TC04388

Appeal number: TC/2014/03718

EXCISE DUTY - CUSTOMS DUTY - VAT – civil evasion penalties – whether appellant dishonest – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GANJO RASULL **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
ELIZABETH BRIDGE

Sitting in public at Fox Court, Grays Inn Road, London on 8 April 2015

The Appellant in person

Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 6 November 2012, the appellant was stopped in the "green channel" at Gatwick airport and found to be in possession of 24,200 "Esse Aura" cigarettes. The appellant appeals against "civil evasion" penalties imposed under s8 of the Finance Act 1994 ("FA 1994") and s25(1) of the Finance Act 2003 ("FA 2003") totalling £6,549 in connection with those cigarettes.

Evidence

2. We had witness statements from Officer Philip Robinson, of the UK Border Force and from Officer Amy Kowalczuk of HM Revenue & Customs ("HMRC"). The appellant declined to ask any questions of HMRC's witnesses in cross-examination, although Officer Robinson answered questions from the Tribunal. We accepted the evidence of both Officer Kowalczuk and Officer Robinson without qualification.

3. The appellant also gave evidence and Ms Choudhury cross-examined him. We found the appellant to be a straightforward and convincing witness, not least since he was ready to accept points where he was at fault and even to point out facts that were not necessarily helpful to him.

4. Ms Choudhury prepared a very helpful skeleton argument, and bundle of authorities, and made clear and reasoned submissions on behalf of HMRC. She also prepared a bundle of documents. We had no reservation as to the authenticity of any of these documents. Accordingly, Ms Choudhury's submissions largely involved taking the Tribunal through documents contained in the bundle.

Facts

5. We make the following findings of fact set out below. Where we quote, or summarise, a statement of a witness, we can be taken to have accepted it unless we indicate otherwise.

Background

6. The appellant originally entered the United Kingdom in order to claim political asylum. He was eventually given indefinite leave to remain and, in September 2011, obtained a full British passport. He had made one trip to Iraq from the United Kingdom after he had been given indefinite leave to remain, but before he obtained his passport in 2011, and was issued with travel documentation for this purpose.

7. In November 2012, the appellant travelled to Iraq, using his British passport to do so. This was his first trip using that passport and only the second international trip he had made since arriving in the United Kingdom.

8. At the time of this trip, the appellant owned an off-licence business in Derby. He described the customers of that business as mainly "local people". We took that to mean that, while the appellant is a member of the Kurdish community, the customers of his business are primarily of United Kingdom origin.

9. We found that the appellant speaks English to a reasonable standard. We understood the evidence that he gave, the submissions he made and why he made them. We concluded, however, from his Notice of Appeal that he had written himself, that his standard of written English was lower than his standard of spoken English. This led us to conclude that he probably could not read English as well as he could speak it.

The purchase of the cigarettes in Iraq

10. While the appellant was in Iraq, he visited a shop in an airport. There he bought 24,200 "Esse Aura" cigarettes for a total cost of the equivalent of £120. He also had to pay $30 in local duties. The appellant explained that "Esse Aura" cigarettes are widely smoked in Iraq. We ourselves had not heard of the brand and, since we had no evidence to suggest that it is commonly smoked in the United Kingdom, we find that it is not.

11. The appellant stated that he is a smoker and smokes around 20 cigarettes a day. He stated that he bought the cigarettes for personal consumption by him, his girlfriend and his sister. Ms Choudhury challenged this evidence in cross-examination. She pointed out that one person smoking 20 cigarettes a day would take over three years to smoke 24,200 cigarettes. Even if divided evenly between himself, his sister and his girlfriend, he had still bought over a year's supply for each. She suggested that this was not credible and put it to him that he had bought the cigarettes to sell in his off-licence. The appellant denied this. He acknowledged that the quantity he had bought was large. However, he said that the reason for this was the sheer low cost of the cigarettes as compared with high prices in the UK.

12. We accepted that the appellant did not buy the cigarettes for sale in his off-licence. As noted above, we have found that the "Esse Aura" brand is not widely smoked in the United Kingdom. There was also no challenge to the evidence that the appellant gave as to the customer base of his off-licence. We have therefore concluded that the cigarettes would not appeal to his customers.

13. We also accepted that the appellant did buy the cigarettes for the personal use of himself, his girlfriend and his sister. In ordinary circumstances, we would agree with Ms Choudhury that the quantity of cigarettes was simply too great to be for personal use. However, we decided that the sheer low cost of the cigarettes made for extraordinary circumstances. Our own experience is that it is not uncommon for people presented with perceived bargains to buy larger quantities of the goods in question than they would normally, and perhaps even more than they need.

14. The appellant also said that he had assumed that the staff at the airport in Iraq selling him the cigarettes would have told him if there was a problem with the

quantity of cigarettes that he was buying. To support this point he explained that, while he was at Gatwick airport, he had bought some whisky and Gatwick staff had told him that there would not be any problems taking alcohol into Iraq. He therefore expected that, when he bought the cigarettes at a shop in an airport in Iraq, he would be told if there was a problem in taking those cigarettes to the United Kingdom. Had the appellant made even one or two more international trips, we would probably not have accepted that such a view could be genuinely held, as we would expect that, by then, the appellant would have realised that different countries have different restrictions on imports of goods and retail staff could not be expected to have a deep knowledge of all restrictions in force in all countries. However, as we have found, this was only the second overseas trip that the appellant had made from the United Kingdom and we accepted that he did hold this view even though a more seasoned traveller would not.

Bringing the cigarettes back to the United Kingdom

15. The appellant does not dispute that he went through the "green channel" on 6 November 2012. There he was met By Officer Robinson who greeted him and asked where he had arrived from and whether he was travelling alone.

16. Officer Robinson explained that the appellant answered these initial questions and immediately told Officer Robinson that his suitcase was full of cigarettes. That admission was not made in response to a question; it was totally unprompted. Officer Robinson explained that he was surprised by the fact that the appellant had responded to his greeting in this way. From that we concluded that the appellant's behaviour was atypical.

17. Officer Robinson explained that the only items of luggage that the appellant had were suitcases containing the cigarettes. He also had another small bag containing some shopping. He did not have any bags containing toiletries or clothing. The appellant explained that he still had friends and family in Iraq and when he had made his last visit, he had left clothes and other items there. Therefore, he did not need to take clothes or toiletries with him on this visit. There was no challenge to this evidence and we accepted it. We therefore concluded that the absence of a bag containing clothes or toiletries did not suggest that the appellant had made a special trip to Iraq for the purpose of purchasing the cigarettes.

18. Ms Choudhury pressed the appellant on why he had entered the "green channel" despite having a quantity of cigarettes that was 121 times his personal allowance. The appellant said that he simply did not appreciate that there were different channels available to him. He said that he did not understand that entering the "green channel" was very different from entering the "red channel". He said that he had not noticed signs around the airport explaining restrictions on bringing cigarettes into the UK and that no announcements had been made during his flight alerting him to the existence of restrictions. If the appellant had been an even slightly more seasoned traveller, we would have regarded those explanations as implausible. However, given that we have found that this was only the second international trip that he had made from the

United Kingdom, we did not regard this evidence as inherently implausible. However, before accepting it, we did weigh up the other evidence set out below.

19. In an aspect of his evidence on an unrelated issue, the appellant explained that he had no sight in one eye. He did not mention this at all in his evidence as to whether he had seen signs at Gatwick airport mentioning restrictions on the import of certain goods. Moreover, he made light of his disability stating that it did not affect his day-to-day life, that he had driven for years without incident and was even in the process of applying for a minicab licence. From this evidence, we concluded that the appellant's vision would not have affected his ability to see signs at the airport. However, the fact that the appellant had not sought to advance poor vision as a reason for his mistaken decision to enter the "green channel", and that he downplayed the extent of his disability left us with a favourable impression as to his credibility. We considered that a less honest witness might have been tempted to make much more of the fact that he had no sight in one eye.

20. The appellant did not advance a lack of understanding of written English as a reason for not noticing, or understanding, signs at Gatwick airport dealing with the import of goods. Given the findings we make at [9], we nevertheless thought that the appellant could have had difficulties in understanding the full significance of a sign explaining UK duties on imported cigarettes. However, we do not believe that his mistaken decision to go through the "green channel" could be explained solely by his understanding of written English.

The previous seizure of wine and discussions with Trading Standards officials

21. In cross-examination, Ms Choudhury pressed the appellant on whether experience gleaned from his off-licence business had not alerted him to the existence of restrictions on the import of cigarettes into the UK. She also referred him to a seizure notice from HMRC indicating that, in May 2012, a quantity of wine had been seized from the appellant's off-licence. She noted that, in the appellant's Notice of Appeal, he had stated that he had never had either "tax issues" or "border/customs faults" as he put it. She submitted that was an untrue statement and invited the Tribunal to draw inferences adverse to the appellant from it.

22. The appellant accepted that discussions with Trading Standards officials in the course of his off-licence business had made him aware of the importance of only stocking what he described as "UK cigarettes" in his off-licence. By "UK cigarettes" he meant cigarettes on which UK duty had been duly paid. However, while he accepted that he was aware of the existence of duties on cigarettes that were being sold commercially, he said that he was not aware that there was any such duty on cigarettes bought for personal use.

23. He accepted that wine had been seized from his off-licence in 2012 and gave his version of events associated with that seizure. He said that he had bought the wine in question from a reputable UK cash and carry and had received an appropriate invoice. However, the wine had been slow to sell. He received a visit from HMRC and was asked to prove that duty had been paid on the wine and presented the invoice.

However, he said that HMRC had said that it was "too old" and refused to accept it as evidence and seized the wine. He had protested at this decision but he accepted he had not made a formal appeal.

24. We make only limited findings in relation to the seizure of wine in 2012. We find that the seizure took place and that the appellant regards it as unjustified. However, we have concluded that the appellant did not make the statements referred to at [21] above with the intention of misleading either the Tribunal or HMRC. As we have said, the appellant does not write English as well as he speaks it. Since the appellant did not regard the seizure as justified he probably did not regard it as a "border/customs fault", to use his phrase and he may not have regarded it as a "tax issue" since it did not result in any demand for tax, just a loss of the wine.

25. The evidence of the previous problems with HMRC did give us pause for thought, however, as to whether the appellant really was as ignorant of customs and excise matters, and the existence of a "red" and a "green" channel as he suggested. Having considered the totality of the evidence, and having formed the view that the appellant was a straightforward and reliable witness, we decided to accept that, when he entered the "green channel" on 6 November 2012, he had a genuine (though mistaken) belief that he was under no obligation to declare that he had the cigarettes by going through the "red channel". We also find that the appellant had a genuine (though mistaken) belief that cigarettes being imported for personal use were not subject to any duty or tax on import. We find that most travellers would not have held either of those views, but that the appellant did because of factors particular to him, primarily relating to the fact that this was only his second international trip from the United Kingdom.

Subsequent events and correspondence

26. During an interview with Officer Robinson on 6 November 2012, the appellant gave an address in Walworth Road, London as an address for correspondence.

27. Nearly a year later, on 31 October 2013, Officer Kowalczuk sent the appellant a "penalty warning letter" explaining that an enquiry had been opened into potentially dishonest conduct. The letter explained that, if the appellant co-operated with the enquiry, he would have the opportunity to reduce significantly the amount of penalty charged. Specifically, the letter stated

> "This can be achieved by making a full and prompt disclosure, providing full details of your involvement in the smuggling or attempted smuggling of alcohol and/or tobacco products between 1 November 2011 and 31 October 2013. Further penalty reductions can be achieved by co-operating throughout the investigation. For example, by promptly replying to correspondence, answering questions, providing paperwork and attending meetings."

28. This letter was addressed, not to the Walworth Road address which the appellant had given Officer Robinson, but to an address in Rotherhithe which HMRC had on file for the appellant. Officer Kowalczuk stated, and we accept, that this letter

was returned to HMRC undelivered. We note that the appellant expressed surprise that this had been the case but accepted that he had not received the letter.

29. Since the first letter had been returned undelivered, Officer Kowalczuk sent an identical version to the Walworth Road address on 2 December 2013. No response was received to that letter, and HMRC sent a further reminder on 23 December 2013.

30. Officer Kowalczuk sent a formal notice on 17 January 2014 (to the Walworth Road address) charging penalties under both s8 FA 1994 and s25 FA 2003. Since there had been no response to any previous correspondence, she concluded that no reduction of the penalty for co-operation or disclosure was appropriate. The appellant did not suggest that these penalties were issued outside any applicable time limit or otherwise invalid for any reason. We find that they were validly issued.

31. The appellant explained that he had been out of the country from 23 November 2013 to 5 January 2014 and substantiated this by reference to stamps on his passport. HMRC did not challenge this evidence and we accepted it.

32. The appellant also explained that, while he used to share the Walworth Road address with his girlfriend, that relationship had broken down and he no longer lived there. He stated that, even after he returned to the UK on 5 January 2014, he did not receive the letters of 2 December or 23 December 2013. However, he said that he did receive the penalty determination of 17 January 2014, although it took a while for him to do so. His evidence was that, as soon as he received it, he replied to it by letter dated 18 February 2014, requesting a review of the penalties charged. He accepted that this letter did not contain any of the information that HMRC had requested in their letters of 31 October 2013 and 2 December 2013. He said that this was because he had not received those letters and was responding to the penalty determination which did not invite him to provide further information.

33. However, in his own letter of 18 February 2014, the appellant gave the address in Walworth Road, which Ms Choudhury submitted called into question the evidence he had given in relation to letters sent to that address and his assertion that he did not live there. For his part, the appellant said that he had made a mistake when writing his letter of 18 February 2014.

34. It is only in relation to this subsequent correspondence that we have not been able to accept the totality of the appellant's evidence. We have concluded that the appellant must have had some connection with the Walworth Road address in February 2014, even if he was not living there permanently, or he would not have given it as an address for correspondence. Having reached that conclusion, we are not prepared to accept that he did not receive HMRC's letters of 2 December 2013 or 23 December 2013 at all, although we do accept that he was out of the country when they were delivered and could not have received them until 5 January 2014 at the earliest. We are also not prepared to accept that it took him a month to receive the penalty determination of 17 January 2014. It may be that he overlooked those letters, or deferred dealing with them because he was worried about them.

35. The final relevant piece of correspondence is that, by letter dated 23 May 2014, addressed to the Walworth Road address, HMRC informed the appellant of the outcome of the review of the penalties that he had requested. HMRC substantially upheld the penalties, but reduced them from £6,602 to £6,549 to take into account the fact that the appellant was entitled to a duty-free allowance of 200 cigarettes. There is no doubt that the appellant received this letter as it was enclosed with his Notice of Appeal in these proceedings.

The law

Excise duty penalty

36. 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 –
>
> (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.

37. Under s8(4) of FA 1994, HMRC, and the Tribunal on appeal, have the power to reduce any penalty to such amount (including nil) as they think proper.

38. Under s16(1B) of FA 1994, there is a right of appeal to the Tribunal against a "relevant decision" which, by virtue of s13A(2)(h) of FA 1994 includes a penalty under s8.

39. Section 8 of FA 1994 was repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008. However, under commencement and transitional provisions contained in The Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 and The Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 that repeal takes effect only:

> (1) insofar as it relates to an inaccuracy in a document or a failure to notify HMRC of an under-assessment; or
>
> (2) insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 of the Finance Act 2008.

40. We accepted Ms Choudhury's submissions, which the appellant did not dispute, to the effect that neither of these exceptions applied. Accordingly, we decided that paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 did not preclude HMRC from issuing the appellant with a penalty under s8 FA 1994.

Customs duty and import VAT penalties

41. These penalties were imposed under s25 of FA 2003 which is, in all material respects relevant to this appeal, identical to those set out in s8 of FA 1994.

Meaning of "dishonesty"

42. A central requirement of both s8 of FA 1994 and s25 of FA 2003 is that the conduct of the person being charged the penalty "involves dishonesty".

43. Ms Choudhury referred us to *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported). In that case, His Honour Judge Pelling QC (sitting as a Judge of the High Court) stated that:

> "In my view, in the context of the civil penalty regime [contained in what was then s60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan*[1] as reconsidered in *Barlow Clowes*[2]. 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. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were."

44. Since s60 of the Value Added Tax Act 1994 was in terms almost identical to those of s8 FA 1995 and s25 FA 2003, we have adopted that as a binding statement of the test that we must apply.

45. Ms Choudhury submitted that this test was "purely objective". We did not accept that aspect of her submissions. We agreed that that the "normally accepted standards of honest conduct" must be determined by reference to an objective standard. We also agree that a taxpayer's subjective knowledge, or otherwise, of those "normally accepted standards" is not relevant. That is made clear in *Barlow Clowes.* However, we still consider that it is necessary to examine the subjective state of a person's mind in order to determine whether he or she has, in fact, been dishonest according to normally acceptable standards of honest conduct.

46. We derive support from that conclusion from Lord Hutton's speech in *Twinsectra v Yardley and others* [2002] 2 AC 164. At [31], Lord Hutton considered the conclusion that Lord Nicholls had expressed in *Tan* at pages 389 B to C to the effect that the test of dishonesty is an "objective standard" and said as follows:

> "… I think that in referring to an objective standard Lord Nicholls was contrasting it with the purely subjective standard whereby a man sets his own standard of honesty and does not regard as dishonest what upright and responsible people would regard as dishonest. Thus after

[1] *Royal Brunei Airlines v Tan* [1995] 2 AC 378

[2] *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476

stating that dishonesty is assessed on an objective standard he continued, at p 389 C:

> "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."

47. That view of the law was not doubted in *Barlow Clowes.* We have therefore concluded that the subjective state of the appellant's mind is relevant for the purposes of assessing the type of conduct in which he has actually been involved. Having assessed the type of conduct in which he has been involved, we have compared that with the objective benchmark of "normally acceptable standards of honest conduct". Following *Barlow Clowes*, we have concluded that it is not relevant to consider whether the appellant is aware of what normal standards of honest conduct are, or whether he has a personal moral code that differs from normal standards of honest conduct.

Discussion and conclusion

48. As noted at [25] above, we have concluded that the appellant had a genuine (though mistaken) belief that he was under no obligation to declare that he had the cigarettes by going through the "red channel". We concluded that he was not aware that there was even a choice to make as to whether to go through the "red channel" or the "green channel".

49. We concluded that the appellant had bought the cigarettes for personal use and had a genuine (though mistaken) belief that, in those circumstances, they were not subject to any duty or tax on import.

50. We concluded that the appellant volunteered to Officer Robinson that he was carrying the cigarettes without first being asked any questions as to the contents of his luggage and that Officer Robinson was surprised by the appellant's candour.

51. Having considered the totality of the evidence and our findings in relation to it, and applied the approach set out at [47] above, we find that the appellant's conduct was not dishonest according to normal standards of honest conduct. Rather, we have

decided that he made an honest mistake and one, moreover, that we are sure he will not make again.

52. We are therefore concluding that no penalty is due. Accordingly, it is not strictly necessary for us to consider whether HMRC were right to refuse to mitigate the penalties to any extent. However, for completeness, given the findings of fact we make at [34] above, we consider that HMRC were right to conclude that the appellant did not provide sufficient co-operation or disclosure to merit significant reduction in the penalties. However, we believe that his candour and frankness when stopped by Officer Robinson on 6 November 2012 should count for something. We therefore find that HMRC should have given a 20% discount for co-operation and disclosure.

53. In conclusion, we allow the appeal.

54. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 6 May 2015