



TC04555

Appeal number: TC/2014/04946

Customs duty and Excise duty – civil evasion penalty – importation of cigarettes without declaration or payment of duty – Finance Act 2003 s 25 and Finance Act 1994 s 8 – whether appellant guilty of dishonest evasion – held burden of proof not discharged – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

QADIR AHMED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
MOHAMMED FAROOQ**

Sitting in public in Priory Court, Birmingham on 20 May 2015

The Appellant appeared in person

Richard Adkinson of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Full findings of fact and reasons for a decision given orally at the hearing on 20 May 2015 and confirmed in writing on 22 May 2015

DECISION

Introduction

1. This appeal concerns civil evasion penalties in respect of customs duty
5 (£1,104) and excise duty (£4,464) imposed on 24 July 2014.

2. The key issue in the appeal was whether HMRC had satisfied the burden that lies upon them to establish that the appellant was guilty of dishonest evasion of duty.

The facts

3. We received a bundle of documents (mainly comprising the correspondence
10 leading up to the imposition of the penalties) and witness statements of Officers Wendy Huggett (the Border Force officer who seized the goods at Manchester Airport in May 2013), Kelly Phipps (who had dealt with the appellant subsequently up to the imposition of the penalties) and Jacqueline Leach (who was the Post Detection Audit Team Manager of HMRC). We heard brief oral evidence from Officers Huggett and
15 Leach (who attended effectively to confirm Officer Phipps' statement in her absence due to illness). The appellant gave oral evidence at some length.

4. We find the following facts.

5. The penalties were imposed following events at Manchester Airport on 5 May
20 2013, when the appellant was stopped in the green channel following his arrival from Pakistan via Dubai and his luggage was found to contain nothing but 20,800 Gold Leaf King Sized Filter cigarettes.

6. The cigarettes were seized as liable to forfeiture and the appellant did not contest the legality of the seizure.

7. Nothing further happened until 24 March 2014, when HMRC wrote a letter to
25 the appellant, informing him they were conducting an enquiry into his involvement in what they considered to be an attempted smuggling attempt with a view to recovering any unpaid duty and interest. They also warned they were considering the imposition of a civil penalty of up to 100% of the duty attempted to be evaded. They invited him to contact them either with a view to a meeting or to reply to a series of questions
30 contained in their letter.

8. No reply having been received, they sent a chaser letter on 9 April 2014 and then in the continuing absence of any response, they wrote a letter dated 24 July 2014 imposing the penalties which are the subject of this appeal. They were calculated as
35 100% of the unpaid duty (after deducting the 200 cigarettes making up the appellant's personal allowance) and made no deduction for disclosure or co-operation. We were not informed whether an assessment had also been raised in relation to the unpaid duties themselves, though as none was mentioned we assume none was raised. In any event, this appeal concerns the penalties alone.

9. HMRC received a telephone call from the appellant in reply on 22 August 2014. He said he had not received HMRC's original correspondence because he had been "abroad" and his family had opened it and "put it away" without telling him. He did not know where it was. (At the hearing, he produced his passport, which showed an entry stamp at Lahore airport dated 28 March 2014, when he said he had travelled to Pakistan to see his mother's grave). He said he was "the victim", as he had gone abroad in 2013 because his mother was ill and then died and the cigarettes had been put in his luggage by his cousins. On the same day, HMRC sent a copy of the original letter dated 24 March 2014 to the appellant, with a covering letter stating that they were still willing to reconsider the penalty if he provided the information requested. On the same date, the appellant submitted a notice of appeal to the Tribunal. He did not respond to the HMRC letter. In his notice of appeal, under "Result", the appellant said this:

15 "I think it should have been a warning because it was my first attempt and to teach me a lesson not to bring anyone's luggage next time."

10. The appellant gave oral testimony before us. We found him to be a convincing witness. He told us that his mother had been taken seriously ill very suddenly, as a result of which he took a snap decision to fly out to Pakistan to see her. He is a taxi driver and was able to leave on short notice. His mother (to whom he was very close) had been thought to have had a stroke and was in hospital. He arranged his travel within two hours of getting the news. He travelled out with three brothers and two sisters-in-law. He had no money, so one of his brothers (who owns a shop) had bought his ticket (which was a one-way ticket) and they travelled out together on the same day. He left in a great hurry (without even eating) and took no luggage with him, which was not a problem as his family in Pakistan were able to provide him with all he needed. He produced his passport to us, which showed an entry stamp at Lahore Airport on 13 April 2013. He also produced a copy of his mother's death certificate, showing she died in Faisalabad on 16 April 2013 after a heart attack.

11. After a period of mourning, he returned home. His passport showed a stamp dated 5 May 2013, which tallied with his arrival date at Manchester airport. His brother had paid for and emailed to him his ticket for the return journey (his brothers had returned earlier due to work commitments).

12. Before he returned home, he was telephoned by a cousin living in Peterborough (whom he named at the hearing), who knew about his situation and asked if he would be able to bring back with him some wedding gifts for a relative who was getting married. He agreed. The arrangement was that he should simply take the case home to Birmingham and his cousin (or some friends of his) would call to collect it.

13. As he was preparing to leave his family's home in Faisalabad (some 6 ½ to 7 hours drive from Lahore airport) some friends of his cousin (who were not known to his family in Pakistan) arrived with a suitcase. They opened it and he saw that it contained suits, bangles, scarves and general wedding clothing. He helped them close it (but not lock it). He asked them to put it in the car boot while he had a shower

before leaving. He noticed the suitcase had been padlocked when he took it out of the car at the airport, but he did not think to ask for a key. He could not remember whether he was asked on checking in at Lahore whether he had packed the case himself.

5 14. In cross examination, Mr Adkinson did not directly challenge the appellant on any of his evidence nor did he specifically put any allegation of dishonesty to him (either in relation to his conduct in May 2013 or in relation to his evidence at the hearing). When this was pointed out to him after the evidence had closed and while he was coming to the end of his closing submissions, he first asked for permission to
10 reopen the evidence in order to do so (which the Tribunal refused as being too late) and he then submitted there was sufficient evidence before us to infer dishonest evasion even in the absence of such a challenge.

15 15. In particular, Mr Adkinson submitted it was clear from the surrounding circumstances that the appellant knew he was smuggling, including the following factors:

(1) His evidence on some crucial issues had been somewhat vague – for example, he might have been expected to ask about a key for the locked suitcase;

20 (2) His reaction when the case was opened showed a telling lack of surprise – he might have been expected to be astonished and outraged, but instead he asked if he could keep 200 of the cigarettes (as his personal allowance);

(3) He must have informed the check-in desk at Lahore airport that he had packed the suitcase himself, which would have been dishonest;

25 (4) In his notice of appeal, he had referred to this as his “first attempt”, implying he accepted he was aware of what he was doing;

(5) Travelling out with no luggage and returning with a suitcase was suggestive of a deliberate planned smuggling attempt

16. In short, we took him to be submitting that the appellant’s story was inherently incredible.

30 17. The appellant submitted that in the light of the story as he had recounted it, none of the above factors were persuasive. He simply had not thought about a key for a suitcase which did not, in any event, contain his property; when he saw the cigarettes he had indeed been surprised, but there was no point in being difficult with the officer, who was just doing her job respectfully; his request for the return of 200
35 cigarettes had been a rather poor attempt to “joke it off” when in reality he was furious with his cousin for having “set him up”; and he had simply used poor language in his notice of appeal form when referring to his “first attempt” – what he meant was that this was his first time “in trouble”. It was clear from the context that he was not making an admission of guilt.

18. In the circumstances, we do not consider HMRC have established, on a balance of probabilities, that the appellant either had a “purpose of evading duty” or that his conduct involved dishonesty.

The law

5 19. As the key issue in this appeal is whether HMRC have established, on a balance of probabilities, that the appellant had “engaged in... conduct for the purpose of evading” duty, and that conduct “involves dishonesty”, we do not consider it necessary to set out the legislative background in full. Nor do we consider it necessary to set out our analysis of the cases cited by Mr Adkinson which explored
10 the meaning in particular of the words “dishonesty” or “evasion” in this context.

Discussion and decision

20. We do not find the appellant’s account of the facts to be inherently incredible and, having seen him give evidence, we accept them as true in all material respects.

15 21. We see him as having been essentially naïve, but not dishonest. Given what he thought he was doing, we find he had no “purpose of evading” duty. Nor could his conduct be regarded as dishonest.

22. The fact of the matter is that HMRC have chosen to impose a penalty, in respect of which the burden of proof as to “dishonesty” and “purpose of evasion” lies upon them, and they have failed to discharge that burden. Had they simply assessed
20 the appellant for the duty, their position would have been much stronger; but that is not what they chose to do.

23. The appeal is accordingly ALLOWED.

24. 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
25 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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**KEVIN POOLE
TRIBUNAL JUDGE**

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RELEASE DATE: 23 JULY 2015