



TC06751

Appeal number: TC/2016/01332

EXCISE DUTY – assessment – wrongdoing penalty (para 4 Sch 41 FA 2008) – whether conduct deliberate

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

JAMIE GARLAND

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MRS SHAMEEM AKHTAR**

Sitting in public at Liverpool on 24 September 2018

The Appellant in person

R Davies, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against:

- 5 (1) an assessment to duty under s 12 of the Finance Act 1994, in the sum of £3,722; and
- (2) a penalty imposed under paragraph 4 of Schedule 41 to the Finance Act 2008, in the sum of £1,302.

10 2. The following matters are not in dispute. On 24 July 2014, the Appellant arrived at London Gatwick Airport on a flight from Alicante in Spain. She was travelling with her mother. After disembarking from the aircraft, but before reaching the customs channels, the Appellant and her mother were stopped by UK Border Force officials, who then ascertained that the Appellant was carrying 21.55 kg of hand-rolling tobacco in her baggage. The tobacco was seized.

15 3. HMRC subsequently issued the Appellant with an assessment to duty, and a wrongdoing penalty. The Appellant's mother was also issued with an assessment to duty and a wrongdoing penalty, but the present appeal is concerned only with those issued to the Appellant.

20 4. The Appellant appealed to the Tribunal against the assessment and the penalty. HMRC applied for the appeal to be struck out. In a decision dated 21 September 2016, the Tribunal refused that application ([2016] UKFTT 573 (TC)).

Applicable legislation

25 5. Section 12 of the Finance Act 1994 provides that HMRC may make a best of judgement assessment of excise duty in cases where it appears to them that an amount of excise has become due and there has been a default under that section. By virtue of ss 13A(2)(b) and 16(5) of that Act, there is an appeal to the Tribunal against such assessments.

6. Paragraph 4(1) of Schedule 41 to the Finance Act 2008 provides:

- 30 (1) A penalty is payable by a person (P) where–
- (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
- 35 (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

7. Subsequent provisions of Schedule 41 provide that the amount of such a penalty will depend on whether or not the conduct of the person is “deliberate” and whether or not it is “concealed”. In cases where the act or failure of the person is “deliberate but

not concealed”, the standard amount of the penalty is 70% of the potential lost revenue. In a case where the act or failure is neither deliberate nor concealed, the standard amount of the penalty is 30% of the potential lost revenue.

5 8. Schedule 41 then provides that the standard amount of the penalty can be reduced where the person discloses the relevant act or failure to HMRC. Where such disclosure is prompted, a standard penalty of 70% can be reduced to a minimum of 35%, and a standard penalty of 30% can be reduced to a minimum of 20%. Where such disclosure is unprompted, a standard penalty of 70% can be reduced to a minimum of 20%, and a standard penalty of 30% can be reduced to a minimum of 10%.

10 9. Paragraph 14 of Schedule 41 provides that HMRC may allow a special reduction of a penalty if they think it right because of special circumstances. It is specified that ability to pay cannot be special circumstances.

15 10. Paragraph 17 of Schedule 41 provides that a person may appeal to the Tribunal against a decision by HMRC that a penalty is payable, and/or against the amount of the penalty payable.

20 11. Paragraph 19 of Schedule 41 provides that in an appeal against the amount of the penalty, the Tribunal may substitute for HMRC’s decision another decision that HMRC had the power to make, but that the Tribunal may rely on paragraph 14 to a different extent to HMRC only if the Tribunal considers the HMRC decision to be flawed when considered in the light of the principles applicable in proceedings for judicial review.

12. Paragraph 20 of Schedule 41 provides that in cases where the relevant act or failure of a person is not deliberate, liability to a penalty will not arise if there is a reasonable excuse for that act or failure.

The HMRC evidence

25 13. Evidence was given at the hearing by UK Border Force Officer Alexandra Tait, HMRC Officer Hayden Lloyd, and HMRC Officer Neil Grant.

30 14. Officer Tait’s witness statement exhibited the pages from her notebook concerning the incident, which stated as follows. She was on duty at the airport on the day in question. She intercepted the Appellant on arrival, and accompanied her to the customs channels. She explained to the Appellant that the red channel was where she could make a customs declaration. The Appellant opted to go through the green channel. Officer Tait then asked the Appellant if she had anything to declare. The Appellant said that a bag she was carrying contained tobacco, but she did not know how much as the bag was not hers and she had been given it by someone else. The Appellant said that the bag had been given to her by a “random man in a hotel” who was going to pay her £200, that she had gone to Alicante to meet this person, and that she had not been paid. Officer Tait then searched the bags and found the tobacco. Officer Tait told the Appellant she was not required to stay for an interview, but that if she did not, the tobacco would be seized. The Appellant said “Nah, keep them. They’re not mine.”
40 Officer Tait then seized the tobacco.

15. In oral evidence, Officer Tait said that her notes had been written immediately after the incident, and maintained that they were an accurate record of what had happened.

16. The Appellant did not wish to ask Officer Tait any questions.

5 17. Officer Lloyd stated in his witness statement as follows. He was the decision maker who issued the excise duty assessment and wrongdoing penalty. The decision to issue the prompted deliberate penalty was based on information given by the Appellant to Officer Tait at the point of interview on 24 July 2014. Before issuing the penalty, he issued a preliminary notice of assessment requesting the Appellant to provide any further information by 22 January 2015. As no further information was received from the Appellant, the excise duty assessment and penalty were issued on 23 January 2015.

18. In examination in chief, Officer Lloyd confirmed that he considered that the Appellant's conduct was deliberate, and that her disclosure to HMRC was prompted.

15 19. The Appellant did not wish to ask Officer Lloyd any questions.

20. Officer Grant stated in his witness statement as follows. He checked paperwork prepared by Officer Lloyd and another relating to the excise assessment and penalty before it was issued, and describes subsequent correspondence between the Appellant and HMRC.

20 21. In examination in chief, Officer Grant confirmed that he was not the primary decision maker, and that his role had been supervisory.

22. The Appellant did not wish to ask Officer Grant any questions.

The Appellant's evidence

25 23. The Appellant did not produce a witness statement, but gave oral evidence at the hearing. She stated as follows.

24. On arrival at Gatwick airport she went to passport control. She was stopped there and taken to customs. She was asked what she had in her baggage and she said tobacco. She was told it was being confiscated, and told that that was then end of it. She had travelled to Spain because she was interested in buying horses. When in Spain, she went out drinking instead. She met a person there who asked her to bring a bag to the UK for her. She did not know that she was doing anything wrong, and did not know how much tobacco there was in the bag.

25. In cross-examination the Appellant said as follows. When asked if she had anything to declare, she had immediately said tobacco. She was not given an option to go through a red channel or a green channel. She was not intending to pay the duty, and if she had not been stopped, she would have just left the airport and looked for the man to give the bag to. She knew that the bag contained tobacco but did not know how much. She just took the bag from the man in Spain who gave it to her. She denied that

she was going to be paid for bringing the bag to the UK and denied ever saying this. She only went to Spain for a couple of days. She had intended to look at horses there but ended up going out and drinking instead.

26. When asked if she knew the man before she went to Spain, she said that her
5 mother knew him more. She agreed that it was not a case of a chance meeting with the
man, and that the meeting had been arranged. When asked how it had been arranged,
the Appellant said that she could not remember. When asked why she agreed to bring
the bag to the UK, the Appellant said that “He just asked us and we just agreed”. She
10 said that she and her mother had no checked luggage on the flight from Alicante to
Gatwick, and only had the two bags of hand luggage that she and her mother had been
given by the man. She said that on the outward flight from the UK to Alicante, she and
her mother had shared a suitcase, and that they had had to abandon this suitcase in
Spain. When asked why she would abandon her own suitcase in order to bring a bag
15 back for someone else, she at first said that she had only gone to Spain for a couple of
days and the suitcase on the outward flight had few clothes in it anyway. She then said
that she honestly did not know and that it was a stupid mistake.

The Appellant’s arguments

27. The Appellant’s grounds of appeal contend as follows. At the time of the seizure
she was told that there would be no further action. She cooperated with HMRC. The
20 assessment and penalty are harsh. She was not aware that she was doing anything
wrong.

The HMRC arguments

28. In relation to the assessment to duty, HMRC argue as follows. Immediately
before being stopped by customs officers at the airport, the Appellant had already
25 passed the excise duty point for the tobacco, on which UK duty had not been paid. The
Appellant is liable to the duty as she was holding the goods at the time. The duty was
correctly calculated. As to the argument that the Appellant was told there would be no
further action, this is a matter that the Tribunal has no jurisdiction to consider. The
Tribunal lacks jurisdiction to determine whether the assessment is proportionate;
30 alternatively, it is proportionate. The fact that the Appellant was unaware that she was
doing anything wrong is not a reason not to assess for duty.

29. In relation to the penalty, HMRC argue as follows. The failure to pay the duty
was deliberate. Her disclosure was prompted. The penalty range was therefore 35% to
70% of the potential lost revenue. The Appellant was given maximum reduction and a
35 penalty of 35% was applied.

30. There are no circumstances that warrant a special reduction.

The Tribunal’s findings

31. As to the assessment to duty, the Tribunal finds as follows.

32. The Appellant has not disputed that she disembarked from the aircraft arriving from Spain with 21.55 kg of hand-rolling tobacco in her carry-on bag.

33. At the time that she disembarked from the aircraft, even before she was approached by any officials, she had passed the duty point for the tobacco that she was carrying in her hand luggage (see *Revenue and Customs v Jacobson* [2018] UKUT 18 (TCC) at [46].

34. The tobacco was not for her own use. She does not suggest that it was, and has stated positively that the goods belonged to another person. The goods were accordingly subject to excise duty in the UK. There is no suggestion that the duty had been paid prior to the Appellant's arrival.

35. At the time that the Appellant disembarked from the aircraft, she was holding the goods.

36. She was therefore liable to an assessment to duty under s 12 of the Finance Act 1994 in respect of the goods.

37. The Appellant has not challenged the way in which HMRC has calculated the excise duty. Nevertheless, at the hearing Mr Davies gave the Tribunal an explanation of the way in which they had been calculated. The Tribunal found no error in this explanation.

38. As to the penalty, the Tribunal finds as follows.

39. At the time the Appellant disembarked from the aircraft, for purposes of paragraph 4(1) of Schedule 41, she had acquired possession of the tobacco or was concerned in carrying, keeping or otherwise dealing with it.

40. In view of the above findings, all of the requirements of paragraph 4(1) of Schedule 41 to the Finance Act 2008 were met at the time she disembarked from the aircraft, even before she was intercepted by any official. She was thus liable to a penalty under that provision.

41. As to whether the Appellant's conduct was "deliberate", the Tribunal has given consideration to her account, but finds it implausible in material respects. It is implausible that the Appellant and her mother would be willing, in return for no payment, to abandon their own suitcase and its contents in Spain, in order to bring a bag containing tobacco back to the UK for a person that the Appellant did not really know. It is all the more implausible that she would do so without ascertaining the quantity of tobacco contained in the bag that she had been given to bring back to the UK. It is general knowledge that there are certain restrictions on the amounts of tobacco and goods that can be brought into the UK duty free even by passengers arriving from other EU Member States. The Appellant must have known merely from handling the bag that its contents weighed some 20 kilograms. It is unlikely that any traveller would believe that it is unconditionally lawful to bring such a large quantity of tobacco to the UK, even from another EU Member State, and it is likely that any traveller who was

not seeking deliberately to avoid excise duty would have either refused to bring the bag to the UK, or would have made further enquiry about the lawfulness of doing so.

42. The Tribunal finds it more likely than not that the Appellant did say to Officer Tait that she was going to be paid £200 to bring the goods to the UK, as it prefers the evidence of Officer Tait in this respect.

43. The Tribunal finds on a balance of probability that the Appellant knew when she left Spain that the tobacco was subject to excise duty in the UK. According to her own evidence, had she not been intercepted, her intention was to take the goods out of the airport without the duty being paid. The Tribunal is satisfied that her conduct was therefore deliberate.

44. HMRC have not suggested that the Appellant's conduct was "concealed" for purposes of Schedule 41.

45. In accordance with Schedule 41, the standard penalty for conduct that is deliberate but not concealed is 70% of the potential lost revenue.

46. For purposes of Schedule 41, the Tribunal is satisfied on a balance of probability that the Appellant's disclosure was "prompted". She admitted that her intention was to walk out of the airport with the tobacco without stopping. The Tribunal is satisfied that she only told Officer Tait that she was carrying tobacco because Officer Tait stopped her and questioned her, and that she would not otherwise have disclosed the fact that she was carrying the tobacco.

47. The minimum penalty that HMRC can apply in a case of promoted disclosure is 35% of the potential lost revenue. That is the percentage that HMRC applied.

48. The Tribunal has found that the assessment was correctly calculated. 35% of £3,722 is £1,302.70, which HMRC have rounded down to £1,302. The Tribunal finds that the penalty has been correctly calculated in accordance with the legislation.

49. The Tribunal finds nothing in the circumstances of this case which could amount to a reasonable excuse. The Tribunal has found her conduct to have been deliberate.

50. In relation to the question whether there are any special circumstances justifying a special reduction, the Tribunal does not consider the HMRC decision to be flawed in respect of this question. In any event, on the evidence before it, the Tribunal finds that there is no basis for a finding of special circumstances. Paragraph 14(2)(a) of Schedule 41 provides that inability to pay the penalty does not amount to special circumstances.

51. The Tribunal finds that this case is distinguishable from *Bowes v Revenue and Customs* [2017] UKFTT 752 (TC). In that case, goods had been seized before the appellant had had an opportunity to reach the customs channels. In that case, the Tribunal found as a fact that it could not be known exactly what the Appellant would have done or said at the customs channel if he had had that opportunity. The Tribunal found that to be a special circumstance justifying a reduction in the penalty, which in that case was only £122. In the present case, the Tribunal has found as a fact that the

Appellant intended that the tobacco would be taken out of the airport without the duty being paid. The fact that she was intercepted before reaching the customs channel is therefore not a special circumstance in this case.

52. In relation to the Appellant's contention that she was told that there would be no further action, the Tribunal is not persuaded on a balance of probability that she was told this. The only evidence to this effect was the Appellant's own evidence, which for the reasons above the Tribunal has found not to be reliable. The bundle includes a copy of a warning letter that was issued to the Appellant at the time of the seizure on 24 July 2014, which states that HMRC "may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty". It is inherently unlikely that the officer would, at the same time as handing the Appellant this document, tell her that no further action would be taken. Furthermore, the Tribunal accepts the HMRC submission that this Tribunal has no jurisdiction to discharge a penalty on grounds of unfairness by HMRC.

15 **Conclusion**

53. The appeal is accordingly dismissed.

54. 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: 8 OCTOBER 2018

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