



TC04606

Appeal number: TC/2014/04679

Excise Duty – importation of tobacco products – evasion of duty – appeal against assessment – whether dishonesty – cross application to strike out – no reasonable prospect of the Appellant’s case succeeding – appeal struck out

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AZHAR IQBAL

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NOEL BARRETT**

Sitting in public at Phoenix House, Rushton Avenue, Bradford on 9 March 2015

Mr Azhar Iqbal appeared in person

Mr S Charles of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

5 1. This is an appeal by Mr Azhar Iqbal (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) in a letter dated 11 June 2014, to issue an Excise and Customs Civil Evasion Penalty in the sum of £2,015.00 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of excise duties.

10 2. HMRC make a cross application for the Appellant’s Notice of Appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on the basis that the Tribunal does not have jurisdiction to hear the matter or, in the alternative, on the basis that there is no reasonable prospect of the Appellant’s case succeeding.

15 **Background**

3. On 02 June 2013, the Appellant was stopped and questioned on entering the Green ‘nothing to declare’ Channel at Manchester Airport, Terminal 2, arriving from Islamabad, Pakistan on flight PK701 by a UK Border Force Officer.

20 4. After initial questioning relating to baggage, prohibitions and restrictions and allowances, the Appellant’s baggage was searched, revealing 12,000 King Size Filter (KSF) cigarettes.

25 5. After the goods were discovered the Appellant stated they were for personal use, however, the Appellant is a non-smoker and said they were for his sons who both smoke and are students on a low income. The overall quantity of cigarettes seized was 60 times the Appellant’s personal allowance.

30 6. The UKBF officer seized the cigarettes found in the Appellant’s possession as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979. The UK Border Force Officer issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice ENF156 and Warning Letter BOR 162, both of which the Appellant signed.

35 7. On 26 February 2014, HMRC (Officer Phipps) wrote to the Appellant informing him of the ongoing investigation for the imposition of a Civil Evasion Penalty under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Excise Duty. The Appellant was invited to cooperate with the enquiry and advised as to the actions he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on his response and cooperation with HMRC’s enquires.

8. On 13 March 2014, in the absence of a reply from the Appellant to HMRC's letter as detailed above, a reminder was issued by Officer Phipps.
9. On 15 March 2014 the Appellant wrote to Officer Phipps. He said that his visits to Pakistan were purely to attend to his sick father who was suffering with bowel cancer.
5 On the visit in question his father passed away. He said that whilst out shopping he noticed that the price of cigarettes was exceptionally low compared with UK prices.
10. Both his sons smoke and tend to spend most of their money on cigarettes. Even though he has tried to get them to give up smoking on many occasions he decided to cut their spending and purchased the cigarettes.
- 10 11. He has stated he was unaware of the consequences and implications involved but due to being in mourning he didn't consider the idea of smuggling. He stated he was deeply sorry for his actions and sincerely apologised and said that the cost of the cigarettes was about £300.00 equivalent. He stated he was a non-smoker and had never had the need to purchase tobacco. The Appellant also said that there was no
15 attempt to generate revenue from it and that he had made three visits to Pakistan within the last two years
12. The Appellant signed, dated and returned a copy of Officer Phipps letter dated 26 February 2014, indicating that he had read and understood its contents.
13. On 11 June 2014 Officer Phipps issued a civil penalty 'notice of assessment' to
20 the Appellant in the sum of £2,015.00 (£78.00 custom civil evasion penalty and £1,937.00 excise civil evasion penalty) with 40% reduction as the Appellant had responded to all correspondence sent to him within the time limits.
14. On 24 June 2014 Officer Phipps received a letter from the Appellant stating that
25 when he entered the Green Channel he had tobacco goods bought from Pakistan for his family's personal use. He thought the amount of tobacco he had would not prevent him from passing through the Green Channel. He stated that if he thought that he was not entitled to go through the Green Channel then he would not have done so.
15. On 4 July 2014 Officer Phipps wrote to the Appellant informing him that the
30 penalty had to be upheld and explained some procedural points including confirming to the Appellant that he was 60 times over the personal allowance limit.
16. On 12 July 2014 the Appellant again wrote to Officer Phipps. The Appellant said that he was not interviewed by anybody, but was simply handed the relevant paperwork. He also stated that when the penalty was imposed the cigarettes should have been returned to him and a double fine was effectively being imposed, which he
35 felt was unjustifiable. He added that he was self-employed and that because his income was below average, under no circumstances could he pay the penalty.
17. On 24 July 2014 Officer Phipps again wrote to the Appellant to say that that the Appellant's latest correspondence did not contain any new information and that the penalty had to be upheld.

18. By Notice of Appeal dated 26 August 2014, the Appellant appealed the decision of 11 June 2014 to the First-tier Tribunal.

The Law

19. Finance Act 1994, Sections 8(1) and 8(4)

5 Penalty for evasion of excise duty.

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

(a) any person engages in any conduct for the purpose of evading any duty of excise, and

10 (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—

15 (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. (...)

20 Finance Act 2003, Sections 25(1) and 29(1)(a)

25 Penalty for evasion.

(1) in any case where

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

25 (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.

30 (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

35 (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. (...)

Customs and Excise Management Act 1979, Sections 78(3) and 139

78 Customs and Excise control of persons entering or leaving the United Kingdom.

(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or level 3 on the standard scale, whichever is the greater. (...)

5 139 Provisions as to detention, seizure and condemnation of goods, etc

(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

10 (2) Where any thing is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—

(a) deliver that thing to the nearest convenient office of Customs and Excise; or

15 (b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

(3) Where the person seizing or detaining any thing as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those

20 proceedings are completed or it is decided that no such proceedings shall be brought.

(4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say—

25 (a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

(b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

(c) ...

30 (5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

35 (6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the Customs and Excise Acts.

40 (7) If any person, not being an officer, by whom any thing is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

45 Travellers' Allowance Order 1994

1. This Order may be cited as the Travellers' Allowances Order 1994 and shall come into force on 1st April 1994.

2. (1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage.

(2) For the purposes of this article—

(a) goods shall be treated as contained in a persons personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

(b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;

(c) "third country", in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25 February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17 May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16 December 1991).

3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
- his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
- The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

The penalty can be mitigated (reduced) to any amount, including nil. Our policy on how the penalty can be reduced is set out in Section 3.

3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100 per cent import duties evaded will normally be reduced as follows:

- Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
- Up to 40 per cent - fully embracing and meeting responsibilities under the procedure by, for example: supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.

In most cases, therefore, the maximum reduction obtainable will be 80 per cent of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

10 HMRC Notice 160 Compliance checks into indirect tax matters

2.3 How can penalties be reduced?

It is for you decide whether or not to cooperate with our check, but if you do you should be truthful as making a statement to us you know to be false, you could face prosecution.

If you choose to cooperate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

You should tell us about anything you think is relevant when we are working out the level of the penalty. At the end of the check we will take into account the extent of your cooperation.

2.3.1 Reductions under Civil Evasion Penalty Rules

The maximum penalty of 100% tax evaded will normally be reduced as follows:

- up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them
- up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.

In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

30 **The Appellant's case**

20. The Appellant's grounds of appeal are that:

- a) the decision to issue a civil penalty is unjust and unfair.
- b) HMRC have not released the cigarettes to him in order that he can pay the duty on those cigarettes.
- c) The cigarettes were for family personal use, that is for his sons in order to cut their financial burden as they are students without jobs. He was not being dishonest.

HMRC's case

21. That on 2 June 2013 the Appellant entered the Green Channel at Manchester Airport knowing that he had a large amount of cigarettes in his possession which were concealed in his suitcase.

5 22. HMRC submit that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax. He entered the Green Channel, indicating that he had nothing to declare.

23. The Appellant himself does not smoke. He has however travelled to Pakistan on several occasions and as a seasoned traveller should have been well aware of the 200
10 cigarettes allowance/limit. Upon a search of his baggage 12,000 KSF cigarettes were found.

24. The Appellant failed to respond to correspondence issued by the Respondents on 15 January 2014 and 6 March 2014. It was only when the actual penalty notice was issued on 2 April 2014 that the Appellant responded by requesting a review.

15 25. HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty because he acted dishonestly and deliberately took action to positively evade duty and tax.

26. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word 'dishonesty'.

20 "It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of evading tax, then by adding that the conduct must involve dishonesty before the penalty is to attach, Parliament must have intended to add a further element in addition to the mental element of intending to evade tax. We think that that element can only be that when he did, or omitted to do, the act
25 with the intention of evading tax, he knew that, according to the ordinary standards of reasonable and honest people, what he was doing would be regarded as dishonest."

27. Dishonesty in this context follows the guidance given by the Court of Appeal in *R v. Ghosh* [1982] 1 QB 1053, CA, where a two-step test for showing dishonesty was set out:

30 "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. . . If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where
35 the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove
40 animals from vivisection laboratories are acting dishonestly, even though they may

consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.”

28. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest, trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* [2005] UKPC 37. In that case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 was the correct test and was summarised as follows:

“...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. The Court of Appeal held this to be a correct statement of the law and their Lordships agree.”

29. The Appellant’s actions demonstrate that he acted dishonestly and deliberately took action to positively evade duty and tax. His attempt to clear customs without paying any duties by walking through the Green Channel ‘nothing to declare’ with the concealed cigarettes demonstrates his intent to evade duty and tax.

30. The legislation at s 8(1) of the Finance Act 1994 and s 29(1)(a) of the Finance Act 2003 provides that the Commissioners, or on appeal, an appeal Tribunal may reduce the penalty up to nil.

31. The amount of penalty due under the law is an amount equal to the duty evaded or the amount which the Appellant sought to evade. The total duty evaded was £3,360. However, the penalty can be reduced if there is prompt disclosure and cooperation.

32. HMRC decided to allow a reduction of 40%, thereby reducing the overall penalty to £2,015, the reduction was calculated as follows:

Disclosure (maximum allowable 40%) - 20%

Co-operation (maximum available 40%) - 20%

33. The penalty is based on the amount of Customs Duties, Import VAT and assessed Excise Duty that was involved in the offence, and has therefore been correctly calculated.

34. The Appellant has not put forward any grounds of appeal which could allow the Tribunal to reduce the penalty as assessed.

Conclusion

35. The facts of the matter are not in dispute and the Appellant has not challenged the legality of seizure of the goods within the statutory time limit. Where there is no timely challenge, the law provides that the goods are deemed to be condemned as forfeited and the Appellant is deemed to have imported the goods for commercial use.

That is a final decision and the Tribunal has no jurisdiction to consider that issue any further.

5 36. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (*Sahib Restaurant v HM Revenue & Customs*).

10 37. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax. He entered the Green Channel, indicating that he had nothing to declare. He had made three other visits to Pakistan within the previous two years and therefore would have been aware of the limits on the amount of tobacco that can be brought into the country. The Appellant has not, in any event, offered any grounds on which he could successfully challenge the decision to issue the penalty.

15 38. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

20 39. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account the penalty has been calculated correctly and reduced appropriately for disclosure and cooperation.

25 40. Both s 8 FA 1994 and s 29 FA 2003 (which refers to a reduction of penalty under section 25) make it absolutely explicit that neither HMRC nor the Tribunal are entitled to take into account any insufficiency of funds.

41. The appeal is struck out and the decision to issue an Excise and Customs Civil Evasion Penalty in the sum of £2,015 is accordingly confirmed.

30 42. 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.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

40 **RELEASE DATE: 25 AUGUST 2015**