



TC04983

Appeal number: TC/2015/00637

*EXCISE DUTY and CUSTOMS DUTY– civil evasion penalties –
s8 of FA 1994 and s25 of FA 2003 – the test of dishonesty in civil cases –
whether reduction sufficient – appeal dismissed – penalty amount upheld*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KIAMARZ BAHRAMI BIRGANI

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE DR HEIDI POON
PHILIP JOLLY**

**Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds
on 4 November 2015**

No representation nor attendance by the Appellant

**Niall Carlin, Advocate instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

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DECISION

Introduction

1. The appeal is against civil evasion penalties of £540 imposed by notice of assessment issued on 17 November 2014. Of the total penalties charged, £433 relates to excise duty evasion, and £107 relates to customs duty evasion.
2. The principal issue in this appeal is to determine whether the burden of proof has been discharged by HMRC in imposing the penalties for *dishonest* evasion of:
- (a) excise duty under section 8 of Finance Act 1994, and
 - (b) customs duty under section 25 of Finance Act 2003.
3. The secondary issue for the Tribunal to decide is whether the mitigation applied of 70% against the full chargeable penalties at the discretion of HMRC is sufficient.

Hearing in absence

4. When there was no appearance of the appellant on the day of the hearing at 10am, the Tribunals Service contacted the appellant on the number provided on the Notice of Appeal. There was no reply and a message was left.
5. The Tribunal was satisfied that the appellant had been notified of the hearing, and that no postponement application had been made. We considered the position in the light of Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and decided that it would be in the interests of justice to proceed with the hearing in the appellant's absence.
6. The appellant had subsequently made contact with the Tribunals Service by telephone on 4 and 5 November, and by a hand-written letter dated 10 November, the appellant sent his apologies for not attending the hearing. He explained that he was 'under the impression that [he] had asked the Tribunal to decide the case on papers without [his] attendance', and that he was in any case unwell on the day.

The facts

7. The respondents led evidence of Officer Duncalf of UK Border Force and Officer Dawson of HMRC. From their evidence and the documents made available to the Tribunal for the hearing, we find the following facts.
8. On 10 February 2014, the appellant arrived from Iran at Manchester Airport, Terminal One, arriving from Iran on flight TK1995.
9. From disembarkation to clearing at Customs, there were a number of notices advising which countries are within the European Union (EU) and which are outside the EU. Notices stating the duty free allowances for excise dutiable goods acquired outside the EU were also displayed in the baggage reclaim area and just before the Customs Control entrances at the airport.

10. The appellant entered the Green 'Nothing to Declare' Channel for customs clearance, and was intercepted by UK Border Force Officer Mr Duncalf when he was 'well into the Green Channel'. Mr Duncalf asked the appellant a standard set of questions regarding duty free allowances and the appellant confirmed that he understood the allowances and restrictions.

11. A search of the appellant's luggage revealed the following items:

- (a) 6,000 Iranian Bahman cigarettes
- (b) 600 Marlboro Gold King Size Filter (KSF) cigarettes.

12. The overall quantity of 6,600 cigarettes was 33 times the personal allowance for a traveller coming in from a third country. The goods were seized and the appellant was issued with Public Notices 1 and 12A, and signed both the Seizure Information Notice BOR156 and Warning Letter BOR162.

13. On 3 September 2014, HMRC Officer Mr Dawson wrote to the appellant informing him that he was investigating whether civil evasion penalties were to be imposed following the seizure of the cigarettes. Public Notice 300 on Customs Duty and Import VAT, and Public Notice 160 on Excise Duty were enclosed with the letter. The appellant was invited to make disclosure; it was explained that any reduction in the penalty was contingent on the response and co-operation with HMRC's enquiries.

14. By letter dated 11 September 2014, the appellant replied, stating that:

- (a) 'In no way I attempted to smuggle tobacco into the country in order to avoid tax duties.'
- (b) 'I do not travel abroad regularly. I mostly travel to Iran every 2 years and sometimes on a yearly basis. I do not bring back cigarettes or tobacco even for my own use.' (Examples of what was brought back from previous journeys given.)
- (c) 'When the custom (sic) officer at Manchester Airport asked me, if I had any tobacco with me, I replied yes and told him about what I had in my case (Bahman cigarettes) and the Marlboro that I had in my back (sic) which I was holding.'
- (d) 'It didn't even cross my mind that I was doing something illegal and never intended to sell any of it.'
- (e) 'I smoke very little and prefer these small Bahman cigarettes that I can only buy in Iran.'
- (f) 'The Marlboro was bought in Turkey (duty free) cost £50 for the two boxes at £25 each, and were intended for a friend.'
- (g) The Bahman cost around £30 and was 'for my own use and some to give away as presents. Because they cannot be bought in the UK, I thought they make a good and novel present'.

15. The Tribunal heard in evidence from Officer Dawson that according to official records from the Home Office, the appellant had made nine trips to third countries

5 outside the EU between 2009 and 2014. Officer Dawson observed that this pattern of travel would make the appellant a ‘seasoned traveller’, and the number of trips and frequency that averaged to almost two trips a year was quite different from what the appellant claimed in his letter of 11 September 2014 that he did not ‘travel abroad regularly’.

16. On 17 November 2014, Officer Dawson issued a Civil Penalty Notice of Assessment, in the sum of £540 (£433 for excise evasion and £107 for customs evasion) in relation to the 6,000 Bahman and 400 Marlboro cigarettes seized. The personal allowance of 200 cigarettes was allocated against the Marlboro cigarettes in the appellant’s favour, as Marlboro Gold has a retail price value of £8.27 per 20
10 cigarettes compared to £5.86 for 20 Bahman.

17. The maximum penalty for each category of civil evasion is the full amount of tax or duty evaded. In this case, the amount of excise duty evaded was £1,445 and customs duty (and import VAT) evaded was £357. Mr Dawson allowed a 35%
15 reduction for disclosure of information, and a further 35% reduction for co-operation against the full amounts of potential liabilities. The final penalty charged was therefore at 30% of the maximum penalty that could have been imposed.

18. By letter dated 2 December 2014, the appellant wrote in response to the penalty assessment, and ‘respectfully request[ed] a review by a person not previously
20 involved with this case’ giving his reasons as:

(a) ‘I strongly object to assumption that I was dishonest on 10 Feb 2014. I declared that I had cigarettes immediately after being asked what I had in my bag by a customs officer. It did not occur to me that I had to pay duty on tobacco that I did not intend to sell, regardless I did not try to
25 hide or to mislead officials.’

(b) ‘Secondly I don’t think the duty [word unclear] on the amount of tobacco that only cost me around £80 ’

(c) ‘Finally I am disabled and receiving disability benefit; I would not be able to pay £540 in one go. I am unable to work and I had to go to Iran in early 2014 because my mother in law had fallen ill.’
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19. By letter dated 14 January 2015, the respondents confirmed that the penalty was upheld on review. The appellant lodged a Notice of Appeal, dated 2 February 2015 against the review decision.

20. The grounds of appeal set out are:

35 (1) ‘I informed the customs officer at the airport immediately that I had cigarettes in my luggage and never tried to hide them. I therefore dispute and strongly object being dishonest.

(2) 6,400 (sic 6,000) cigarettes out of 6,600 were small cigarettes roughly a third or a fourth of the size normal cigarette. I therefore should not be paying the duty of normal full sized cigarettes.
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(3) I submit that I have been charged for too much for the amount of tobacco I had.’

The relevant law

Excise duty penalty

5 21. Section 8 of FA 1994 provides as follows:

‘8 Penalty for evasion of excise duty

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

10 (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.

15 22. Under s8(4) of FA 1994, HMRC and on appeal, the Tribunal ‘may reduce any penalty to such amount (including nil) as they think proper’.

Customs duty and import VAT penalties

20 23. The provisions for the imposition of penalties for the evasion of customs duty and import VAT under s25 of FA 2003 are, in all material respects, identical to those set out above for the evasion of excise duty under s8 of FA 1994.

Burden of proof and Tribunal’s jurisdiction

24. The burden of proof lies with HMRC as provided under s16(6) of FA 1994 (for excise duty) and s33(7)(a) of FA 2003 (for customs duty and import VAT). The standard of proof is the civil standard of ‘on the balance of probabilities’.

25 25. The Tribunal has full jurisdiction to consider whether the penalty has been properly imposed, and to reduce the penalty where appropriate, but not on the grounds of inability to pay.

Case law on the test of dishonesty

30 26. The test to be applied is primarily objective, namely: *was the appellant’s behaviour dishonest according to normally accepted standards of behaviour?*¹

¹ A thorough exposition of the law relating to the imposition of civil evasion penalties in respect of customs and excise duty can be found in *Bintu Binette Krubally N’Diaye v HMRC* [2015] UKFTT 0380 (TC), and is not reproduced here. See in particular paragraphs [42] to [50] in respect of the test of dishonesty.

27. The penalties in this case concern civil evasion. The Tribunal has adopted the test of dishonesty set out in *Barlow Clowes International Ltd* ('*Barlow Clowes*')² as the appropriate test in the context of civil liability, instead of using the test for dishonesty applicable in criminal law as set out in *R v Ghosh* ('*Ghosh*')³ and cited in HMRC's Statement of Case.

28. There had been ambiguity concerning whether the test of dishonesty for civil liability should include a subjective element⁴, and this was clarified in *Barlow Clowes*, which states, *inter alia*, at [10]:

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.'

29. The test of dishonesty adopted in *Barlow Clowes* was first set out in *Royal Brunei v Tan* ('*Royal Brunei*')⁵ in relation to civil liability for accessory breach of trust. The leading judgment by Lord Nicholls in *Royal Brunei*, having stated that the test of dishonesty is by '*an objective standard*', remarks on the subjective element in the test in the following terms:

20 '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.'

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

² *Barlow Clowes v Eurotrust International Ltd* [2006] 1 WLR 1476 is the decision by the Privy Council on an appeal from the Isle of Man. The case is significant for the law of England and Wales because it clarifies the interpretation of the test for dishonesty as set out in *Twinsectra Ltd v Yardley* [2002] UKHL12. The status of the Privy Council's decision on *Barlow Clowes* as a relevant authority for English law (to be suitably regarded as having the force akin to that of precedent and not merely persuasive) is carefully analysed by Arden LJ in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492, at [68].

³ The two-step approach set out in *R v Ghosh* [1982] 1 QB 1053 involves (1) *an objective test*: that the action must be dishonest 'according to the ordinary standards of reasonable and honest people what was done was dishonest'; and (2) *a subjective test*: 'whether the defendant himself must have realised that was he was doing was by those standards dishonest'. This contrasts with the test for dishonesty set out in *Barlow Clowes*, which is primarily an objective test.

⁴ See Lord Hoffmann's clarification at [15] in *Barlow Clowes* and Arden LJ at [64] to [66] in *Abou-Ramah*.

⁵ *Royal Brunei Airlines Sdn Bhd v Tan* [1995] All ER 97 concerns civil liability for accessory breach of trust, and is a Privy Council decision. The case sets out the test of dishonesty as applicable for civil liability, and is the test adopted in the House of Lords' decision in *Twinsectra Ltd v Yardley* [2002] UKHL12, thereby confirming its relevance as a precedent for the law of England and Wales.

5 ‘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.’

Discussion

31. The appellant’s first ground of appeal disputes that he had been ‘dishonest’ because he informed the customs officer at the airport *immediately* that he had cigarettes in his luggage and that he had never tried to hide them.

10 32. In applying the test of dishonesty to the facts of the instant case, the Tribunal has regard to the ‘*personal attributes of the third party such as his experience and intelligence*’ as guided by Lord Nicholls. In so doing, the Tribunal has due regard to the following facts:

15 (a) Though English might not have been the appellant’s first language, the appellant has a very good command of the language; from his hand-written correspondence, and the order and manner in which the appellant set out his reasons in the course of his correspondence with HMRC and then with the Tribunals service, the Tribunal can adduce that the appellant had a good grasp of the situation and a very good awareness of the issues involved in this matter;

20 (b) That at the material time the appellant was a ‘seasoned traveller’, having made 9 trips to countries outside the European Union between 2009 and 2014;

25 (c) That as a seasoned traveller, the appellant would be familiar with the signage in and around the airport for the purpose of informing travellers of the restrictions on certain goods that can be brought into the UK *before* going through customs clearance;

 (d) That the ability to read and interpret signs and notices written in English is not in doubt in the appellant’s case;

30 (e) That the quantity of tobacco was 33 times of the allowed limit; the excess was substantial and it was improbable that the limit was inadvertently exceeded;

 (f) That to go through Customs Control at the airport by the Green Channel would normally have involved a choice by decision.

35 33. The Tribunal notes that the appellant was well into the Green Channel when being intercepted by Officer Duncalf. It is immaterial that the appellant informed Officer Duncalf immediately that he had tobacco in his luggage when he was intercepted. The point of declaration was on entering the *Green* Channel, not at the point of being stopped by an officer.

40 34. The Tribunal notes what the appellant stated in his letter of 11 September 2014 concerning the frequency of his travel: ‘I do not travel abroad regularly. I mostly

travel to Iran every 2 years and sometimes on a yearly basis' (see §14(b)). We refrain from drawing any inference as regards the truthfulness of the appellant's statements because he was not available to attest to the meaning of his statements.

5 35. We make our assessment concerning what the appellant knew at the time when he cleared customs control on 10 February 2014 based on the factual detail given in evidence. That in the period leading up to his trip to Iran in February 2014, according to Home Office records, the appellant had made 9 trips outside the EU between 2009 and 2014. By ordinary standards, the frequency of these trips renders the appellant a 'seasoned traveller'.

10 36. As a seasoned traveller, it is reasonable to expect that the appellant would have read the signs and notices in and around any airports regarding what going through the Green Channel signifies. As a seasoned traveller, the appellant would have read signs and notices regarding Customs clearance, and knew, or ought to have known, the duty free allowance limits for 'importing' certain goods from countries outside the
15 EU. By ordinary standards, the quantity of dutiable goods – 6,600 cigarettes – carried by the appellant was 'excessive', and an ordinary person would have considered that he had something to declare. By ordinary standards therefore, the choice of the Green Channel implying the person had 'Nothing to Declare' would have been construed as dishonest.

20 37. The test of dishonesty is an objective test, assessed in the light of what a person actually knew at the time. By ordinary standards and in the light of what the appellant knew, or ought to have known at the time, the appellant's behaviour would be characterised as dishonest, and on the balance of probabilities, HMRC have found it so, and the Tribunal agrees.

25 38. The second ground of the appellant's appeal is that the Bahman cigarettes are smaller than the normal-sized cigarettes and therefore should not be assessed on the same basis. However, the calibration of cigarettes is according to the unit of rolled-up tobacco; each cigarette is one unit, whatever its size. The calibration for cigarettes is not by weight, and the calculation of penalties has been legislated to be referenced to
30 the calibration. The second ground of appeal has no validity in law.

39. The third ground of appeal pertains to the penalties being excessive or disproportionate, in view of the fact that the appellant only paid around £80 for all the cigarettes. This ground of appeal has to be dismissed because (a) the penalties are not intended to be compensatory but to serve a penal and deterrent purpose; (b) the cost of
35 the tobacco to the appellant being much lower is essentially the reason for the attempt to bring in tobacco that can be acquired at a fraction of its retail price in the UK through the avoidance of paying the requisite duties.

40. The appellant has also raised the point in his letter that the goods were for personal use and that he was in no financial position to pay the penalties. These
40 premises are not valid in law for the consideration as regards whether the penalties have been correctly imposed according to the legislation. In respect of civil evasion penalties, the relevant consideration is whether the behaviour concerned, on the

balance of probabilities, had been dishonest by applying an objective test in the light of what the appellant knew at the time.

41. Finally, in view of the 70% reduction already given to arrive at the penalty of £540, the Tribunal considers the mitigation to be more than sufficient.

5 **Decision**

42. For the reasons stated above, the appeal is dismissed. The overall penalty in the sum of £540 is confirmed.

43. 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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**DR HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 24 MARCH 2016