



TC04797

Appeal number: TC/2014/04398

Excise and Customs Duty - importation of tobacco products - appeal against penalties - cross application to strike out - whether dishonesty - yes - whether any reasonable prospect of the Appellant's case succeeding - no - appeal dismissed.

FIRST-TIER TRIBUNAL

TAX CHAMBER

SIDNEY WITHERS

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER MICHAEL ATKINSON**

Sitting in public at H M Courts and Tribunals Service, Lincoln County Court, 360 High Street, Lincoln on 27 August 2015

Mr Sidney Withers in person

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 Sidney Withers (“the Appellant”) against a decision by
5 HM Revenue and Customs (“HMRC”) on 4 June 2014, to issue Excise and Customs
Civil Evasion Penalties in the total sum of £2,011 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 Duty.

2. HMRC make a cross application for the Appellant’s appeal be struck out under
10 rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules
2009, on the basis that the Tribunal has no jurisdiction to hear the appeal or
alternatively that there is no reasonable prospect of the Appellant’s appeal succeeding.

Background

3. On 11 October 2013 the Appellant arrived at Gatwick Airport on flight VS28
15 from Orlando, Florida. He entered the Green ‘nothing to declare’ Channel where he
was stopped by a UK Border Force officer. The officer explained the personal
allowances to the Appellant who confirmed that he was within the allowances. A
500g box of Golden Virginia was visible on top of the Appellant’s bags. The officer
removed the tobacco and found cartons of cigarettes (1,800) underneath it. The officer
20 asked if there were any more in the Appellant’s luggage and he admitted there was. A
search of the Appellant’s bags revealed:

2,000 Marlboro cigarettes,
2,000 Lambert & Butler cigarettes,
1,600 Richmond cigarettes,
25 9,400 Mayfair cigarettes,
800 Benson & Hedges Gold cigarettes,
400 Superking Black cigarettes,
1.75 kg of Golden Virginia tobacco.

4. The goods were not declared and were over the allowances as set out in the
30 Travellers’ Allowances Order 1994 (as amended). Persons entering the UK and
travelling from outside the EU are entitled to bring in 200 cigarettes. The Appellant
stated that he wanted to take full responsibility for the goods and that it was nothing to
do with his travelling companion Ms Shaw. The goods were seized under s 139 of the
35 Customs and Excise Management Act 1979 (“CEMA”) as being liable to forfeiture
under s 49 of CEMA and the officer issued forms BOR156 and BOR162 as well as
Public Notices 1 and 12A.

5. The legality of seizure was not challenged in the Magistrates’ Court within one
40 month and the seizure was therefore deemed to be legal pursuant to paragraph 5
schedule 3 CEMA.

6. On 8 May 2014 HMRC notified the Appellant of ongoing investigations for the
imposition of a Civil Evasion Penalty under s 25(1) of Finance Act 2003 for the

- evasion of Import VAT and s 8(1) Finance Act 1994 for the evasion of Excise Duty. The letter invited any disclosure by the Appellant and made it clear that any reduction in the penalty was contingent on response and co-operation with HMRC's enquiries. 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 response and co-operation with HMRC's enquires. The Appellant was given the opportunity to provide any relevant information which he thought should be taken into account in calculating the amount of the penalty.
- 5
- 10 7. The Appellant did not respond to the communication and therefore HMRC on 22 May 2014 again invited the Appellant to advise them of any representations he wished to make in respect of the seized goods.
- 15 8. On 22 May 2014 the Appellant wrote to HMRC enclosing a signed copy of HMRC's letter of 8 May 2014 stating that he read and understood its contents. The Appellant explained he had bought the goods as birthday and Christmas gifts for his brother and three sisters because they did not have much money.
- 20 9. On 4 June 2014 HMRC issued a civil penalty notice of assessment to the Appellant for the sum of £146 (customs civil evasion penalty) and £1,865 (excise civil evasion penalty). HMRC had allowed a 10% reduction for disclosure and 10% for co-operation (out of a maximum for each of 40%). The penalty also took into account the 200 cigarettes personal allowance.
10. The Appellant requested a review of the decision received by HMRC on 20 June 2014.
- 25 11. On 1 August 2014 HMRC informed the Appellant that the decision to issue the penalties had been upheld. HMRC advised the Appellant that there was an error in the calculation of the original penalty which was being reduced to £2,010.
12. The Appellant lodged a Notice of appeal with the Tribunal on 12 August 2014.

The Law

13. The legislation relevant to this appeal is:
- 30 Finance Act 1994, Sections 8(1) and 8(4)
- “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
- 35 (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—

- 5 (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. (...)

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

10 “s25 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
- 15 (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—

- 20 (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
- 25 any part of the reduction previously made by the Commissioners. (...)

Customs and Excise Management Act 1979, Sections 49(1), 78(3) and 139

“49(1) Where-

- 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,
- 30 without payment of that duty-
- (i) unshipped in any port,
- those goods shall ...be liable to forfeiture.”

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

- 35 “S78(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. (...)

S139 Provisions as to detention, seizure and condemnation of goods

(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.

5 (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

10 (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
15 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—

20 (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;

25 (c) nothing in [section 31 of the Police (Northern Ireland) Act 19987 shall apply in relation to that thing.

(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.
30

(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.

35 (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.

40 (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.”

Paragraph 5 Schedule 3 CEMA states:

“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.”

Travellers’ Allowance Order 1994

5 “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—

15 (a) goods shall be treated as contained in a person’s 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;

20 (c) “third country”, in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th 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 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991

25 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.”

30 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:

- 35 • 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.

40 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:

- 5
- 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.

10 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.”

HMRC Notice 160 Compliance checks into indirect tax matters

15 “2.3 How can penalties be reduced?

It is for you decide whether or not to co-operate 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 co-operate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

20 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:

- 25
- 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.

30 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.”

The Appellant’s Case

35 14. The Appellant’s grounds of appeal as stated in his Notice of Appeal are that:

- He won some money on a bet so went on holiday;
- He decided to buy some cigarettes as Christmas presents for his family which is why he had a variety of cigarettes;

- He did not bring the goods in to sell commercially and cannot afford to pay the penalty.

15. At the hearing the Appellant argued the grounds of appeal as set out in his Notice of Appeal. He added that some of the cigarettes had been purchased on the plane back from America and that it was unfair that he had not been reminded what the tobacco allowances were from non EU countries.

16. In cross examination by Mr Davies the Appellant admitted that he knew he had more than his allowance “but it was for the family”.

HMRC’s Case

17. 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. The Appellant had in his luggage a quantity of tobacco which was forty-three times over his personal allowance.

18. 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 the action to positively evade duty and tax.

19. The penalties under these provisions require the Appellant to have been dishonest. A finding of dishonesty requires that the 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. The Appellant’s claim that he was not going to sell the cigarettes or that he does not have the funds to pay is irrelevant. HMRC contend that lack of funds is not in itself a ground for appealing the penalty. Further the law permits personal goods of 200 cigarettes or 250g of hand rolled tobacco into the United Kingdom from a ‘third country’. Any goods in excess of this must be declared and the duty paid.

21. The Appellant had undertaken two previous trips to third countries (including Tenerife and the USA) in the previous two years leading up to this seizure and would have known what the duty allowances were.

22. The quantity of goods being well in excess of his personal allowance combined with the Appellant’s travel history and the Appellant’s evident dishonesty in answering questions put to him by the UKBF officer supports the contention that this must be a considered deliberate act.

23. In any event, entering the green channel with non-duty paid excise goods above the allowance is objectively dishonest by the standards of an ordinary, reasonable person.

24. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word ‘dishonesty’:

5 “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.”

10 25. 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:

15 “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 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 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.”

20 26. ‘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:

25 “...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.”

30 27. The Appellant’s actions in attempting to clear customs 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.

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

29. HMRC exercised its discretion as to the amount of discount to be allowed. The Appellant gave a brief account of why he had a large quantity of goods in his possession. However, most of the questions put to the Appellant in the letter of 8 May 2014 remained unanswered. A 10% deduction was allowed for early disclosure and
5 a further 10% for co-operation (both out of a maximum of 40%), that is a total of 20%, which in the circumstances was considered reasonable.

30. The Appellant has not put forward any grounds of appeal which could allow the Tribunal to reduce the penalty as assessed. Accordingly the Appeal should be struck out.

10 **Conclusion**

31. The Appellant imported the cigarettes from the United States, a non EU country, and there are strict limits on the number of cigarettes that can be brought into the UK. The issue as to whether or not the cigarettes were for personal use does not arise. In any event, the facts of the matter are not in dispute and the Appellant did not
15 challenge 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 what that means in practice, is that, in law, 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.

20 32. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed and for the correct amount. That raises the question of whether the Appellant has been dishonest. 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
25 for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (*Sahib Restaurant v H M Revenue & Customs* and *Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

33. In determining the Appellant's culpability we take into account that:

- i. It is well known that tax and duty is payable on imported cigarettes;
- 30 ii. The United States is clearly a non EU country and so no confusion is possible in respect of the "unlimited for own use" provisions when importing from other EU countries;
- iii. The airport has signage which clearly describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. In
35 any event, a reasonable person would check the allowances;
- iv. The Appellant appears to have been a regular traveller and would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes.

- v. Once in the green channel the officer explained the allowances to the Appellant and the Appellant stated that he was within them. It follows that the Appellant intended to deceive the officer with this answer.

34. The Appellant was dishonest if he knew:

- 5 (i) that there were restrictions on the personal import of cigarettes to the UK from the United States, and
- (ii) that he was carrying a greater number of cigarettes than the permissible limit.

10 It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. Moreover he admitted (see para 16) that he knew that he had more than his allowance “but it was for the family”, which of course is no excuse or defence to the imposition of the penalty.

15 35. We have to conclude therefore 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 should have been aware of the limits on the amount of tobacco that can be brought into the country. He has not offered any grounds on which he could successfully challenge the decision to issue the penalties.

20 36. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, penalties are due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

25 37. 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 in our view been calculated correctly and reduced appropriately for disclosure and co-operation.

40. For the above reasons we dismiss the appeal and confirm the Excise and Customs Civil Evasion Penalties in the total sum of £2,210.

30 41. 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
35 “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
RELEASE DATE:**