



**TC04697**

**Appeal number: TC/2014/03498**

*Excise Duty - importation of tobacco products - appeal against civil evasion penalty - cross application to strike out - no reasonable prospect of the Appellant's case succeeding - appeal struck out.*

**FIRST-TIER TRIBUNAL**

**TAX CHAMBER**

**RICKY MARTIN**

**Appellant**

**- and -**

**HM REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER SIMON NEWTON**

**Sitting in public at 4<sup>th</sup> Floor City Exchange 11 Albion Street Leeds LS1 5ES on 27 May 2015**

**The Appellant did not attend.**

**Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal by Mr Ricky Martin (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) to assess the Appellant for Excise and Customs Civil Evasion Penalties in the sum of £1,632 notified to the Appellant by letter dated 5 19 March 2014 and reduced to £734 on 7 April 2014.

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 Chambers) 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. 10

3. The Appellant did not attend the hearing. The Appellant had been given notice of the time, date and venue of the appeal hearing and had earlier agreed that the appeal could be heard in his absence.

### 15 **Background**

4. On 21 January 2013 the Appellant, travelling from Lanzarote, entered the green ‘nothing to declare’ channel at Robin Hood Airport. He was stopped and questioned by a UK Border Force (“UKBF”) Officer.

5. A search of the Appellant’s baggage found that the Appellant had 6,200 (above his allowance) mixed brand cigarettes (5,800 Canary Kingdom, 400 Mayfair KSF) inside a black holdall in the centre of the suitcase. 20

6. By virtue of Article 2(2) of Council Directive 92/12/EEC, Lanzarote is a third country for the purposes of s 2 of the Travellers’ Allowances Order 1994. The personal allowance is 200 cigarettes.

7. The goods not declared were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended). They were 32 times over the individual allowance of 200 cigarettes. The goods were seized under s139 of the Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture under s 49 of CEMA. The Appellant was given Notice 1 and was also issued with a seizure information notice and warning letter, both of which he signed. 25 30

8. The Appellant refused to stay for interview and did not read or sign the Officer’s notebook.

9. The legality of seizure was not challenged in the Magistrates’ court and the seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

10. The UKBF referred the matter to HMRC. Consideration was given to the evidence provided in order to determine whether the Appellant should be issued with a penalty, due to his conduct involving dishonesty for the purpose of evading Customs and Excise Duty. 35

11. On 23 January 2014 HMRC wrote to the Appellant informing him of the ongoing investigation for the imposition of a Civil Evasion Penalty under s 25(1) of Finance Act 1994 for the evasion of Customs Duty and VAT and under s 8(1) of Finance Act 1994 for the evasion of Excise Duty. The letter invited any disclosure by the  
5 Appellant and made it clear that any reduction in the penalty was contingent on response and co-operation with HMRC's enquiries.

12. No response was received to the letter of 23 January 2014 and on 12 February 2014 HMRC wrote again to the Appellant advising him that, in the absence of any reply by 26 February 2014, it would be assumed that he did not intend to help with  
10 their enquiries and a decision as to the imposition of a penalty would be made.

13. No response was received to the letter of 12 February 2014 and on 19 March 2014 HMRC issued a penalty based on a Civil Evasion Notice of Assessment in the sum of £1,632.00. This was the amount of duty on 6,200 cigarettes, (thereby excluding from the assessment the 200 cigarettes under the Appellant's personal allowance). The  
15 Notice of Assessment explained how the penalty had been calculated and advised that no reduction had been made.

14. On 24 March 2014 the Appellant wrote requesting a review of the decision. He stated that:

- i. the cigarettes were for personal use;
- 20 ii. as he had paid by cash, in Euros, he thought he could import as many as he liked so long as they were for his own use;
- iii. he didn't realise that Lanzarote isn't in the E.U.;
- iv. he bought the cigarettes to last 6 months and to save money;
- v. no interview took place nor was there a clear explanation of any forthcoming  
25 events;
- vi. he did not respond to the previous letters due to personal problems and because he was diagnosed with depression by his GP.

15. As a result of this disclosure and cooperation the penalty were revised and reduced to £734, (Excise Civil Evasion Penalty £720 and Customs Civil Evasion  
30 Penalty £14) a 55% deduction. This was issued by letter dated 7 April 2014.

16. On 16 April 2014 a further letter was received from the Appellant stating that he still believed he did nothing wrong and all the cigarettes were for personal use and again requested an independent review.

17. A further review was carried out upholding the penalty and on 6 June 2014 the  
35 Appellant was notified of the outcome.

18. On 25 June 2014 the Appellant appealed the penalty to the First-tier Tribunal.

19. In his appeal the Appellant states that the decision dated 6 June was out of time as in excess of 45 days had elapsed. The decision, however, upheld the previous decision. As the review decision provided the Appellant with the same outcome as if no decision had been made the previous decision was thereby deemed confirmed.

5 **The Law**

20. The Customs and Excise Management Act 1979 (“CEMA”) provides:

“49(1)Where-

10 *a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-*

*(i) unshipped in any port, those goods shall... be liable to forfeiture.”*

15 *139(1) Any thing liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer..”.*

21. Paragraph 3 Schedule 3 CEMA provides:

20 *“Any person claiming that any thing seized as liable to forfeiture is not so liable shall, within one month of the date of the notice of seizure or, where no such notice has been served on him, within one month of the date of the seizure, give notice of his claim in writing to the Commissioners ...”*

22. Where notice of a claim is not given, Paragraph 5 Schedule 3 CEMA states:

25 *“If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if in the case of any such notice given, any requirement of paragraph 4 above is not complied with the thing in question shall be deemed to have been duly condemned as forfeited.”*

30 23. Section 8 Finance Act 1994 states:

*“Penalty for evasion of excise duty.*

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

35 *(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), 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.*

*(2) References in this section to a person's evading a duty of excise shall include references to his obtaining or securing, without his being entitled to it—*

- 5                    *(a) any repayment, rebate or drawback of duty;*  
                      *(b) any relief or exemption from or any allowance against duty, or*  
                      *(c) any deferral or other postponement of his liability to pay any duty*  
10                   *or of the discharge by payment of any such liability, and shall also*  
                      *include references to his evading the cancellation of any entitlement to,*  
                      *or the withdrawal of any such repayment, rebate, drawback, relief*  
                      *exemption or allowance.*

15                   *(3) In relation to any such evasion of duty as is mentioned in subsection (2)*  
                      *above, the reference in subsection (1) above to the amount of duty evaded or*  
                      *sought to be evaded shall be construed as a reference to the amount of the*  
                      *repayment, rebate, drawback, relief exemption or allowance or, as the case may*  
                      *be, the amount of the payment which, or the liability to make which, is deferred*  
                      *or otherwise postponed.*

*(4) Where a person is liable to a penalty under this section—*

- 20                   *(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.*

25                   *(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,*  
30                   *(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.*

*(6) Statements made or documents produced by or on behalf of a person shall not be inadmissible in—*

- 35                   *(a) any criminal proceedings against that person in respect of any*  
                      *offence in connection with or in relation to any duty of excise, or*  
                      *(b) any proceedings against that person for the recovery of any sum due*  
                      *from him in connection with or in relation to any duty of excise, by*  
                      *reason only that any of the matters specified in subsection (7) below has*  
                      *been drawn to his attention and that he was, or may have been, induced*  
40                   *by that matter having been brought to his attention to make the*  
                      *statements or produce the documents.*

(7) *The matters mentioned in subsection (6) above are*

(a) *that the Commissioners have power, in relation to any duty of excise, to assess an amount due by way of a civil penalty, instead of instituting criminal proceedings;*

5 (b) *that it is the Commissioners' practice, without being able to give an undertaking as to whether they will make such an assessment in any case, to be influenced in determining whether to make such an assessment by the fact (where it is the case) that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for an investigation;*

10 (c) *that the Commissioners or, on appeal, an appeal tribunal have power to reduce a penalty under this section, as provided in subsection (4) above; and*

15 (d) *that, in determining the extent of such a reduction in the case of any person, the Commissioners or tribunal will have regard to the extent of the co-operation which he has given to the Commissioners in their investigation.*

(8) *Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence, that conduct shall not also give rise to liability to a penalty under this section.”*

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24. Section 25(1) Finance Act 200 states:

*“Penalty for evasion*

(1) *In any case where—*

25 (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), 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”*

30 25. Section 29 Finance Act 2003 states:

*“Reduction of penalty under section 25 or 26*

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

35 (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.*

5                    *(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—*

10                    *(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 of any relevant tax or duty,*

15                    *(c) the fact that the person liable to the penalty, or a person acting on his behalf has acted in good faith”*

### **The Strike out application**

26. Under Rule 8(3) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may strike out the whole or part of the proceedings if:

20                    *“(c) the Tribunal considers there is no reasonable prospect of the appellant’s case, or part of it, succeeding.”*

27. Under Rule 8(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal

*“(a) does not have jurisdiction in relation to the proceedings or that part of them;”*

25                    28. HMRC applies for strike out of the appeal on the following grounds:

a) the Appellant’s appeal is predicated on showing that the tobacco was wrongly seized, i.e. unlawful;

30                    b) the Appellant did not challenge the lawfulness of seizure and this is now duly deemed under paragraph 5 schedule 3 of the Customs and Excise Management Act 1979;

c) the Tribunal lacks jurisdiction to consider arguments relating to the legality of the seizure following *HMRC v Jones and Jones* [2011] EWCA Civ 824 and *HMRC v Race* [2014] UKUT 0331 (TCC);

- d) in the alternative there is no reasonable prospect of success on this or the other grounds of appeal.

### **The Appellant's Case**

29. The Appellant's grounds of appeal can be summarised as follows:

- 5       i. he paid for the cigarettes in Euros;
- ii. he was then under the impression he was in the EU;
- iii. the cigarettes were purchased for his own use.

### **HMRC's Case**

10       30. HMRC contends that the Appellant was stopped in the green channel, which automatically constituted a false declaration that he had no goods attracting Excise or Customs duty. It is a deemed fact that the goods were legally seized and therefore that he had entered the green channel with goods in excess of his allowances.

15       31. The penalties under the relevant Regulations require that the Appellant has been dishonest. A finding of dishonesty requires that act undertaken (entering the green channel with an amount of cigarettes above the allowance) was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what he was doing was, by those standards, dishonest.

20       32. The Appellant has stated, in correspondence, that he wanted to save some money in comparison to costs in England and, in his Notice of Appeal, that he intended to buy a quantity of cheap cigarettes to last him "over the coming months". He had the clear motive of financial gain had he succeeded in passing through the green channel without being challenged.

25       33. HMRC are entitled under s 8(1) of the Finance Act 1994 and s25(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.

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

30        "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 with the intention of evading tax, he knew that according to the ordinary standards of reasonable and honest people that what he was doing would be regarded as dishonest."

35       35. "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 this 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:

- 5           “..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.”
- 10       36. Entering the green channel with non-duty paid excise goods above the allowance is objectively dishonest by the standards of an ordinary, reasonable person.
37. HMRC contends that the subjective element of the test will be met:
- i.     it is well known that Lanzarote is outside the EU for excise purposes;
- ii.    the Appellant is a regular traveller within and outside of the EU, including  
15           previously to Lanzarote;
- iii.   the airport has signage which described the allowances. The signage is designed to inform travellers who are not aware of importation restrictions;
- iv.    accordingly the Appellant would have known of the allowances for importing tobacco and cigarettes.
- 20       38. Further or in the alternative, when stopped the Appellant’s travelling companion stated that they did not know their allowances and the Appellant did not demur. A reasonable person would check the allowances before importing a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.
- 25       39. Finance Act 1994, s 8(1) and Finance Act 2003, s 25(1) provide that a penalty is applicable for conduct involving dishonest evasion of duties and VAT, the penalty being the amount of duty evaded or potentially evaded.
40. No challenge has been brought to the calculation of the duties.
41. The Appellant has submitted that he does not have the funds to pay the penalty  
30           because of his employment situation. HMRC contend that Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.
42. Accordingly the Appeal should be struck out.

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## Conclusion

43. The facts of the matter are not in dispute
- 5 44. The Appellant did not challenge the legality of seizure and the goods were therefore deemed to be duly condemned as forfeit under paragraph 5 schedule 3 of the Customs and Excise Management Act 1979. Thus the legality of the seizure has been deemed a fact.
- 10 45. The Appellant's actions demonstrate that he acted dishonestly and deliberately took the action to positively evade duty and tax. His attempt to clear import controls without paying any duties by walking through the green channel 'nothing to declare' with the concealed cigarettes demonstrates his intent to positively evade duty and tax.
- 15 46. The Tribunal does not have any jurisdiction to reopen the issue as to whether the goods were held for personal use. The Appellant has not put forward any other grounds of appeal other than to say that he will suffer financial hardship and will not be able to pay the penalty. As HMRC say, this is not a valid ground of appeal. The goods were lawfully seized as being held for a commercial purpose without the payment of duty and in consequence HMRC are therefore entitled to assess the duty amount on the goods and raise a penalty under Schedule 41 paragraph 4 of the Finance Act 2008.
- 20 47. The penalties notified to the Appellant on 19 March 2014 are based on the amount of Customs Duties, Import VAT and Excise Duty that was involved in the offence, an amount of £1,632.00. This was subsequently reduced to £734.
- 25 47. Finance Act 1994 s 8(4)(a) and Finance Act 2003 s 29(1)(a) provide that the Commissioners, or on appeal, an appeal tribunal, may reduce the penalty (including to nil).
- 30 48. HMRC considered the matters notified to them in the Appellant's letter of 24 March 2014 and exercised its discretion as to the discount made on the maximum possible penalty, reducing the penalty to £734, being 55% reduction for the limited extent of disclosure of information and co-operation with the enquiry. A 30% deduction was made for early disclosure and a further 25% for co-operation (both out of a maximum of 40%). In our view this discount was properly considered and represents a reasonable exercise of HMRC's discretion to reduce the penalty.
- 35 49. The Appellant has not disclosed any grounds to successfully appeal HMRC's decision to issue the penalty. In our view the penalty has been made correctly and to best judgement given all the circumstances of this case.
50. The appeal is accordingly struck out and the assessed penalties confirmed.
51. 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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**MICHAEL CONNELL  
TRIBUNAL JUDGE**

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**RELEASE DATE: 27 OCTOBER 2015**

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