



TC05161

Appeal number: TC/2015/00184

Excise duty and customs duty – civil evasion penalty - appellant entering green channel with 24 kg of shisha tobacco – whether dishonest conduct – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MAKBUL HUSSAIN KARI

Appellant

- and -

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

**TRIBUNAL: JUDGE ZACHARY CITRON
MR JOHN ADRAIN FCA**

Sitting in public at Fox Court, London on 12 April 2016

The Appellant in person

Ms Sadiya Choudhury, Counsel, instructed by the General Counsel and Solicitor to HMRC, for the Respondents

DECISION

1. This case concerned whether the appellant's conduct in going through the green channel at Gatwick Airport carrying nearly 24 kg of "shisha" (water-pipe) tobacco in his bags amounted to dishonesty, such that HMRC were justified in imposing a civil evasion penalty (the "penalty") in respect of excise duty, customs duty and import VAT.

The appeal

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2. HMRC raised an assessment of the penalty on the appellant by letter of 7 November 2014 from Mrs Gillian Davison of HMRC. The penalty was in the amount of £911 (£688 excise penalty and £223 customs penalty), reflecting total duty evaded of £3,040, reduced by 70% for disclosure (35%, of a maximum (per HMRC policy) of 40%) and co-operation (35%, of a maximum (per HMRC policy) of 40%).

3. Following a request by the appellant for a review of the decision, Mrs Davison upheld her own decision by letter to the appellant dated 5 December 2014.

4. The appellant appealed by notice of appeal dated 8 January 2015.

Evidence

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5. We had a hearing bundle and a legislation & authorities bundle. Mr Christopher Howes, UK border force officer, provided a witness statement and gave evidence at the hearing, as did Mrs Gillian Davison of HMRC. The appellant also gave evidence at the hearing.

25 Facts – agreed and disputed

6. The following facts were not in dispute:

(a) On 5 March 2014, the appellant arrived at London Gatwick Airport, having travelled from India via Dubai. He was carrying nearly 24 kg of shisha tobacco (the "Shisha") in his bags, which he had purchased for about £120 in Dubai.

(b) There are signs at Gatwick Airport, both near the baggage reclaim area and in front of the blue, red and green channels, with information on personal allowances for tobacco (250g in the appellant's case)

(c) The appellant entered the green "nothing to declare" channel and was questioned by Officer Howes, who found and seized the Shisha.

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(d) The appellant purchased the Shisha to give to members of his extended family, many of whom took part in what the appellant referred to in correspondence as “shisha smoking”.

5 (e) The appellant himself used to smoke shisha, although he stopped doing so after the incident at Gatwick.

7. According to Officer Howes’ evidence (based closely on his hand written notes, made within two hours of his conversation with the appellant in the green channel), the conversation proceeded as follows (we have extracted the relevant parts) (“CH” means Officer Howes and “MK” means the appellant):

10 CH: Are these your bags?

MK: Yes

CH: Did you pack them all yourself?

MK: Yes

CH: Are you fully aware of the contents?

15 MK: Yes

CH: Has anyone given you anything to bring into the UK?

MK: No

CH: Are you aware it’s illegal to import controlled drugs, weapons, firearms?

MK: Yes

20 CH: Do you have any cigarettes, tobacco or alcohol?

MK: No

CH: Are you sure?

MK: Erm, some tobacco, 500g

Baggage examination detected excess tobacco

25 CH: This is much more than 500g, are you aware of your allowances, 250g of tobacco?

MK: It’s not tobacco

CH: It says tobacco on packaging. Is there any more in the other bags?

MK: No

30 CH: Are you sure?

MK: Yes

CH: if there is more, tell me, as I’m going to search them.

MK: Yes there is more.

Baggage search detected more tobacco

35 MK: I didn’t pack bags

CH: Sir, you already told me you packed them all yourself and you are aware what's in them

8. In his letter of 31 October 2014, the appellant recounted his conversation with
5 Officer Howes in this way:

“On my arrival at London airport custom officers pull me over and asked me what do I have? I told them I have shisha flavour so custom officer open my bags and took the flavours out and they said to me do you know it is illegal to bring tobacco. I replied to officer and said I don't have tobacco with me I have shisha flavour. Then they said it's
10 tobacco. I said no it's not tobacco, and then they showed me the notice written on the goods (Tobacco smoking is dangerous for the health, tobacco smoking causes cancer) something like that don't know exact wording.”

9. At the hearing, the appellant largely accepted Officer Howes' account of their conversation. He did not, however, accept that he had stated that he was carrying
15 about 500g of tobacco, prior to Officer Howes pointing out that the packaging on the Shisha stated that it was tobacco. The appellant maintained that, until Officer Howes pointed this out to him by drawing his attention to the packaging, he did not know that the Shisha was tobacco. The appellant said that he was aware of the personal allowances on bringing tobacco into the country; he said that if he had known the
20 Shisha was tobacco, he would not have brought it in to the country.

10. The Tribunal asked both Officer Howes and the appellant to describe what was written on the packaging of the Shisha. Officer Howes said, as best he could recall, that the packaging had the words “Shisha Tobacco” in large writing. The appellant said the packaging stated only the flavour of the Shisha in large type, such as “Orange
25 Flavour”, “Apple Flavour”. The appellant and Officer Howes agreed that the health warning, referring to the contents as tobacco, was in smaller type on the packaging.

11. We find as a fact that Officer Howes' version of the conversation he had with the appellant in the green channel was accurate; we thus prefer it to the appellant's version, where there was disagreement between them. We find this because Officer
30 Howes committed his version to writing within a very short time of the conversation taking place; because it had more detail than the appellant's version; and because we found Officer Howes to be the more credible witness. We also, for similar reasons, accept Officer Howes' version of what was written on the packaging of the Shisha, although we give this evidence less weight, as it was not recorded in Officer Howes'
35 contemporaneous notes.

12. We shall make findings of fact as regards the appellant's credibility and knowledge of whether the Shisha was tobacco, in our discussion below.

13. HMRC's duty calculations were as follows:

(a) Excise duty was calculated as quantity (23.75 kg) multiplied by a rate per
40 kg (£96.64, set out in Schedule 1 to the Tobacco Products Duty Act 1979 as the rate for “other smoking tobacco and chewing tobacco”). The total excise duty (rounded down to nearest £1) was £2,295.

5 (b) Customs duty was calculated as a percentage (74.9% - the rate for importing ‘smoking tobacco’ and ‘water-pipe tobacco’ from outside the EU, according to a print out from the ‘UK Trade Tariff Tool’ (on www.gov.uk/trade-tariff) produced by HMRC at the hearing) of the value of the goods (taken as 23.75 kg times a price per kg of £11 (taken from a Dubai duty free website), giving £261.25). The total customs duty (rounded down to nearest £1) was £195.

10 (c) Import VAT was calculated as a percentage (20%) of the total value of the goods including customs duty (£261.25 plus £195 plus £2,295). The total import VAT (rounded down to nearest £1) was £550.

(d) The grand total of the excise duty, customs duty and import VAT was £3,040.

14. HMRC confirmed at the hearing that they would not raise assessments in relation to the underlying excise duty, custom duty and import VAT.

15 **The law**

Excise duty penalty

15. Section 8(1) of Finance Act (“FA”) 1994 provides as follows:

“Subject to the following provisions of this section, in any case where –

20 (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.”

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

30 17. Under s8(5) FA 1994, ‘the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty’ is not a matter which HMRC, or the Tribunal, may take into account in exercising their powers under s8(4).

Customs duty and import VAT penalties

18. 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

19. The burden of proof lies with HMRC as to the matters mentioned in s8(1) FA 1994 and s25(1) FA 2003; but it is otherwise for the appellant to show that the grounds on which his appeal is brought have been established (per s16(6) FA 1994 (for excise duty) and s33(7)(a) FA 2003 (for customs duty and import VAT)). The standard of proof is the civil standard of 'on the balance of probabilities'.

20. The Tribunal has full jurisdiction to consider whether the penalty has been properly imposed, and to reduce the penalty where appropriate.

Dishonesty

21. Lord Nicholls provided an oft-cited description of dishonesty in civil liability cases, in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 378 at 389 (a Privy Council case):

'... acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. 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. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.'

'In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.'

22. Later in his judgement, Lord Nicholls said (at 391):

'... 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.'

23. The objective and subjective aspects of dishonesty were more recently clarified thus by Arden LJ in the Court of Appeal in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 (at [59]):

5 ‘...it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour.’

24. Arden LJ (at [66]) acknowledged the subjective aspects of dishonesty, referring to statements by Lord Nicholls in the passages from *Royal Brunei* reproduced above.

10 25. As for the level of knowledge required, Rix LJ in *Abou-Ramah* (at [23]) cited Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* (at [10]), a Privy Council case:

15 ‘In summary, [the judge] said that liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example a misappropriation of other people’s money) or it may consist in suspicion combined with a conscious decision not to make enquiries which might result in knowledge: see *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469. ... The Court of Appeal held this to be a correct statement of the law and their Lordships agree ...’

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26. In addition to the above cases, Ms Choudhury cited *Sahib Restaurant v HMRC* Case M7X 9 April 2008 (unreported) where HH Judge Pelling QC (sitting as a judge of the High Court) stated at [40] that the correct test in relation to civil penalties was as follows:

25 ‘In my view in the context of the civil penalty regime at least the test for dishonesty is that identified by Lord Nicholls in [*Royal Brunei*] as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards of honest conduct.

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

Appellant’s arguments

27. The notice of appeal made the following points:

- 35 (a) The Shisha was not for sale but for home use only
- (b) The appellant honestly did not know that the Shisha came under tobacco products. He know it only as “shisha flavour”
- (c) The Shisha had been taken at the airport at the airport and not given back – so why was he being charged the tax?
- 40 (d) The Shisha was worth less than £120

28. At the hearing, the appellant expressed incredulity at the “rate per kg” of £96.64 used in the calculation of excise duty. In his view, this was a very expensive rate, far higher than the price for shisha tobacco on the London “street”.

Respondent’s arguments

5 29. Ms Choudhury emphasised the following in her submissions:

(a) The appellant entered the green channel with shisha that was 96 times his personal allowance of tobacco

(b) When initially questioned by Officer Howes, the appellant first denied having any tobacco, but then admitted having 500g

10 (c) When Officer Howes found more than 500g in the appellant’s first bag, the appellant stated it was not tobacco, despite the fact that this was stated on the packaging, as subsequently accepted by the appellant

(d) The appellant further denied having any more tobacco in his bags, before admitting that he did have further quantities when Officer Howe stated that he was going to search them

15 (e) The appellant then claimed that he did not pack his bags, having previously stated that he had

30. Ms Choudhury submitted that the appellant

20 (a) would have been aware of his personal allowance from the signs posted around Gatwick Airport, including at the entrance to the channels; and

(b) was aware that he was carrying shisha tobacco considerably in excess of his allowance

His actions in entering the green channel were therefore, in HMRC’s submission, dishonest.

25 31. Ms Choudhury further submitted that the appellant’s claim that he was not aware that the Shisha was tobacco, is not credible when considered in the light of the fact that

(a) the packaging stated that it was tobacco;

30 (b) the appellant admitted having 500g of “tobacco” but, apart from the Shisha, no other type of tobacco was found in his bags; and

(c) in his correspondence with HMRC, it was clear that the appellant was aware that shisha was “smoked”.

35 32. As for the appellant’s complaint that the penalties are greater than the amount he paid for the Shisha, Ms Choudhury submitted that the penalties were calculated by reference to the amount of duty of would have been payable in respect of the Shisha if it had been declared – and this was in accordance with s8(1) FA 1994 and s25(1) FA 2003. The fact that the appellant had paid much less for the Shisha than the duty

payable in respect of it does not mean the penalty ought to be less, or had been calculated wrongly.

33. Similarly, in Ms Choudhury's submissions, the fact that the Shisha had been seized does not prevent the penalty being imposed. It is open to an individual whose
5 goods have been seized to challenge that seizure by means of condemnation proceedings in the magistrates court, regardless of whether or not a penalty is imposed.

34. Ms Choudhury submitted that a further discount to the penalty, on top of the 70% granted by HMRC to take account of cooperation by the appellant, would not be
10 appropriate.

35. Ms Choudhury further submitted that the fact that the appellant may not have sufficient funds to pay the penalty is not a reason that can be taken into account in considering whether the penalty ought to be reduced: s8(5) FA 1994 and s29(3) FA 2003.

15 36. In closing, Ms Choudhury submitted that the only question in dispute in the appeal was whether the appellant genuinely believed that the Shisha was not subject to duties.

Discussion

37. This case turns on whether, by going through the green channel with the Shisha
20 in his bags, the appellant was engaging in conduct for the purpose of evading excise and custom duties, and that conduct involved dishonesty. The test for dishonesty is whether the appellant acted as an honest person would in the circumstances, assessed in the light of what he actually knew at the time.

38. In terms of what the appellant "knew" at the relevant time:

25 (a) he was entirely familiar with what shisha was - a substance smoked for recreational purposes – having smoked it himself, having many family members who smoked it regularly, and having just bought 24kg of it in Dubai; and

(b) he knew that there were limits on the amount of tobacco that could be brought into the country without paying duties, and that 24kg considerably
30 exceeded those limits.

39. What is disputed is whether the appellant knew that the Shisha was tobacco: HMRC say he did, the appellant says he didn't.

40. We did not find the appellant a wholly reliable witness: we preferred Officer Howes' account of their exchanges in the green channel to the appellant's (although
35 there was considerable overlap between the two); and, during those exchanges, the appellant contradicted himself a number of times.

41. We do not, however, find that the appellant was simply lying when he asserted to us that he did not know, upon entering the green channel, that the Shisha (which he

consistently referred to as a ‘flavour’) was tobacco. There are degrees of ‘knowledge’, and we accept that the appellant did not have *certain* knowledge that the Shisha was tobacco.

5 42. We do find, however, that the appellant knew there was a serious possibility that the Shisha was tobacco. We infer this from his familiarity with shisha as a substance which, like other forms of tobacco, is smoked for recreational purposes; and also from the odd twist in his conversation with Officer Howes in the green channel, whereby he first said that he had 500g of tobacco in his bag and then (after the Shisha was discovered by Officer Howes) asserted that the Shisha was not tobacco. HMRC
10 submit that this exchange proves that the appellant knew all along that the Shisha was tobacco ie his first statement was his true view and his later statement was a lie. We are not entirely convinced by this interpretation. We find that the appellant did not have certain knowledge on this matter, but was quite willing, opportunistically, to argue it both ways. We find this borne out by the fact that once Officer Howes
15 showed him the wording on the health warning on the packaging, the appellant accepted, without further argument, that the Shisha was, in fact, tobacco. In our assessment, this did not come altogether as a surprise to him – rather, it was confirmation of something he always knew was a serious possibility, but wasn’t entirely certain about.

20 43. Having made findings as to what the appellant knew at the time he entered the green channel, we now have to decide whether, in the light of this knowledge, his conduct met normally accepted standards for honest behaviour. We find that a person who had the appellant’s level of knowledge – that there was a serious possibility that the Shisha was tobacco – would, behaving honestly, have sought assistance from one
25 of the officials at the scene (as to whether the Shisha was indeed tobacco) rather than simply proceeding through the green channel. We find that the appellant deliberately turned a blind eye to whether the Shisha was, in fact, tobacco. Such conduct was, by normally accepted standards of behaviour, dishonest.

44. Turning finally to other points raised by the appellant in his notice of appeal:

30 (a) The fact that the appellant bought the Shisha for £120 is not relevant to the calculation of the penalty:

(i) the penalty is of an amount equal to the duties evaded, reduced to such amount as HMRC (or the Tribunal) think proper;
(ii) the price paid for the Shisha by the appellant does not affect the
35 amount of duties: this can be seen from HMRC’s method for calculating the duties (see [13] above), which we find to be correct.

(b) The seizure of the Shisha is deemed to be lawful as it was not challenged in the magistrates court. The penalty is imposed in addition to the seizure.

(c) HMRC have reduced the penalty by 70% in recognition of the appellant’s
40 co-operation and disclosure. We do not consider it proper, given our finding in [43] above, to reduce it further.

Conclusion

45. The appeal is dismissed; the penalty is upheld as assessed.

46. This document contains full findings of fact and reasons for the decision. Any
5 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

**ZACHARY CITRON
TRIBUNAL JUDGE**

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RELEASE DATE: 10 JUNE 2016