[2016] UKFTT 0451 (TC)

TC05204

Appeal No: TC/2015/02323

PENALTY — excise duty civil evasion and customs duty and VAT evasion penalties imposed on traveller from outside EU importing large quantity of tobacco -— whether dishonesty established — yes — scale of penalties — 80% reduction allowed by HMRC — whether further reduction justified — no — appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN:

ALAN JOHN JONES	**Appellant**
and	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

Tribunal: Judge Colin Bishopp

Decision on papers only

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DECISION

1. In this appeal Mr Alan Jones challenges the imposition on him by the respondents, HMRC, of a penalty for the dishonest evasion of excise duty, and a separate penalty for evasion of customs duties and VAT. The penalties were imposed in accordance, or purported accordance, with s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 respectively, and they amount in all to £466.

2. Mr Jones lives in Thailand, and it has been agreed between the parties that this appeal should be determined on the basis of written submissions only. I had a skeleton argument prepared by Mr Thomas Chacko of counsel for HMRC, and a response prepared by Mr Jones. In addition I had copies of various relevant documents, including a witness statement made by Ms Catherine Whittaker, the HMRC officer who decided on the amount of the penalties.

3. It does not seem to be disputed that on 2 May 2013 Mr Jones arrived at Heathrow airport on a flight from Bangkok via Muscat. After disembarking he left the baggage hall by means of the Green, or nothing to declare, channel, but was intercepted within the channel by a Border Force officer, who found in Mr Jones' hand luggage 8.55kg of hand-rolling tobacco. The quantity of hand-rolling tobacco which a traveller from a country outside the European Union may bring into the United Kingdom without payment of UK excise duty is 250g: see the Travellers' Allowances Order 1994, art 2 and Schedule. The tobacco was seized and Mr Jones has not sought to challenge the seizure by causing the Border Force to take condemnation proceedings in the magistrates' court.

4. On 20 May 2014 HMRC wrote to Mr Jones to inform him that an enquiry had been opened into his conduct. The letter made it clear that the outcome of the enquiry might be that he would receive an assessment for the duty chargeable on the tobacco and that a penalty or penalties might be imposed on him. Mr Jones was invited to cooperate with the enquiry, which he did, and promptly. He did not dispute the contention that he had attempted to import the tobacco without payment of UK duty, but maintained that he had been merely negligent in failing to check the permitted allowance. He said he had bought the tobacco for his own use and in order that he could give a substantial part of it to his two sons, who I deduce are resident in the UK. He also provided, as requested, details of his several journeys between the UK and Thailand during the preceding two years, and of one trip to France.

5. No assessment for the duty was made, and Mr Jones has been subjected only to the penalties. The maximum amount of each penalty is 100% of the duty. The appropriate excise duty was £1720 and the customs duty and VAT amounted to £613, a total of £2333. Mr Jones does not appear to challenge those figures, and I have no reason to think they might be incorrect. Ms Whittaker recognised that Mr Jones had made no attempt to conceal the goods from the Border Force officer at Heathrow and that he had cooperated fully with her enquiry, and she reduced the maximum penalties by 80%, 40% for disclosure and a further 40% for cooperation. These are the maximum amounts of reduction permitted by HMRC's published guidelines, save in exceptional cases; HMRC say that this is not such a case. Ms Whittaker's decision was upheld, without amendment, on review.

6. I have not set out any of the relevant law since there does not appear to be any dispute, with the proviso to which I come next, that what HMRC have done complies with it. I should nevertheless make it clear, subject to the same proviso, that I am satisfied that HMRC do have the power to impose penalties such as these on a person in Mr Jones' position.

7. The proviso is that penalties may be imposed on a person pursuant to s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 only if HMRC are able to show that, as both subsections put it, "his conduct involves dishonesty". In his written submissions Mr Jones accepts that the penalties were "justified, as it was negligent and wrong to enter UK with a large amount of tobacco without checking allowance first". However, as Mr Chacko very fairly accepted in his skeleton argument, that is not an admission of dishonesty. I need therefore to determine whether that element of HMRC's case is made out.

8. Ordinarily a court or tribunal makes a finding of dishonesty only when the allegation has been put to the person concerned in clear terms, and after hearing him give evidence, or at least after he has been offered but has declined the opportunity to give evidence. Here, there is no doubt in my judgment that HMRC's case has been put clearly: Ms Whittaker's initial letter made it plain that her enquiries were designed to enable her to ascertain whether Mr Jones' conduct was dishonest, and the letter notifying him of the penalties made it equally plain that HMRC had reached the conclusion that he had acted dishonestly. Mr Jones has not, of course, given evidence but although he has been offered the opportunity to do so it would be unfair to treat his having declined that opportunity as a material factor, suggesting for example a reluctance to expose himself to cross-examination, when the cost of his attending a hearing for that purpose would be disproportionately high. I have, therefore, taken particular care to examine Mr Jones' written submissions.

9. Despite that note of caution I am driven to the conclusion that Mr Jones must have entered the Green channel knowing that he had more tobacco than he could legitimately bring into the UK without paying duty, and that he was attempting to evade the payment of that duty. That is dishonesty within the meaning of the statutory provisions.

10. I reach that conclusion from the following facts. First, although Mr Jones now lives in Thailand, it is apparent from his submissions that he has spent most of his life in the UK. By his own account he is a smoker; it is difficult to accept that a smoker who has lived for a long period in the UK and who makes, as Mr Jones does, frequent overseas trips has not taken the trouble to acquaint himself with the relevant allowances. It is well known to anyone who has entered the UK by air that notices setting out the allowances, and warning of the consequences if excessive quantities are brought in, are prominently displayed in the baggage halls of airports, and it is also difficult to accept that Mr Jones had not seen and read at least one such notice. The amount of tobacco he was carrying was large, so much so that it ought to have occurred to him, if he did not know what was the allowance, to enquire; but he did not do so. He readily admitted that he had a large quantity of tobacco when he was intercepted, but there is no record, and he does not claim, that he protested before it was seized that he believed he was allowed to import such a quantity. In short, I cannot accept that Mr Jones was merely negligent. His conduct is consistent only with a deliberate attempt to evade the payment of the applicable duty.

11. Accordingly I determine that the penalties were properly imposed.

12. The essence of Mr Jones' argument that the penalties should be further reduced lies in his criticism of the manner in which he has been treated by HMRC. It was not until 20 May 2014, that is more than a year after he was intercepted, that Ms Whittaker wrote to Mr Jones to inform him of her enquiry. Even though the delay does not offend any time limit, Mr Jones can be forgiven for thinking, after a year had gone by without any communication at all, that the matter was closed. Bizarrely, although it was sent on 20 May 2014, Ms Whittaker's letter was dated 22 May 2013. It required Mr Jones to respond within 30 days of its date which, as he understandably pointed out, was impossible. No apology for HMRC's error was offered and as far as I can tell it was not until Mr Chacko's skeleton argument was served that HMRC even acknowledged that the letter had been incorrectly dated. Once Mr Jones had made a request for a review, and again when he intimated an appeal, he was told that collection of the penalties would be suspended but, he says, attempts at enforcement were nevertheless made, moreover on at least one occasion at his estranged wife's UK address.

13. I have set out the detail of those complaints since they lead to Mr Jones' contention that because HMRC's actions have put him to expense and inconvenience, and have caused unnecessary stress, the penalties should be further reduced, to nil. I accept that there is some substance in what he says, but unfortunately for him complaints about HMRC's conduct are not a matter over which this tribunal has any jurisdiction—I have no power to do any more than record the complaints and, importantly for this appeal, I have no power to adjust a penalty because of a perception that HMRC have acted unfairly. I agree with the observation of the VAT and Duties Tribunal in *Gent v Revenue and Customs Commissioners* (1995, VAT Decision 13227) that the position might be different if HMRC's conduct had somehow led the person concerned to commit the dishonest act, which of course is not the position here, but that HMRC's conduct after the act has been committed, including in the imposition of the penalty, is not a factor which the tribunal may take into account. Mr Jones' remedy is to make a formal complaint to HMRC and, if he remains dissatisfied, to approach the Revenue Adjudicator.

14. I have nevertheless considered whether there is any other basis on which I might adjust the penalties. The power to do so is conferred by s 8(4)(a) of the Finance Act 1994 and s 29(1)(a) of the Finance Act 2003, which enable me to "reduce the penalty to such amount (including nil) as [I] think proper". (In each case paragraph (b) enables me to increase a penalty, but I do not intend to do that.) Subsections (5) and (3), respectively, impose some limitations on the exercise of the power to reduce a penalty, but none is relevant here. As I have said, the 80% reduction was arrived at by the application of HMRC's published policy. The policy has no statutory force, and is therefore not binding on me. However, unless a policy of this kind can be shown to be based on an error of law, or to be irrational, it should normally be respected in the interests of consistency between taxpayers and upon the basis that the care and management of the collection of taxes is a function of HMRC and not of the tribunal. Thus the question to be asked will almost always be whether the policy has been correctly applied in the case in hand.

15. Here, it is difficult to see any error of application, or more precisely an error to Mr Jones' detriment. He was allowed the maximum permissible reduction for disclosure

and cooperation. As I have said, the policy goes on to provide that in exceptional circumstances a further reduction might be allowed, and the guidance offers the example of an unprompted disclosure of evasion which would otherwise have gone undetected, which is not this case. Of course, there may be other exceptional circumstances, but I do not see what they might be in Mr Jones' case, and he has not identified any himself. As I have found, he attempted to evade the payment of UK duty which he must have known was due. That is conduct which, in my view, should not go unpunished, and I do not think that a penalty of 20% of the duty sought to be evaded can realistically be described as excessive or disproportionate. I recognise that Mr Jones has lost the tobacco, and therefore the money he spent when buying it is, from his perspective, wasted, but I do not see how I can regard that as an exceptional circumstance justifying a reduction in the penalty. Parliament must be assumed to have been aware, when passing the relevant penalty provisions, of the fact that s 139 of the Customs and Excise Management Act 1979 provides for the forfeiture of excise goods such as tobacco imported without payment of the applicable duty, and if it had intended that the forfeiture of the goods should be taken into account in the assessment of any penalty it could easily have said so. The fact that there is no such provision, in my view, is an indication that Parliament intended no offset of that kind.

16. Accordingly I see no grounds on which I might further adjust the penalty and the appeal must be dismissed.

17. 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.

COLIN BISHOPP
TRIBUNAL JUDGE

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