



Neutral Citation: [2022] UKFTT 346 (TC)

Case Number: TC08602

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/19397

Customs civil evasion penalty – excise evasion penalty – whether penalties should be reduced

Heard on: 1 September 2022

Judgment date: 09 September 2022

Before

**TRIBUNAL JUDGE HOWARD WATKINSON
CHRISTOPHER JENKINS**

Between

OLUJINMI LALEYE

Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: The Appellant himself.

For the Respondents: Ms. Jessica Parlour, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. The documents to which we were referred were: a bundle of documents running to 100 pps., HMRC's Statement of Reasons, and a bundle of legislation and authorities.
2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.
3. This is an appeal by Mr. Laleye against a Customs Civil Evasion penalty in the sum of £1,760 and an Excise Civil Evasion penalty in the sum of £5511.00 issued pursuant to s.8(1) Finance Act 1994 and s.25(1) Finance Act 2003. The penalties total £7,311.00.

THE RELEVANT LAW

4. Sections 8(1), (4) and (5) of the Finance Act 1994 provide as follows:

“8 Penalty for evasion of excise duty

(1) Subject to the following provisions of this section, in any case where –

- (a) any person engages in 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.

...

(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.”

5. Section 8 of the Finance Act 1994 was repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 with the exception of the dishonesty penalty, which was preserved by the Schedule 41 (Appointed Day and Transitional Provisions) Order 2009.

6. Sections 25(1) and 29 of the Finance Act 2003 provide as follows:

“25 Penalty for evasion

(1) In any case where –

(a) a person engages in any conduct for the purposes 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.

...

29 Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section 25 or 26 –

(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 or 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.”

24. The Travellers’ Allowance Order 1994 provides for the limits for the importation of relevant goods from third countries (whereby a “third country” is defined in relation to relief from excise duties as a place to which Council Directive 92/12/EEC of 25 February 1992 does not apply). The limit for cigarettes is 200.

25. The test for dishonesty has been clarified by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords v Genting* [2017] UKSC 67. Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) stated as follows at [74]:

“[74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent

people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

FINDINGS OF FACT

7. We had before us the notebook of UK Border Force Officer Siddiq who stopped the Appellant at Terminal 3 of Heathrow Airport. We also had a witness statement from Officer Roberts of HMRC which dealt with issuing the penalties.

8. From the documents we find the following facts:

9. On 6.3.20 at 16:45 Officer Siddiq stopped the Appellant in the Green Channel of Terminal 3 of Heathrow Airport. The Appellant was dragging two grey large hard sided suitcases. Officer Siddiq asked the Appellant where he had come from that day, the Appellant said that he had come from Lagos. In answer to Officer Siddiq’s questions the Appellant confirmed that: he was travelling alone, he had been away for a week on holiday, he was a nurse at Warwick hospital, the bags were his, he had packed them himself, he was aware of their contents, he had not been asked to bring anything into the UK by anyone, he was aware that he was in the Green Channel for those with nothing to declare, and he was aware of the customs allowances. Officer Siddiq searched the Appellant’s suitcases, where he found 37,000 Benson & Hedges cigarettes. Officer Siddiq seized the cigarettes, gave the Appellant a seizure information notice and a warning letter about seized goods. The seizure was not challenged and the cigarettes were therefore condemned as forfeit.

10. On 25.5.21 Officer Roberts sent a letter to Mr. Laleye advising him of an enquiry and that co-operation may reduce any penalties. On 14.6.21 Mr. Laleye provided a letter setting out some details in relation to the seizure and in which he claimed that the goods were for his personal use.

11. 28.6.21 Officer Roberts issued a penalty letter to the Appellant charging total penalties of £7,311. Officer Roberts had reduced the penalty from the £14,623 Excise Duty, Customs Duty and Import VAT that he had calculated as initially due by 25% for disclosure and 25% for co-operation. The matter was subsequently reviewed on Mr. Laleye’s request.

12. Mr. Laleye’s Notice of Appeal said that he did not believe that he had been given a fair conclusion because this was the first and only time he had committed such an offence, he didn’t understand why the fine had been given to him, and he couldn’t afford to pay the fine.

13. Based on what Mr. Laleye told the Tribunal we also find the following facts:

14. Mr Laleye is a registered Mental Health nurse with the NHS in the Coventry and Warwickshire Partnership Trust. He paid around the equivalent of £2,000 for the cigarettes, which he was going to share with friends since he only smoked around 5 cigarettes a day and he knew it was not possible for him to consume all of them. He was at university at the time and had travelled internationally before, mainly through Nigeria, the USA and UAE.

15. Mr. Laleye admitted that what he had done was dishonest, and we so find.

MR. LALEYE’S CASE

16. Having admitted that what he had done was dishonest, Mr. Laleye nonetheless asked the Tribunal to reduce, or cancel the penalties, saying that it was not viable for him to pay them. In relation to his means Mr. Laleye confirmed that he drove a Mercedes Benz car for which he was in the process of paying around £20,000 on finance.

DECISION

17. The Tribunal cannot reduce the penalties by reference to Mr. Laleye’s ability to pay (see s.8(5) of the Finance Act 1994 and 29(3) of the Finance Act 2003). Even if we could, Mr.

Laleye did not satisfy us that he could not pay the penalties. He could have put the monies to be paid for his vehicle towards paying the penalties instead. We see no other reason to interfere with the 50% reduction already provided to Mr. Laleye. Those reductions were made before Mr. Laleye admitted that in fact he was going to distribute some of the cigarettes to others and at a time when he maintained instead that they were for his personal use. The appeal is therefore dismissed, and we uphold the penalties.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

18. 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.

**HOWARD WATKINSON
TRIBUNAL JUDGE**

Release date: 09TH SEPTEMBER 2022