



TC06157

Appeal number: TC/2015/06527

*EXCISE DUTY – tobacco imports – whether dishonest conduct – yes –
appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

NIHAD ALMUFLEH

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR PETER SHEPPARD**

Sitting in public at Manchester on 24 January 2017

The Appellant did not appear and was not represented

Ms Aspinall, Counsel for HM Revenue and Customs, for the Respondents

DECISION

1. The appellant did not attend. This was the second hearing listed for this matter, an earlier hearing listed for 1 August 2016 having been adjourned as the appellant was
5 abroad and had not been aware that the hearing had been listed until shortly before the date of the hearing.

2. The appellant remains abroad, according to correspondence between the tribunal service, the respondents (HMRC) and the appellant's ex-wife, who resides at the address for correspondence notified to the tribunal by the appellant. The
10 appellant's ex-wife has agreed to pass on correspondence from the tribunal and HMRC to the appellant, who has not notified HMRC or the Tribunal of an alternative address for correspondence. The appellant's ex-wife had explained that the appellant had left the UK and she did not expect that he would return.

3. It was clear from the correspondence that notice of this present hearing date had been sent to the appellant both directly and to his ex-wife for such notice to be
15 forwarded to him well in advance of the hearing. No objection to the listing of this present hearing had been received from the appellant, although it was also noted that the appellant did not appear to respond to most correspondence received from the Tribunal.

4. At the request of the Tribunal the Clerk telephoned the mobile telephone number in the papers but the call could not be completed and it appeared that the
20 telephone number was no longer in use.

5. HMRC argued that the hearing should take place in the absence of the appellant on the basis that it was obvious that the appellant had been notified of the hearing and
25 had made no objection to its proceeding, having been warned of the consequences of not appearing.

6. We had due regard to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). We decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with Rule 33
30 of the Rules since this was the second attempt to hold a hearing in this matter and it appeared that the appellant had chosen to remain abroad and not attend the hearing. The appellant's attention is drawn to Rule 38 of the Rules in the event that there was good cause for the non-attendance at this hearing.

The appeal

7. The appellant appeals against HMRC's decision to impose a civil excise penalty of £9,101 under section 25(1) Finance Act 2003 in relation to tobacco brought into the
35 UK by the appellant.

Background

8. The appeal relates to three seizures of tobacco, as follows:

5 (1) On 24 June 2014, the appellant returned to the UK, arriving at Heathrow airport, from Amman, Jordan. As his luggage did not arrive on his flight, he completed (inter alia) a form BOR1422 “Clearance of Missing or Delayed Baggage – Non EU arrivals”. This is a Border Force form for customs clearance in respect of missing baggage. The form asks (inter alia) whether the missing baggage contains

- (a) any prohibited or restricted goods?
- (b) any goods which must be declared?
- 10 (c) Any goods which you are claiming as part or all of your duty and tax free allowance?

The form includes “Yes” and “No” boxes, requesting that the correct box be ticked. The appellant ticked “No” to each of these questions. The appellant also signed a declaration that he had read the “Bringing goods into the UK from outside the EU” poster and the warning and that the answers to the questions and the particulars given on the form were true and complete.

The back of the form BOR1422 contains sections to be completed if the luggage does contain (inter alia) “Tobacco products Cigarettes, cigarillos, cigars, other tobacco”.

20 On 1 July 2014, once the missing luggage had been recovered, Border Force searched the luggage and found 13,020 cigarettes. These were seized and the appellant was sent a notice of seizure form and a warning letter.

25 (2) On 1 February 2015, the appellant again returned to the UK, this time to Manchester airport, from Amman, Jordan. The appellant entered the green channel at Manchester airport and was stopped there by Border Force officers. The appellant’s luggage was searched and found to contain 18.060 cigarettes. These were seized and the appellant was issued with a notice of seizure form and a warning letter, which he signed.

30 (3) On 18 February 2015, the appellant again returned to the UK, arriving at Heathrow airport, from Amman, Jordan. He was stopped on passing through the air gate on disembarking. His hand baggage was searched and found to contain 7.100 cigarettes. These were seized and the appellant was issued with a notice of seizure form and a warning letter, which he signed.

9. On 5 June 2015, a civil excise penalty in the sum of £9,149 was issued to the appellant. The appellant requested a review the penalty.

35 10. On 27 July 2015, the review decision was issued to the appellant, varying the penalty to £9,101 but otherwise upholding the penalty.

40 11. On 26 October 2015, the appellant appealed to this tribunal. The appeal was made late because the appellant had moved address and had not received the original review decision. HMRC consented to the extension of time for the appellant’s lodging of the notice of appeal.

Appellant's evidence and submissions

12. In his notice of appeal, the appellant stated that he had “at no time intended to be dishonest or be a ‘pirate’”. In a statement dated 24 May 2016, he stated that at no time had he denied having the cigarettes and was honest in stating what he had.

5 13. His family had sent for him as his mother was ill in hospital; they had paid for his ticket (presumably to Jordan, although this was not specifically stated). Subsequently, the appellant's paternal uncle and maternal uncle had died and his father also became ill.

10 14. With regard to the cigarettes seized from the lost baggage on 1 July 2014, The appellant's family wanted to give him a gift for helping and supporting them through this, and he asked them to give him cigarettes as these are much more expensive in the UK. The appellant explained that he was a heavy smoker, particularly as he suffered from depression following bankruptcy arising from the recession.

15 15. The appellant explained that as the cigarettes were a gift he believed that “it is okay to bring [them]”.

16. In correspondence with HMRC, in a letter dated 29 June 2015, the appellant stated that he was not able to declare anything in respect of the cigarettes in his missing baggage “as my case was lost and unavailable to me and as such I had nothing to declare with me in my possession”.

20 17. In a statement dated 24 May 2016, the appellant explained that he did not declare anything on the form BOR1422 because the cigarettes were a gift and he believed he did not need to declare them as he had not purchased the cigarettes.

25 18. The appellant further noted in that statement and in his grounds of appeal that, if he had intended to be dishonest, why would he have reported his case missing if he knew he should not have the cigarettes with him. He did not hide what was in his case at any time and always confirmed the contents when asked what he was carrying.

30 19. With regard to the cigarettes seized on 1 February 2015, when the appellant returned to the UK he had gone to the green channel because he could not see anyone in the red channel to ask about his cigarettes. As these cigarettes were, again, a gift from his family he “thought it was okay to go to the green and tell the staff there”. When stopped in the green channel, he stated that he had told the officers that he had cigarettes and did not try to hide anything.

35 20. In correspondence, the appellant stated that he was simply asked what was inside the case on this occasion, and no-one had asked him if he wanted to declare anything.

21. With regard to the cigarettes seized on 18 February 2015, the appellant explained that he was stopped before he got to the red and green channels and again explained what he had in his case. The appellant noted that he was not given the

chance to go to the red channel, nor was he asked whether he wanted to declare anything. These cigarettes were, again, a gift from his family.

22. Finally, the appellant explained that he was not normally a frequent traveller and this had been an unusual period in which he had been required to go back to Jordan several times because of family problems. He also explained that he had been made bankrupt when his shop went out of business during the recession; this had resulted in depression and the appellant had been hospitalised for a period of time. This penalty would place him back into bankruptcy.

23. The appellant submitted that the penalty should be dismissed, accordingly. In his statement of 24 May 2016, the appellant also stated that he was “considering seeking restoration of the seized goods as they were intended for [his] own use and nobody else’s and not for financial gain either”.

HMRC evidence and submissions

24. HMRC’s evidence was as follows:

Seizure on 1 July 2014

25. Border Force Office Brazier confirmed that the appellant had completed a form BOR1422 on 24 June 2014 in respect of his missing luggage; this form included a statement that his luggage had nothing to declare.

26. When the luggage was located, it was searched and found to contain 5,600 Marlboro Red cigarettes and 7,420 Marlboro Gold cigarettes. The items were seized and the appellant was sent a Notice of Seizure and warning letter explaining the possibility of assessment.

Seizure on 1 February 2015

27. Border Force Officer Patel explained that the appellant entered the Green Channel on arrival at Manchester airport, and was intercepted in the Green Channel by Border Force. The appellant had walked past the Red Channel entry point and had also walked past the Border Force officers present and was heading for the exit when intercepted. He did not approach the officers to ask for assistance.

28. A search of his luggage found 18,060 Marlboro cigarettes, which were seized and the appellant issued with a seizure notice, which he signed, and was also issued with a warning letter explaining the possibility of assessment, which he also signed to confirm receipt.

Seizure on 18 February 2015

29. Border Force Office Perry explained that on 18 February 2015 Border Force carried out full document checks at the arrival gate in respect of the appellant’s flight. In addition to the standard questions as to whether he had packed his own bags,

whether he was carrying any illegal items, and whether anyone had given him anything to carry, the appellant was asked whether he was aware of the customs allowances. He answered 'yes'.

5 30. Following the document check, the appellant was escorted through passport control and towards the Green Channel. On approach to the Green Channel, the appellant was asked whether he had anything to declare. He replied 'no' and so was escorted into the Green Channel, where his luggage was searched and 7,100 Marlboro cigarettes were found. These were seized and the appellant was issued with a seizure notice and a warning letter, both of which were signed by the appellant to confirm
10 receipt.

Subsequent correspondence

15 31. On 19 March 2015, HMRC wrote to the appellant to inform him that an investigation had been opened under section 25 Finance Act 2003 and section 8 Finance Act 1994 in respect of evasion of excise duty. The letter requested answers to a number of questions. Public Notice 160 and Human Rights enclosure CC/FS9 were enclosed.

20 32. The appellant did not respond and so a reminder letter was issued on 2 April 2015. On 27 April 2015, a signed receipt was received from the appellant confirming that he had read and understood the enclosures sent on 19 March 2015. HMRC wrote to the appellant to provide an additional 14 days to respond to questions raised in the letter of 19 March 2015.

33. On 12 May 2015, the appellant responded, saying that his family had paid for the cigarettes as a gift. This letter was acknowledged by HMRC on 18 May 2015.

25 34. On 5 June 2015, a civil excise penalty was issued in the amount of £9,149. The penalty was calculated on the basis of the number of cigarettes seized, less the allowance of 200 per trip. The price was based on the price of the cigarettes on the date of seizure. The penalty was reduced by 20% for co-operation on the part of the appellant as he had replied to correspondence; no further reduction was considered appropriate as the appellant had not given any substantial answers to the information
30 requested.

35 35. On 27 July 2015, following a review request by the appellant, HMRC wrote to confirm that the penalty was varied to £9,101 but that the decision to issue the penalty would be upheld.

HMRC submissions

36. HMRC submitted that the key questions for the tribunal to decide are:

- (1) Was the penalty properly imposed? That is, had the appellant acted dishonestly to evade duty and tax?

(2) Is the level of the penalty imposed on the appellant appropriate in the circumstances?

37. With regard to the first question, HMRC submitted that case law, such as that in *R v Ghosh* [1982] 3 WLR 110, is clear that whether an action is dishonest is first to be assessed against the ordinary standards of reasonable and honest people rather than any standard of the appellant himself and then, where the action is considered to be dishonest by such standard, also to be assessed against any reasonable view held by the appellant.

38. In this case, HMRC submitted that the appellant had, on three occasions, failed to declare cigarettes substantially in excess of the permitted allowances. They submitted that such an action meets the objective test in *Ghosh*: that is, that by the ordinary standards of reasonable and honest people, a failure to declare cigarettes substantially in excess of the permitted allowances would be regarded as dishonest. In particular, in respect of the second and third occasions, HMRC also submitted that the appellant cannot have had any reason to believe that he was in compliance with the law with regard to the cigarettes that he carried as he had already had cigarettes seized in July 2014. HMRC submitted that the appellant cannot reasonably have believed his actions were honest and he was therefore acting dishonestly in respect of the second two seizures.

39. With regard to the first seizure, on 1 July 2014, HMRC submitted that, as above, the failure to declare cigarettes substantially in excess of the permitted allowance was a dishonest action under the objective test. They further submitted that the appellant could not have reasonably believed that he was acting honestly when he failed to declare the cigarettes on the form BOR1422, as the form clearly states that certain goods must be declared and specifically includes cigarettes in the list of items to be declared. The form also requires the signatory to confirm that they have read the poster with details of the allowances. HMRC submitted that the appellant's statement that he believed that, as the cigarettes were a gift, no declaration was required was not a reasonable view given the information provided on the poster which he had confirmed that he had read.

40. Having been given a clear opportunity to make the necessary declaration, and not having sought any assistance, HMRC submitted that there was a clear dishonest intention to evade customs duty and tax in respect of the cigarettes which were subject to the first seizure.

41. HMRC submitted that the appellant's statement that he is unemployed and has been made bankrupt (such that he is in financial difficulty) is not relevant to the appeal as insufficiency of funds is not a matter which can be taken into account when considering the amount of a penalty, under section 8(5) Finance Act 1994 and section 29(2),(3) Finance Act 2003.

42. With regard to the appellant's statement that the cigarettes were a gift from his family, HMRC submitted that this is not material as duty is due in respect of relevant goods imported and not in respect of purchases of such goods.

43. With regard to the appellant's statement relating to the seizure on 1 February 2015, that he could not see anyone in the Red Channel to ask about the cigarettes, HMRC submitted that the appellant made no attempt to ask a member of staff and instead chose to enter the Green Channel without making any declaration. HMRC
5 also submitted that the appellant's evidence is inconsistent as he also stated in correspondence that he thought there would be no problem because the cigarettes were a gift and he had not paid for them. HMRC submitted that this indicated that he had no intention of declaring the cigarettes, as he could not have reasonably thought that it 'would be no problem' following the earlier seizure in July 2014, and that this
10 was confirmed by the appellant's failure to approach any staff in the Green Channel.

44. HMRC submitted that the appellant acted dishonestly in respect of each of the three seizures and that the penalty was therefore imposed appropriately in the circumstances. HMRC further submitted that the amount of the penalty was also appropriate in the circumstances, and no reduction beyond the 20% already given was
15 merited.

45. HMRC also sought an order for costs associated with defending this appeal, including the costs of the previous adjourned appeal on 1 August 2016 as well as the costs of this hearing.

46. HMRC submitted that the Tribunal has discretion to make an award for costs under Rule 10 of the Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009 (SI 2009/273) where (inter alia) the Tribunal considers that a party has acted unreasonable in defending or conducting proceedings.
20

47. HMRC submitted that the failure of the appellant to attend two scheduled hearings, in circumstances where he knew or ought reasonably to have known that the hearings were so listed, amounted to unreasonable conduct such that the tribunal should exercise its discretion and make an order for costs in favour of HMRC. Both
25 hearings required the attendance of four witnesses in addition to a representative of the Solicitor to HMRC and Counsel. HMRC produced a schedule showing the costs involved amounting to £1,444.45 in total.

30 **Relevant law**

48. The Schedule to the Travellers' Allowances Order 1994 provides relief from value added tax and excise duty for the import to the UK by a person travelling from a third country of up to 200 cigarettes.

49. Section 25(1) Finance Act 2003 states that:

35 In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

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

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

50. Section 25(1) is subject to section 29 Finance Act 2003, which states as relevant that:

- 5 (1) Where a person is liable to a penalty under section 25 ...
- (a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
- 10 (b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.
- (2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account
- 15 any of the matters specified in subsection (3).
- (3) Those matters are—
- (a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,
- 20 (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,
- (c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

51.

25 **Decision**

52. The issue in this appeal is whether HMRC were correct in imposing a civil evasion penalty under section 25 Finance Act 2003 on the appellant.

30 53. Section 25 Finance Act 2003 requires two elements: the evasion of tax and dishonesty. It is not disputed that failure to declare excise goods is an evasion of tax and so we consider that the necessary element of evasion has been established.

54. Having regard to the two stage test of dishonesty which has been established through case law, we consider that the objective test is met: a failure to declare cigarettes substantially in excess of the allowances permitted by law is to be regarded as dishonest by the ordinary standards of reasonable and honest people.

35 55. Considering the second, subjective element of the test, and having regard to the appellant's evidence, we consider that the appellant's evidence that he reasonably believed that he did not have to declare the cigarettes because they were a gift from his family is not credible in respect of the second and third seizures. The appellant had had a substantial number of cigarettes seized as a result of a failure to declare such

40 goods in July 2014 and we find as a fact that he must have known on both occasions

in February 2015 that he was bringing in goods which had to be declared in the Red Channel at the airport.

56. We have considered the appellant's evidence that he tried to declare the cigarettes on the second occasion and entered the Green Channel to look for someone to make the declaration to. On balance, we consider that the appellant's evidence is inconsistent as he also stated that he thought that no duty was due because the goods were gifts. On balance, we prefer HMRC's evidence that the appellant made no approach to staff in the Green Channel to declare the goods on the second occasion.

57. We have also considered the appellant's evidence that he was simply led into the Green Channel on the third occasion and, given the continuing inconsistency in the appellant's evidence, as he again stated that he still thought that no duty was due as the cigarettes were gifts, we prefer HMRC's evidence that he was asked before entry into the Green Channel whether he had anything to declare and that he answered no.

58. His failure to declare such goods in the second two seizures was, therefore, dishonest by the standards established in case law.

59. With regard to the first seizure, we also find that despite the appellant's evidence that he reasonably believed that he did not have to declare the cigarettes, he should reasonably have known that he did in fact need to declare those cigarettes: the appellant completed a form which specifically asked him to declare any cigarettes imported and signed a document confirming that he had read information which set out (inter alia) the permitted allowance for cigarettes being brought into the UK. We therefore find that the appellant ought reasonably to have known that he was not complying with his obligation to declare the cigarettes.

60. In conclusion, we find that there was dishonesty at an objective level: that is, by the ordinary standards of a reasonable and honest person, the failure to declare the cigarettes in excess of the allowance is dishonest. We also find that there was dishonesty at a subjective level in respect of all three seizures: in respect of the first seizure, we find that the appellant had been informed of the relevant allowances and still failed to declare that he had cigarettes in excess of the allowances. In respect of the second and third seizures, we find that the appellant knew both from the information provided at the time of the first seizure and the fact of that seizure that he was not allowed to bring in cigarettes in excess of the allowance and still failed to declare the cigarettes on both occasions.

61. We have also considered HMRC's application for costs on this occasion and have considered our discretion under Rule 10 of the Tribunal Procedure (First Tier Tribunal)(Tax Chamber) Rules 2009 (SI 2009/273). We find that the appellant's conduct with regard to this appeal was unreasonable: he has consistently failed to respond on time, or at all, to correspondence. He has failed to provide either HMRC or the Tribunal with timely details of changes to contact details and appears to have left the UK some time before this hearing without informing either HMRC or the Tribunal. According to the information available to us, it appears that the appellant

had no intention of engaging with the tribunal or appeal process but did not withdraw his case.

5 62. Accordingly, we have decided to exercise our discretion under Rule 10 and award HMRC their costs in respect of this hearing and the previously postponed hearing, totalling £1,444.45, in full.

10 63. 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.

15

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 10 OCTOBER 2017

20