



TC06747

Appeal number: TC/2018/00471

***CUSTOMS DUTY – EXCISE DUTY – customs evasion penalty and excise
civil evasion penalty – whether or not conduct dishonest***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RODNEY SMITH

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR LESLIE BROWN**

Sitting in public at North Shields on 26 September 2018

No appearance by or on behalf of the Appellant

**Anthony Senior, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. The Appellant appeals against penalties imposed under:

- 5 (1) s 25(1) of the Finance Act 2003 for the (attempted) evasion of customs duty, and
(2) s 8(1) of the Finance Act 1994 for the (attempted) evasion of excise duty.

Background

10 2. On 7 June 2015, the Appellant arrived at Newcastle Airport on a flight from Tunisia. He entered the green (“nothing to declare”) channel. He was stopped by UK Border Force Officer Parkin, who ascertained that he was carrying 8,200 cigarettes and 50 grams of shisha tobacco in his baggage. These goods were seized by Officer Parkin under s 139 of the Customs and Excise Management Act 1979.

15 3. By a letter dated 15 June 2016, HMRC notified the Appellant of their intention to investigate whether it was appropriate to issue an evasion penalty, and invited him to make disclosures and to cooperate, noting that any penalty could be reduced if he did.

20 4. By a letter to the Appellant dated 4 July 2016, HMRC noted that he had not responded to the 15 June 2016 letter, and would be treated as not intending to cooperate if he did not respond by 18 July 2016.

5. In an undated letter to HMRC, the Appellant responded, stating: “yes [] went to Tunisia June 2015 and [] more cigarettes that was allowed [] got the countries mixed up and [] it was 16 I was allowed, this [] my first and last time I hav[] cigarettes into this country”.

25 6. On 22 July 2016, HMRC notified the Appellant of their decision that his action was dishonest and that it was appropriate to impose a penalty equal to 25% of the amount of duty that he had sought to evade, 10% reduction having been given for disclosure and 15% for co-operation. The overall penalty was assessed at £1,807.

30 7. In a telephone call to HMRC on 26 July 2016, the Appellant stated that he could not afford the penalty. HMRC responded that he had the right to request a review.

35 8. In an undated letter to HMRC, the Appellant requested a review of the 22 July 2016 decision, and further stated as follows. He is 51 years old, disabled, has no income other than benefits, and cannot pay the penalty. He was under the impression that Tunisia was in the EU. Knowing that he would never go there again, he bought cigarettes for himself and his ex-partner. He has never done this before and will never do it again.

9. In a review decision dated 31 August 2016, HMRC upheld the penalties.

10. The Appellant now appeals to the Tribunal. His grounds of appeal state:

5 I fully admit what I have done, my ex partner and I saved up for months to buy the cigarettes as we could not afford them in the uk. I honestly did not know the amount I was allowed to bring back, however fully admit to my ignorance. I would like to appeal about the amount of money that Im being asked to pay and think it is really unfair that Im being asked to pay tax on something I got took off me. Financially I am unable to pay this amount as already stated I am on benefits.

10 **Applicable legislation**

11. Section 8 of the Finance Act 1994 relevantly provides:

8 Penalty for evasion of excise duty

- (1) Subject to the following provisions of this section, in any case where—
- 15 (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),
- 20 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.
- ...
- (4) Where a person is liable to a penalty under this section—
- 25 (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
- 30 Commissioners.

12. Section 25(1) of the Finance Act 2003 provides:

25 Penalty for evasion

- (1) In any case where—
- 35 (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),
- 40 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.

13. Section 29 of the Finance Act 2003 provides:

29 Reduction of penalty under section 25 ...

- 5 (1) Where a person is liable to a penalty under section 25 ...—
- (a) the Commissioners (whether originally or on review) or, on
10 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
15 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
20 account any of the matters specified in subsection (3).
- (3) Those matters are—
- (a) the insufficiency of the funds available to any person for
15 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
20 on his behalf, has acted in good faith.

14. The burden of proof is on HMRC to prove the matters mention in s 8(1)(a) and
(b) of the Finance Act 1994 and s 25(1)(a) and (b) of the Finance Act 2003, but it is
25 otherwise for the Appellant to establish his grounds of appeal (see Finance Act 1994,
s 16(6); Finance Act 2003, s 33(7)).

The hearing

15. At the hearing, there was no appearance by or on behalf of the Appellant. The
Tribunal requested the Tribunal clerk to telephone the Appellant on the telephone
30 number given in his notice of appeal to ask whether he intended to attend. The clerk
reported that the telephone number rang out without being answered.

16. The Tribunal was satisfied that reasonable steps had been taken to notify the
Appellant of the hearing. In a letter to the Appellant dated 7 July 2018, sent to the
Appellant by e-mail, the Appellant had been advised of the date and place of the
35 hearing. In his notice of appeal, the Appellant stated that he preferred to be contacted
by e-mail, and the notice of hearing was sent to the e-mail address given in the notice
of appeal. The Tribunal file includes an e-mail from the Appellant from that e-mail
address dated 24 May 2018, responding to a communication from the Tribunal,
demonstrating that the Appellant was contactable at that e-mail address. That e-mail
40 stated that the Appellant had “no witnesses to call or dates to avoid” and said “I hope
I am correct in assuming this is all you need from me”. On one reading, that e-mail
suggested that the Appellant himself did not intend to attend the hearing.

17. The Tribunal was satisfied that it was in the interests of justice to proceed with the hearing. The Appellant had given no reasons for failure to attend, and had not requested a postponement. There was nothing to indicate that he would attend a future hearing if a postponement were granted. Unnecessary adjournments or
5 postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the Appellant or his or her representative were not present at the hearing, if it is in the interests of justice to do so (rule 38(2)(d)).

10 18. The Tribunal therefore proceeded with the hearing in the Appellant's absence.

19. HMRC Officers Carmichael and Crozier attended the hearing and adopted their witness statements. Officer Carmichael confirmed that he had been present when the Appellant was stopped by Officer Parkin, and that he could confirm from his own
15 personal observation that everything stated in Officer Parkin's witness statement about that event was correct.

The Appellant's arguments

20. The Appellant's arguments are as stated above.

The HMRC arguments

21. Dishonesty can be inferred from the fact that the Appellant entered the green
20 channel carrying 41 times the duty free allowance, when notices setting out the duty free allowances are visible at the airport at the baggage reclaim area and at the entrance to the customs channels. The reductions to the penalty given by HMRC are fair and reasonable.

The Tribunal's findings

25 22. A requirement for the imposition of the penalties is that the Appellant's conduct involved dishonesty. The Tribunal understands the Appellant to be contending that his actions were not dishonest. That is the main issue in this case.

23. The test of dishonesty is whether the Appellant's subjective state of mind at the material time (assessed in the light of what he actually knew at the time, as opposed to
30 what a hypothetical reasonable person would have known) would by ordinary standards be characterised objectively as dishonest. The Appellant must also realise that what he was doing was by those standards dishonest. (Compare *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [10], *Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389; *Abou-Rahmah v Abacha* [2006]
35 EWCA Civ 1492 at [16] and *Yosefi v Revenue and Customs* [2017] UKFTT 814 (TC) at [34]).

24. The burden of proof is on HMRC to establish dishonesty (paragraph 14 above).

25. The standard of proof is the balance of probability. The Tribunal must establish whether it was more likely than not that the Appellant was acting honestly, or more likely than not that he was acting dishonestly.

5 26. It is a fact generally known by international travellers that all or most countries—including the UK—have limits on the amount of goods that can be brought into the country duty free by arriving passengers, that passengers arriving on international flights go through a customs barrier on arrival, and that arriving passengers are warned that they face penalties for bringing in goods in excess of the duty free allowance without declaring them.

10 27. It is a fact also generally known by international travellers that even when arriving in the UK from another EU Member State, there are restrictions on the ability of passengers to bring in tobacco products without declaring them, in particular the restriction that the goods must be for the passenger's own use.

15 28. Reminders of these facts are provided by signs in airport arrival halls, before the customs channels are reached.

29. It is possible that there are adult international passengers who are totally oblivious to these facts. However, this would be very uncommon.

20 30. The quantity of tobacco carried by the Appellant exceeded, by some 41 times, the duty free allowance for passengers arriving from places outside the European Union. The quantity was so large that even if he had been arriving from another EU Member State, UK officials would likely have questioned whether it was genuinely for his own use.

25 31. It is unlikely that an international traveller, even one who is an inexperienced traveller, would fail to know that it is not permitted to bring in such a quantity from a country outside the European Union without declaring it, or even appreciate that this might not be permitted. It is also unlikely that an international traveller, even one who is an inexperienced traveller, would fail to realise that it would at the very least be questionable whether it is possible to bring in such a large quantity even from another EU Member State. An honest traveller, aware of these questions, would have
30 made appropriate enquiries as to the correct position.

32. The Appellant has made a number of inconsistent claims. He has said that he got the country mixed up and thought he was travelling from another EU Member State. Inconsistently with this, he has said that he did not know what the duty free allowance was. Inconsistently with this, he has said that he thought the duty free
35 allowance was 16 cartons. (See paragraphs 5, 7, 8 and 10 above.) It is noted that even if this last claim were to be accepted, he was in fact carrying 41 cartons of cigarettes, which would still have been significantly in excess of his duty free allowance.

40 33. Even if each of these claims, considered individually, is not entirely impossible, each is more than a little implausible, at least in the absence of any further explanation by the Appellant. The inconsistencies in the different claims advanced further

undermines their plausibility. In the absence of further explanation from the Appellant, the Tribunal concludes that it is more likely that the Appellant's account is not true than that it is true. The Tribunal does not accept that the Appellant thought that he was travelling from an EU Member State, or that he genuinely thought that the duty free allowance was 16 cartons or 41 cartons. In reaching that conclusion, the Tribunal takes into account that a finding of dishonesty is a serious matter, and that all the evidence must be considered carefully.

34. Having concluded that it does not accept the Appellant's account, the Tribunal finds that it is more likely than not that the Appellant did know that he was carrying more than the duty free allowance of tobacco products, and knew that it was illegal to bring that quantity into the United Kingdom without declaring it, and that he sought to pass through the green channel in the hope that he could bring the goods into the UK without declaring them and without being detected. The Tribunal is satisfied that this was dishonest by the standards of an ordinary, reasonable person and that the Appellant must have realised that what he was doing was, by those standards, dishonest.

35. The Appellant appears to argue in the alternative that the penalty should have been given greater mitigation. The Appellant bears the burden of establishing an entitlement to mitigation.

36. According to the HMRC policy, the Appellant is entitled to up to 40% mitigation for disclosure. It follows from the above that the Tribunal is not satisfied that the Appellant gave a truthful explanation, and the Tribunal is not persuaded that greater mitigation should have been given for disclosure.

37. According to the HMRC policy, the Appellant is entitled to up to 40% mitigation for co-operation. The Tribunal considers that in the circumstances of this case, given the very large amount of tobacco involved, full cooperation would have involved giving HMRC a far more detailed account than the Appellant did. The evidence of Officer Parkin, confirmed in oral evidence by Officer Carmichael, is that at the time of the seizure, the Appellant became extremely aggressive and verbally expletive. He did not initially respond to the 15 June 2016 HMRC letter, and after being prompted again by the HMRC 4 July 2016 letter, he provided only a minimal response. He provided certain additional information in his request for a review and in his grounds of appeal, but this information was provided only subsequently with a view to having adverse decisions overturned, and not out of any genuine concern to cooperate with HMRC. The Tribunal is not persuaded that greater mitigation should have been given for cooperation.

38. Given the finding of dishonesty, and the inconsistencies in the claims made by the Appellant, the Tribunal does not accept that the Appellant has established on a balance of probability the other matters that he advances by way of mitigation. However, even if he had established these matters, the fact that the goods were for his own use and that of his ex-partner (rather than for a commercial purpose) and the fact that he has never done this before and will not do it again, are not of themselves reasons for mitigating the penalty.

39. The legislation precludes consideration being given to the Appellant's lack of funds to pay the penalty.

40. The Appellant has not established that in the particular circumstances of this case any further mitigation is warranted.

5 41. Apart from the issue of the percentage mitigation to be given, the Appellant has not challenged the way in which HMRC has calculated the penalties. Nevertheless, at the hearing Mr Senior gave the Tribunal an explanation of the way in which they had been calculated. The Tribunal found no error in this explanation.

Conclusion

10 42. The appeal is accordingly dismissed.

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.

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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 06 October 2018

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