



Neutral Citation: [2023] UKFTT 01 (TC)

Case Number: TC08723

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Bristol Magistrates Court and Tribunals
Hearing Centre

Appeal reference: TC/2022/07910

CUSTOMS AND EXCISE PENALTIES – tobacco seized by Border Force at Heathrow Airport – subsequent assessment by HMRC for civil evasion penalties – was Appellant “dishonest” – was HMRC’s reduction in penalty amount appropriate – appeal dismissed - Section 8 Finance Act 1994 and Section 25 Finance Act 2003

Heard on: 30 January 2023

Judgment date: 02 February 2023

Before

**TRIBUNAL JUDGE ALEKSANDER
CHRISTOPHER JENKINS**

Between

HUSSAIN ALI OMAR

Appellant

and

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

Representation:

For the Appellant: in person

For the Respondents: Dr Timothy Heal, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against civil evasion penalties totalling £1363 in respect of the importation of 12kg of hand rolling (shisha) tobacco and 800 cigarettes through Heathrow Airport on 15 September 2019. The penalties were determined as follows:

Penalty	Duty liable to a penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty	£532	40%	60%	£319	£1363
Excise civil evasion penalty	£1740	40%	60%	£1044	

2. Dr Heal represented HMRC. Mr Omar appeared in person. Mr Omar's friend, Mr Mohamed, assisted Mr Omar at the hearing.

3. Because Mr Omar's native language is Somali, we had the assistance of a Tribunal interpreter, Ibrahim Deria.

4. We heard evidence on oath or affirmation from (a) Matthew Kirby, the Border Force officer who interviewed Mr Omar at Heathrow and who seized the tobacco, (b) Shaun Reed, the HMRC officer responsible for assessing Mr Omar to penalties, and (c) from Mr Omar. Mr Deria, the interpreter gave the interpreter's oath. In addition, a bundle of 471 pages was admitted in evidence.

5. There was some dispute as to whether Mr Omar had received a copy of the bundle. HMRC's records show that that it had been posted to Mr Omar in July 2022 by recorded delivery, but Mr Omar could not recall receiving it. However, Dr Heal had prepared a spare hard copy bundle, which was given to Mr Omar for the purposes of the hearing.

BACKGROUND FACTS

6. The background facts are, for the most part, not in dispute, and we find them to be as follows:

7. Mr Omar has lived in the UK for 15 years – so at the time of the importation under appeal, he would have lived in the UK for over 11 years. Mr Omar's family lives abroad, and he travels to visit them typically once each year – sometimes more frequently if there is a special need (such as illness). His evidence was that he had travelled abroad around ten times between his arrival in the UK and the time of the importation under appeal.

8. In September 2019, Mr Omar had been visiting family in Yemen. His return journey was in two stages, first flying from Yemen to Cairo, and then flying from Cairo to London.

9. He arrived at Heathrow Airport from Cairo on 15 September 2019. After collecting his two bags, he went through the green customs channel, indicating that he had nothing to declare, and in particular had no duties or taxes to pay.

10. He was stopped and questioned by Officer Kirby. Officer Kirby asked Mr Omar where he had been travelling, and the purpose of his journey. Officer Kirby told us that if a traveller's English was limited, he would record this fact in his notebook, and use the "Google Translate" facility on his official mobile phone to communicate with the traveller. Officer Kirby's notebook does not record that Mr Omar had any difficulty understanding Officer Kirby's

questions, nor that Officer Kirby had recourse to Google Translate when communicating with Mr Omar.

11. Officer Kirby told Mr Omar that he had gone through the green channel and asked if he knew what that meant. Mr Omar said “no”, so Officer Kirby explained that it meant that he had nothing to declare. Mr Omar told Mr Kirby that he had nothing to declare. Officer Kirby asked Mr Omar to open his bags, and Officer Kirby found 12kg of shisha tobacco and 800 cigarettes in the bags. Mr Omar said that the tobacco was for friends. Officer Kirby seized the tobacco.

12. It is not disputed that Mr Omar was served with Border Force Notices BOR156 (Seizure Information Notice) & BOR162 (Warning Letter), and copies of these notices (countersigned by Mr Omar) were included in the bundle. Mr Omar’s evidence was that he was not given Notice 12A setting out his rights of appeal against the seizure. BOR156 includes “yes/no” boxes setting out the other documents provided to the traveller, and the “yes’s” are circled to show that Notice 1 (setting out details of the customs allowances) and 12A (appeal rights) were both given to Mr Omar. In addition, Officer Kirby’s notebook sets out a contemporaneous note of his interview with Mr Omar and records that Notices 1 and 12A were served on Mr Omar.

13. Mr Omar’s evidence that he countersigned form BOR156 without understanding it as his English was poor, he was tired from two days of travelling, and he just wanted to get home – and so he did not read the notices that he signed and did not understand what they meant. Whilst we can believe that Mr Omar may not have fully appreciated the meaning of the notices that he countersigned, on balance we believe Officer Kirby’s evidence that Notice 12A was given to Mr Omar, and this is supported by the circles on BOR156 and Officer Kirby’s notebook. We find that Mr Omar was given Notices 1 and 12A.

14. As no appeal was lodged against the seizure, the tobacco seized at Heathrow was duly condemned as forfeit by the effluxion of time.

15. On 16 December 2020 (more than one year after the seizure), HMRC issued Mr Omar an initial enquiry letter, advising that HMRC were considering assessing him to a civil evasion penalty. Enclosed with the letter were various notices informing Mr Omar of his rights. As Mr Omar did not reply to this letter, HMRC sent a reminder letter on 31 December 2020.

16. On 11 January 2021, Mr Omar telephoned HMRC. No note of the telephone conversation was included in the bundle, and Mr Omar did not recall the telephone call.

17. We find that the call did take place, as included in the bundle is a copy of HMRC’s 16 December 2020 letter countersigned and dated by Mr Omar on 11 January 2021. The countersignature acknowledges receipt of the HMRC letter and the various accompanying information leaflets. Also included was a copy of the 31 December 2020 letter with the following manuscript note added at the end.

Per our conversation on the telephone you were advised to send you letter to confirm that the reason I was bringing some personal items with myself only tobacco it has already thrown away at airport but since from up date no information except you letter.

The reference to the telephone conversation indicates that the telephone call took place.

18. On 22 January 2021, Officer Reed wrote to Mr Omar assessing civil evasion penalties as follows:

We have assessed the penalty for 15 September 2019	Duty liable to a penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty for period
Customs civil evasion penalty	£532	25%	75%	£339	£1704
Excise civil evasion penalty	£1740	25%	75%	£1305	

19. Officer Reed explained that HMRC had decided to allow a reduction of 25%, calculated on the basis of the following factors:

- (a) disclosure (maximum allowable 40%): 5%
- (b) co-operation (maximum available 40%): 20%

20. Included in the bundle were HMRC's notes of subsequent telephone calls. The notes of a call on 1 February 2021 with Mr Omar record that Mr Omar said that he did not understand what he needed to do. He said that he had tried to obtain help from CAB, but they were closed due to COVID. The HMRC officer suggested that they proceed with a telephone interview with the aid of an interpreter, and second call was scheduled for 11 February 2021. The second call went ahead on 11 February, but the HMRC officer was not able to get hold of the interpretation service. Mr Omar asked his neighbour to help with interpretation, but his neighbour's English was not good enough. In the end the HMRC officer suggested that Mr Omar obtain legal assistance in order to respond to HMRC's letter.

21. On 18 February 2021, there was a call with Mr Omar and someone from the Bristol Somali Resource Centre. The conclusion from the call was that it would not be possible for the Centre to provide an interpreter, and that it would be better to deal with HMRC's questions in correspondence.

22. Another copy of the 16 December 2019 letter was included in the bundle which was countersigned by Mr Omar and dated 2 March 2021 together with a letter from Mr Omar to HMRC dated with the same date. In this letter Mr Omar explains:

I can confirm that I was the person who carried these items.

I travelled to Yemen where my lovely wife lives, on my way back I bought some Cigarettes and tobaccos for personal use, I did not know how much would be allowed, having language barrier and difficulty to read I could understand how much it would be allowed and the quantity. I bought about 10 boxes of Cigarettes and punch of tobacco for personal use.

Unfortunately, the boarder agency authority took it from me, and I never had it. After few years I had first correspondence in December 2020, in which you asked me to pay huge amount of money which made me shocked. I am an unemployed with language barrier but, trying to work hard to improve my live.

I never attempted this before this was first time had I knew this was illegal I would have never attempted. I travelled to Yemen via Cairo for family visit on my way back to UK this when this incident happened.

I never commit any crimes in the past I am law-abiding person who understand the generosity of Great Britain.

23. On 22 March 2021, Officer Reed wrote to Mr Omar thanking him for his letter, and increasing the mitigation to 40% for both penalties as follows:

We have assessed the penalty for 15 September 2019	Duty liable to a penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty for period
Customs civil evasion penalty	£532	40%	60%	£319	£1363
Excise civil evasion penalty	£1740	40%	60%	£1044	

24. There were a series of subsequent telephone calls and correspondence, culminating in a letter dated 11 November 2021 requesting a review. The letter was drafted with the help of a CAB advisor. The grounds for the review were as follows:

I consider that in all the circumstances the penalty is excessive and should be reduced or cancelled.

At the time of the incident I was an infrequent traveller with little experience of what was involved with the duty rules and channels. I do not understand English and so was not able to read the relevant signs at the airport. I was travelling alone and so there was no one to help me. I mistakenly thought that as the cigarettes were for my own consumption there was in any event no duty on them, but now realise that this only applied to items from the EU.

When I was stopped at the airport and the cigarettes were confiscated, I was cooperative and explained what had happened. I do not consider that I was dishonest but accept I was naive. I was warned to be more careful in the future and was given the impression that the confiscation of the cigarettes would be the sole consequence of my inadvertently failing to declare the cigarettes.

25. The review upheld the assessment of 11 November 2021, and Mr Omar now appeals against that review decision.

EVIDENCE

26. We found the evidence of both Officer Kirby and Office Reed to be credible and reliable. The only challenge to Officer Kirby's evidence was whether he had provided a copy of Notice 12A to Mr Omar, and we prefer the evidence of Officer Kirby to that of Mr Omar for the reasons we have given. Officer Reed's evidence was not challenged in any material way.

27. In contrast we found Mr Omar's evidence to be of limited assistance. He did not remember the telephone conversations that he had with HMRC. Mr Omar's evidence relating to the importation of the tobacco was inconsistent. When interviewed by Officer Kirby at Heathrow, he said that the tobacco was for his friends – but in subsequent correspondence he said that the tobacco was for personal use. At the hearing, in his oral evidence he said that he had been given the tobacco as a gift by friends in Yemen. But his letter of 2 March 2021 states that he bought the tobacco on the way home. The 11 November 2021 letter states that Mr Omar is an infrequent traveller with little experience of customs formalities – yet in his oral evidence he said that he had travelled abroad roughly ten times (once or twice each year) prior to the September 2019 journey. Mr Omar explains these inconsistencies as having happened because of his limited knowledge of English and because he was tired when he arrived at Heathrow, and just wanted to get home.

28. Mr Omar was questioned about his understanding of customs allowances, and whether he had checked the allowances before going through the green channel at Heathrow. During cross-examination, Mr Omar insisted that he was aware of the allowances, and that the amount he was importing was below the allowance. He was asked where he checked this information, but eventually he admitted that he just "knew" from watching television and talking to people what the allowances were – in other words, he acknowledged that had not checked the UK

customs allowances – for example - either before returning to the UK, or from the posters on display at Heathrow Airport.

29. Dr Heal challenged Mr Omar as to his English language skills, noting that there was nothing in Officer Kirby’s notebook indicating that Mr Omar had any problems understanding Officer Kirby’s questions – and Officer Kirby’s oral evidence was that he would have recorded language difficulties in his notebook. Dr Heal also drew our attention to the notes of the telephone call on 1 February, in which Mr Omar apparently communicated without problems. We are reluctant to make any findings as regards Mr Omar’s language skills. The telephone conversation on 1 February addresses language issues and recommends that another call be held which would have the benefit of an interpreter. And subsequent calls are with the benefit of either a friend or an advisor with English language skills. We can see that Mr Omar’s explanation given on the 11 January 2021 countersigned letter was short and simple, and shows limited ability to write in English. It is also clear from the evidence that the letters of 2 March and 11 November 2021 were written with the help of advice workers. Whilst we consider that Mr Omar has some understanding of English, we find that it is basic.

THE LAW

30. There was no dispute before us as to the law, which we summarise briefly as follows.

31. The personal allowances for importing tobacco products into the UK from outside the European Union were set out in the Travellers Allowances Order 1994 (SI 1994/955). The amount of tobacco in Mr Omar’s possession was roughly 50 times the relevant allowance.

32. Section 8(1) Finance Act 1994 (“FA 1994”) provides that HMRC may issue penalties, equivalent to the amount of duty evaded, where a person has engaged in conduct for the purpose of evading any duty of excise and that person’s conduct involves dishonesty. Section 25(1) Finance Act 2003 (“FA 2003”) provides that HMRC may issue penalties, equivalent to the amount of duty evaded where a person has engaged in conduct for the purpose of evading customs duty and that person’s conduct involves dishonesty. Section 8(4) FA 1994 and section 29(1) FA 2003 allow HMRC to reduce these penalties as they see proper. The total amount of (customs and excise) duty evaded by Mr Omar was £2272 and the penalties imposed on him were reduced by 40% to £1363 on account of his disclosure and co-operation.

33. Mr Omar did not dispute that he had significantly more tobacco with him than was allowed and that he had gone through the “Green Channel” with it. He did, however, dispute HMRC’s assertion that he had been dishonest. In essence, his case was that he believed that he had complied with the relevant rules.

34. Section 16(6) FA 1994 (for excise duty) and Section 33(7)(a) FA 2003 (for customs duty) provide that the burden of proof is on HMRC to establish that the Appellant has engaged in conduct for the purpose of evading the duty and that his conduct involved dishonesty. The standard of proof is the ordinary civil standard, namely proof on a balance of probabilities.

35. The test of dishonesty in the civil penalty regime has been discussed in a number of cases.

36. Judge Pelling QC (sitting as a High Court Judge) in an appeal against a decision of the VAT and Duties tribunal in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported) said:

In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards

of honest conduct. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were.

37. That the civil test of dishonesty is essentially objective was confirmed by Lord Hoffmann in *Barlow Clowes International Limited v Eurotrust International Limited* [2005] UKPC 37, where it is stated at [10]:

Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.'

38. While the test for dishonesty is primarily objective, Lord Nicholls has remarked on the subjective element that remains relevant to the test as follows:

Honesty, indeed, does have 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. Further, honesty and its counterpart, dishonesty, are mostly concerned with advertent conduct, not inadvertent conduct.

39. In respect of how this 'subjective element' is to be taken into account by the court, Lord Nicholls' guidance is:

Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.

40. In essence the question for us to decide is whether HMRC have satisfied us that, taking into account Mr Omar's experience and intelligence and his actual state of knowledge at the relevant time, he was behaving in a way which was dishonest according to normally acceptable standards of honest conduct. But, if he was so behaving, it is not necessary that he should actually have appreciated that he was acting dishonestly; it is sufficient that he was. Of relevance in the circumstances of Mr Omar's case, the First-Tier Tribunal in *Zuned Osman v HMRC*, [2016] UKFTT 524 (TC), put the point like this:

In reaching a judgment as to alleged dishonesty in civil penalty cases the tribunal must have regard to the fact that while the test is primarily objective, the tribunal's fact-finding responsibilities in relation to the taxpayer's knowledge are critical. For example, by normally accepted standards proceeding through the green channel while in possession of goods on which duty is clearly due might well be indicative of dishonesty by those objective standards. But what if the person did not understand the difference between the green and red channels, and could not read the relevant customs warnings at the airport?

DISCUSSION

41. We have no hesitation in finding that HMRC have satisfied the burden of proof that Mr Omar was dishonest in evading duty on the tobacco he imported.

42. Whilst Mr Omar's letter of 11 November 2021 states that he is an infrequent traveller, we find that in fact he is a regular international traveller – travelling abroad at least once each year. Because of his experience of travelling internationally, we find that he would be familiar with the operation of customs and the use of red and green channels internationally. We do not believe Mr Omar when he said to Officer Kirby that he did not know what going through the green channel meant – and in any event, even after Officer Kirby explained that this meant that

he had nothing to declare, Mr Omar confirmed that he had nothing to declare. Whilst we acknowledge that Mr Omar's understanding of English is basic, we find that it would have been sufficient to understand Officer Kirby's questions and responses – and there is nothing in Officer Kirby's notebook to suggest otherwise.

43. Mr Omar's evidence that he believed that the tobacco he was importing was within the customs allowances demonstrates that he was aware of the existence of these allowances. Further, he would have been aware of the posters around Heathrow Airport's baggage hall explaining the allowances – and even taking account of his basic understanding of English, we find that his English would have been sufficient either to understand the posters or to appreciate that he would need to ask someone if he needed to declare the tobacco he was carrying.

44. We find that Mr Omar's behaviour in going through the green channel at Heathrow and not declaring the tobacco was dishonest. It was not the behaviour of a reasonable and honest individual, taking account of Mr Omar's intelligence and previous experience of international travel.

45. Mr Omar's evidence about the tobacco was inconsistent – whether he imported the tobacco for friends or for his own use, or whether it was given to him as a gift or he purchased the tobacco himself on his way home to the UK. We do not believe that these kinds of inconsistencies arise because of only a basic understanding of English or because someone is tired. These are indicators that Mr Omar's evidence is unreliable and support our finding that he was dishonest.

46. As regards HMRC's mitigation, we have no reason to disturb HMRC's decision to apply 40% mitigation overall. We find that it fairly reflects his disclosure and co-operation.

DISPOSAL

47. For these reasons we dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

Release date: 02 FEBRUARY 2023

Cases referred to in skeletons, but not mentioned in the decision:

Abou Ramah v Abacha [2006] EWCA Civ 1492

Han v CEE [2001] EWCA Civ 1040

HMRC v Hok [2012] UKUT 363 (TCC)

Ivey v Genting [2017] UKSC 67

N'Daiye v HMRC [2015] UKFTT 0380 (TC)

Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378

Tahir Iqbal Khawaja v HMRC [2008] EWHC 1687 Ch

Twinsectra Ltd v Yardley [2002] UKHL 12