



TC05522

Appeal number: TC/2016/00211

EXCISE DUTY, CUSTOMS DUTY AND VAT – whether civil evasion penalties payable – whether penalties should be reduced

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KARSHE MOHAMED

Appellant

- and -

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

**TRIBUNAL: JUDGE VICTORIA NICHOLL
JULIAN SIMS, FCA, CTA**

Sitting in public at Fox Court London on 4 October 2016

The Appellant in person

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

DECISION

1. This appeal is against an excise duty civil evasion penalty imposed under section 8(1) Finance Act 1994 and a customs duty and import VAT penalty imposed under section 25(1) Finance Act 2003 in the total sum of £5,877 (“the Penalties”) in respect of the attempted smuggling of 44 kg of shisha tobacco.

Background and facts found

2. The Appellant (“Mr Mohamed”) presented his case and gave evidence. UK Border Force Officers Assad Shah and Christine White also gave evidence. We find the following facts from the evidence in tribunal bundle and the oral evidence.

3. Mr Mohamed is a businessman who regularly travels on long haul flights, most frequently to Los Angeles in 2014. He and his partner travelled to Dubai in November 2014 for a short 5 or 6 day break. While they were on holiday the couple bought shisha tobacco for guests at their forthcoming wedding. Neither Mr Mohamed nor his partner smoke.

4. The couple returned to London Heathrow on 15 November 2014 with the two hold suitcases and two pieces of hand luggage that they had travelled out with. They spent longer than usual passing through passport control and arrived at the luggage carousel to find that their two suitcases had been removed from the baggage carousel. They loaded their suitcases onto a trolley and pushed the trolley to the green “nothing to declare” channel. Two UK Border Force officers followed Mr Mohamed and his partner into the green channel. Officer Shah had been standing by the entrance to the green channel and also followed Mr Mohamed into the green channel as he had selected him for questioning.

5. Mr Mohamed informed Officer Shah that the baggage contained quite a lot of tobacco before the suitcases were opened. Officer Shah’s colleague found 43.5 kg of Al-Fakher tobacco and 500 g of Starbuzz tobacco in the baggage. This is 176 times the passenger allowance. The tobacco was seized and Officer gave Mr Mohamed two notices and a letter warning him that in addition to the seizure, HMRC could issue an assessment and wrongdoing penalty. Mr Mohamed signed the documents. Mr Mohamed’s partner stood next to him throughout this search but did not make any comments. Mr Mohamed understood from what he was told by Officer Shah and his colleagues that the seizure would close the issue and that “that was it”. Officer Shah meant “that was it” for that day and that they could go.

6. On 19 October 2015 HMRC wrote to Mr Mohamed to make enquiries about the attempted smuggling in November 2014 and related customs and excise duty and import VAT. In the letter HMRC Officer Christine White provided Mr Mohamed with a list of the information requested for the enquiry. Mr Mohamed called Officer White on 26 October 2015 and said that he would send in the information. On 25 November 2015 Officer White wrote a letter imposing the Penalties.

7. On 8 December 2015 Officer White received Mr Mohamed's letter which was dated 5 November 2015. Mr Mohamed did not provide an explanation for this delay. Officer White replied that the Penalties decision was upheld as Mr Mohamed had not co-operated with the enquiry as he had failed to provide the information requested. On 5 2 February 2016 Mr Mohamed lodged an appeal against the decision to impose the Penalties.

8. The appeal was made late but the reason for the delay was that Mr Mohamed was out of the country. The delay was short and had limited, if any, any consequences for HMRC. HMRC confirmed that they did not object to the late appeal being 10 allowed. We exercised our discretion in accordance with the overriding objective and allowed the late appeal.

9. We have considered other matters of evidence and made further findings of fact in paragraphs 26 – 35 below.

The law

15 10. Section 2 of the Tobacco Products Duty Act 1979 imposes excise duty on tobacco products imported into the UK.

11. Chapter 24 of the UK Tariff reproduces the Combined Nomenclature which classifies shisha tobacco under code 2403 11 00. This results in shisha tobacco being subject to customs duty at the rate of 74.9% and VAT at the standard rate.

20 12. The Travellers' Allowance Order 1994 sets out what individuals who travel from a country outside the EU to the UK are entitled to bring in free of duty and VAT. The allowance for tobacco products is 200 cigarettes or 100 cigarillos or 50 cigars or 250 grams of smoking tobacco.

13. Section 8 Finance Act 1994 provides:

25 “(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

30 (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...”

14. Section 8(4) Finance Act 1994 provides that the Commissioners, or the Tribunal on appeal, may reduce the penalty by such amount as they think proper.

35 15. Ms Choudhury explained that although section 8 Finance Act 1994 was repealed by Finance Act 2008 Schedule 40 paragraph 21, this is only insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 Finance Act 2008 and which relates to an inaccuracy in a document or a failure to

notify an under-assessment. It remains in force for the purposes of the conduct in this case.

5 16. Section 16 (5) Finance Act 1994 provides that a penalty assessed by HMRC may be quashed or varied by the Tribunal on appeal and the Tribunal may substitute its own decision for one quashed.

17. Section 16(6)(a) Finance Act 1994 provides that the burden of proof is on HMRC as to the matters in section 8(1)(a) and (b) Finance Act 1994, but it is otherwise for the appellant to show that the grounds for the appeal have been established.

10 18. Section 25(1) Finance Act 2003 imposes a penalty for the evasion of customs duty and import VAT in any case where

“(a) a person engages in any conduct for the purposes of evading any relevant tax or duty; and

15 (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability)”.

19. Sections 29 and 33 Finance Act 2003 reflect the provisions of section 8(4) and 16 Finance Act 1994 and give the Tribunal power to reduce, quash, vary or substitute its own decision on appeal. Section 33(7) Finance Act 2003 provides that the burden of proof is on HMRC as to the matters in section 25(1) and on the appellant in relation
20 to the grounds on which the appeal is brought.

Submissions

20. Mr Mohamed submits that this incident was the result of a genuine mistake. He claims that he had asked the sellers of the shisha tobacco if it would cause any problems on his return to the UK and was assured that it would not. He had also asked
25 the gentleman at the Dubai check-in desk about the excess weight of their baggage and if it would cause any problems on their return to the UK. Mr Mohamed claims that he was told that it would not cause any problems as it was shisha tobacco as opposed to cigarettes.

21. Mr Mohamed claimed at the hearing that he and his partner were approached by
30 Border Force officers before they entered the green channel and that the officers talked with them as they walked towards the green channel. He also claims that he was led to believe that the seizure of the shisha tobacco and warning would bring the incident to a close. It is unreasonable to be charged £5877 over a year later when the products had been taken away.

35 22. HMRC submit that Mr Mohamed engaged in dishonest conduct because he entered the green channel thus showing that he had “nothing to declare” even though he had 176 times his personal allowance for tobacco products in his possession.

23. HMRC submit that it would have been reasonable for Mr Mohamed to check the signs at Heathrow Airport or to make enquiries prior to his interception in the green channel given that his previous enquiries in Dubai suggested that he was uncertain regarding the restrictions applying to shisha tobacco.

5 24. HMRC further submit that Mr Mohamed was aware that he was carrying products considerably in excess of his traveller's allowance. His action in entering the green channel was therefore dishonest.

25. HMRC also submit that it would not be appropriate for the penalties to be discounted as Mr Mohamed failed to co-operate during the course of the enquiry.

10 Discussion and conclusions

26. The appeal is against penalties that were imposed in respect of the attempted evasion of excise duty, customs duty and import VAT on the basis that Mr Mohamed's conduct involved dishonesty. The statutory burden of proof on HMRC and Mr Mohamed is referred to in paragraphs 16 and 18 above, but the relevant
15 legislation does not set out the test for dishonesty or the standard of proof applicable to the imposition of these penalties and we were therefore guided by case-law.

27. Ms Choudhury referred us to the cases of *Han (t/a Murdishaw Supper Bar) v CCE* [2001] EWCA Civ 1040, *Tahir Iqbal Khawaja v HMRC* EWHC 1687 (Ch.), *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 ("*Royal Brunei*"), *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, *Abou Rahmah v Abacha* [2006] EWCA Civ 1492 and *Bintu Binette Krubally N'Diaye v HMRC* [2015] UKFTT 0380 (TC) ("*N'Diaye*"). We are grateful to Judge Redston for her clear analysis in *N'Diaye* of the meaning of dishonesty in relation to customs and excise penalties following these cases, and we adopt her conclusion:
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25 "The test we apply to Ms Krubally N'Diaye's case is therefore primarily objective: was her behaviour dishonest according to normally accepted standards of behaviour? We also need to consider what she actually knew at the time, not what a reasonable person in her position would have known or appreciated."

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28. Ms Choudhury also referred us to the analysis of the standard of proof in *N'Diaye* (paragraphs 63 – 83) which follows the Upper Tribunal's decision in *Khawaja v HMRC* [2013] UTUT 0353 (TCC). We respectfully adopt those conclusions and agree that the civil standard of proof applies to penalty proceedings
35 of this nature.

29. In applying the dishonesty test to Mr Mohamed's behaviour, we considered that the following findings weighed the balance of probabilities heavily towards his behaviour being dishonest:

40 30. First, it would be dishonest according to normally acceptable standards of behaviour to carry 44 kg of tobacco products in your luggage without finding out

from an official source of information whether any duty is payable on arrival in the UK.

31. Mr Mohamed wrote in his appeal that “I did ask the sellers and the gentleman that was dealing with our bags at Dubai airport”. However, at the hearing Mr Mohamed told us that it was his wife who bought the shisha and asked a seller about taking it back to the UK. We find that this inconsistency does not support Mr Mohamed’s case, and we find that asking a seller in Dubai was not sufficient in any event. Mr Mohamed also told us at the hearing that his concern and discussion with the check-in staff at Dubai airport was about the excess baggage charge but, again, this is inconsistent with his appeal that suggested that he was concerned about the shisha tobacco. We find that Mr Mohamed was aware, as a regular long-haul traveller, that there are limited travellers’ allowances and that he was concerned that there was an issue with the shisha tobacco, but he failed to check the official position prior to travel or prior to walking into the green channel.

32. Second, Mr Mohamed claimed at the hearing that he was targeted by Border Force and surrounded by officers asking him and his fiancé questions as they walked to the green channel. It was not clear if Mr Mohamed was implying that he was taken to the green channel against his choice, but we find that this is not consistent with his letter of 5 November which stated that “when we were entering the green zone we honestly thought we did not have to declare it”. We also find that when Mr Mohamed saw the Border Force officers before he entered the green channel the honest behaviour would have been to ask whether he should go through the red channel given what was in his baggage. We accept Officer Shah’s evidence that Mr Mohamed was first stopped in the green channel as this is consistent with Mr Mohamed’s earlier evidence cited above which was given nearer the time of the events, and it is consistent with Border Force policy as interception can only take place once the passenger has made the declaration that he has nothing to declare by entering that channel.

33. Thirdly, the fact that Mr Mohamed and his fiancé squeezed nearly 44 kg of shisha tobacco into their two pieces of holiday hold luggage suggests that, at best, they deliberately chose to close their eyes to the need to establish their liability on what was 176 times their allowance. As Lord Nicholls commented in *Royal Brunei* “... an honest person [does not] 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.” Mr Mohamed’s behaviour was exacerbated at the hearing when he said that it was his wife who had checked the duty position with a seller (as noted in paragraph 31 above). We find it inconsistent that Mr Mohamed did not call his wife as a witness or mention what she was told in his letter of 5 November or in his appeal despite Officer White’s letter of 19 October 2015 specifically asking for:

“Confirmation of who was involved in the smuggling (attempt)
For each person involved, please state what they did.
For each person involved, please state why they did it.”

34. Mr Mohamed claims that he did not expect any further contact or outcome after the seizure at Heathrow (see paragraph 21 above). We accept that there may have been a genuine misunderstanding about this, but Mr Mohamed was given and signed a letter warning him that HMRC may make further enquiries and he responded to Officer White's letter by making a call and promising further information. This was not forthcoming and his letter dated 5 November 2015 (which did not provide the information requested) was not received until 8 December 2015.

35. We find that HMRC have satisfied the burden of proof to show to the civil standard that Mr Mohamed's attempt to walk through the green channel was dishonest behaviour. We also find that Mr Mohamed failed to co-operate with Officer White's enquiry. We find that the penalties were reasonable in the circumstances and the fact that they are equal to the customs and excise duties and VAT that would have been evaded if he had not been intercepted is an appropriate deterrent and proper in these circumstances given the absence of co-operation.

15 **Decision**

36. The appeal is dismissed and the penalties imposed on Mr Mohamed are confirmed.

37. 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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VICTORIA NICHOLL

TRIBUNAL JUDGE

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RELEASE DATE: 1 DECEMBER 2016