act provides a mechanism for challenging the forfeiture and seizure of goods, which involves the person in question giving notice of his claim that anything seized is not liable to forfeiture. That initiates a procedure before the Magistrates' Courts (and not this Tribunal) for the condemnation of the goods as forfeit. If no notice of claim is made within the requisite period, paragraph 5 of Schedule 3 provides that the goods shall be deemed to have been duly condemned as forfeited.

20. Section 8 of the Finance Act 1994 ("FA 1994") provides for a penalty for evasion of excise duty in a case in which the person's conduct involves dishonesty. Under section 8(4) FA 1994 this tribunal on an appeal may reduce the penalty to such amount (including nil) as they think proper or may cancel the whole or any part of the reduction made by the Respondents. Under section 8(5)(a) FA 1994 the insufficiency of the funds available to any person for paying the excise duty or for paying the amount of any penalty is not something that the tribunal may take into account.

21. At the hearing we noted that section 8 FA 1994 appeared to have been repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 ("FA 2008"). Mr Davies for the Respondents drew our attention, however, to *Dyer v HMRC* (TC05051) [2016] UKFTT 278 (TC) and *Ganjo Rasull v HMRC* (TC04388) [2015] UKFTT 0193 (TC) in which Judge Richards explains that the repeal takes effect only:

> (1) insofar as it relates to an inaccuracy in a document or a failure to notify HMRC of an underassessment; or
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> (2) insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 FA 2008.

22. Having had the opportunity to review the matter we have concluded that the repeal of section 8 FA 1994 is limited in this way and we note that Judge Richards' decisions on this issue are also supported by Judge Falk in *Ali Hassan Kassab v HMRC* (TC05070) [2016] UKFTT 301 (TC) and Judge Scott in *Zuned Osman v HMRC* (TC05273) [2016] UKFTT 524 (TC). We also accept Mr Davies' submission to the effect that neither of these exceptions apply in this case. Accordingly, we have decided that paragraph 21(d)(i) of Schedule 40 FA 2008 does not preclude the Respondents from issuing the Appellant with a penalty under section 8 FA 1994.

23. Section 25 of the Finance Act 2003 ("FA 2003") imposes in relation to customs duty and import VAT penalties that are, in all material respects for the purposes of this appeal, identical to those set out in section 8 FA 1994.

24. Both section 8 FA 1994 and section 25 FA 2003 require that the person's conduct "involves dishonesty". The burden of proof in this respect is on the Respondents to the ordinary civil standard, namely on the balance of probabilities.

25. The test of dishonesty was considered in each of the cases to which we have referred in paragraphs 21 and 22 above. In this respect we set out and adopt the five propositions of Judge Scott in paragraphs 27 to 39 of his decision in *Zuned Osman*, which we summarise as follows:

> (1) The test is not the same as that applying in cases of criminal dishonesty, which involves a two-step approach where the second step is a subjective test of whether the defendant himself must have realised that what he was doing was dishonest by the ordinary standards of reasonable and honest people. The criminal dishonesty test attaches greater weight to the subjective element, which is framed and assessed in a different way to the civil test.
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> (2) The test is not wholly objective, but

(3) The test is primarily objective, by reference to the normally accepted standards of behaviour.

(4) The objective element is not determined by reference to a reasonable person, but by reference to the actual knowledge of the particular person whom the Respondents must prove has acted dishonestly.

(5) The relevant knowledge is the person's actual knowledge regarding the facts which (objectively) point to dishonesty in the case in question. Whether that person regards their behaviour as dishonest by their own moral code is not the test. Nor is that person's knowledge of the relevant "normally accepted standards" the test.

26. As summarised by Judge Falk in *Ali Hassan Kassab* at paragraph 54:

"*The test we need to apply is therefore to decide whether the appellant's behaviour was dishonest according to normally accepted standards of behaviour, and whether he knew about the elements that made it dishonest according to those standards.*"

Our decision

27. In correspondence the Appellant maintained that the cigarettes were for his own use, that he was not aware of the duty free allowances and that he had been given a warning by which he had subsequently abided. He regarded the penalty as unfair and pointed to the confusion of dates in the original penalty assessment letter. A summary of his grounds for appeal, including the result he is asking for, as set out in his notice of appeal, is as follows:

(1) The penalty is unfair;

(2) There was a misunderstanding in the correspondence;

(3) His English is not perfect and he has had to rely on his daughter to help with the correspondence;

(4) The cigarettes were for his own use;

(5) He was not aware of UK law and of his duty free allowance;

(6) He has been given a warning and had his cigarettes seized and he was never told that the Respondents would charge a penalty;

(7) He has not brought into the UK any cigarettes since November 2012;

(8) Everyone should have a second chance.

28. A penalty may be thought to be unfair either because the person concerned was not dishonest (as explained above) or because the reduction in the amount of the penalty for disclosure and cooperation is considered inadequate. We have considered both aspects of the matter.

29. The 'misunderstanding' about the date of entry – essentially a typographical error that was immediately resolved – is in our view irrelevant to what we have to

consider. Any 'misunderstanding' surrounding the first reply that the Appellant claims to have made (but was never received) to the initial enquiry letter of 31 October 2013 also seems to be of limited on-going significance. The course of correspondence leads us to doubt whether in fact a first reply was ever sent (see paragraph 12 above) but in the event the information seems to us to have been taken into account in due course in arriving at the revised penalty.

30. We accept that the Appellant's English is not perfect and, as we have noted, at the hearing he was assisted by his daughter who presented his case and acted as necessary as an interpreter. Nevertheless, the Appellant did not claim that he was unable to read the relevant signs or warnings at the airport or did not appreciate the difference between the "green channel" and the "red channel" or was unable to understand Officer Newbould's questions. He deliberately entered the green channel because he claimed not to know the law or the amount of his duty free allowance not because of any lack of understanding about the signage or channels.

31. He has also lived in the United Kingdom for some years and in that time has travelled abroad on a number of occasions. We do not believe that the existence of restrictions on what he could bring back into the United Kingdom can have escaped his notice. Furthermore the fact that he had been stopped and had had cigarettes seized in 2009 provided him with first-hand experience of those restrictions. Even allowing for the fact that this was three years earlier and that he may have travelled abroad on a number of occasions in those intervening three years, we do not think that his experience in 2009 was so remote that he could have forgotten it or believed that the whole basis of restrictions on bringing cigarettes back into the UK had changed.

32. His belief that it sufficed if he could say that the cigarettes were for his own consumption might suggest some confusion on his part about the applicable rules for intra-EU goods and those coming from a third country. He did not claim that this was the case and individuals returning on flights from other EU countries are often directed through a different EU channel and not the green channel. Given his regular travel to non-EU countries and his 2009 seizure experience, however, we consider that the Appellant would have appreciated that goods brought from a non-EU country are subject to greater restriction.

33. The suggestion that he was given a warning and had his cigarettes seized and that he was never told that the Respondents would charge a penalty is entirely wrong. The seizure is the basis for considering a penalty and is not the penalty itself. Furthermore the warning he received was that the Respondents might impose a penalty if they concluded that he was dishonest. It is true that almost a year passed before the Respondents opened their enquiry with a view to imposing a penalty. Ideally they might have been quicker in taking action but the passage of that amount of time does not mean that the Appellant should escape a penalty if he was dishonest.

34. The fact that he claims not to have brought cigarettes in excess of his allowance (or at all) into the UK since November 2012 is of no relevance to the question whether he should suffer a penalty in respect of the occasion when he did do so. And

on the basis that no penalty was imposed following the 2009 seizure, the Appellant was given a second chance but in 2012 was found to have transgressed again.

35. The Appellant entered the green channel voluntarily and without the intention of declaring the cigarettes and paying the duty. Office Newbould asked him the standard questions as a result of which the Appellant confirmed his knowledge of the contents and his knowledge of the prohibitions and restrictions in force. Officer Newbould's evidence to that effect was not challenged and is consistent with what we have concluded in any event by reference to the Appellant's regular foreign travel and the 2009 seizure. The Appellant nevertheless did not attempt to declare the cigarettes even when stopped by officer Newbould and before his bags were searched. Furthermore, after the cigarettes had been detected the Appellant denied that he had ever previously had any encounter with customs or had had goods seized. The suggestion that this was a first event was also suggested in correspondence. We have concluded, however, that this was untrue.

36. Applying the two limbs of the relevant dishonesty test, we think that the first limb is plainly satisfied: the Appellant's behaviour was clearly dishonest by normally accepted standards. As regards the second limb – whether the Appellant knew about the elements that made it dishonest according to those standards – Mr Davies for the Respondents submitted that this was satisfied by the combination of factors:

(1) The similarity between the 2009 seizure and the 2012 seizure in terms of the type and quantity of cigarettes, the point of departure (i.e. the Middle East) for the UK;

(2) The fact that the 2009 seizure would have made the Appellant aware of his allowances and the need to declare goods over the allowance;

(3) The denial of the 2009 seizure, which indicated a propensity to lie;

(4) The fact that it is well known that excise duty is payable on goods entering the UK and that Tehran and Dubai are outside the EU;

(5) The airport signage described the allowances and the Appellant had stated that he understood the allowances;

(6) The fact that the cigarettes carried by the Appellant were some 60 times more than his allowance; and

(7) That quantity of cigarettes would have prompted a reasonable and honest person to make enquiries rather than just assume that there was no tax.

37. In our view these lead to the inescapable conclusion that the Appellant satisfies the second limb of the test, so that the Respondents have established the conditions that are required to be satisfied for the imposition of penalties under section 8 FA 1994 and section 25 FA 2003.

38. The remaining issue is whether the 40 per cent reduction in the penalty amount is appropriate. The Appellant made no specific submissions about the appropriate percentage but, as we have noted, asserted that the penalty was "unfair". The maximum reduction is 40 per cent for an early and truthful disclosure and 40 per cent

for co-operation, including providing information promptly, giving all relevant facts and answering questions truthfully.

39. Leaving aside his behaviour at the airport at the time of the seizure and looking at the correspondence, we have commented on the Appellant's initial suggestion that this was the first occasion – something that he has implicitly maintained through his plea that he should be given a second chance. We have also commented on whether there was in fact any first reply to the Respondents' letter of 31 October 2013. The replay of 27 January 2014 was in any event supplied after the new deadline set by officer Kowalczuk had expired, but was nevertheless taken into account in the final reduction that was applied. We do not think that Respondents' delay in opening their enquiry merits any adjustment to the reduction allowed. We reach the same conclusion about the fact that the cigarettes may have been for the Appellant's own use.

40. Overall, taking into account all the circumstances, we have concluded that no adjustment (up or down) should be made to the reduction allowed.

41. The Appellant also submitted that he could not afford the penalty and would be unable to pay it. As we have noted, however, this is not a consideration that we can take into account (see paragraph 20 above).

42. Accordingly we confirm the penalty of £2,012 and dismiss Mr Behzadfar's appeal.

43. 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.

MALCOLM GAMMIE CBE QC
TRIBUNAL JUDGE

RELEASE DATE: 9 JANUARY 2017