



TC06752

Appeal number: TC/2017/02642

EXCISE and CUSTOMS DUTY - importation of tobacco products - appeal against Civil Evasion Penalties - s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 - whether dishonesty - yes – disclosure – no – minimal co-operation – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT ELDER

Appellant

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Tuesday 25 September 2018

No appearance by or on behalf of the Appellant

Sarah Mitchell, Solicitor, Office of the Advocate General for Scotland, for the Respondents

DECISION

Preliminary matters

1. On 31 August 2018 the appellant contacted the respondents (“HMRC”) indicating that he would not be attending the hearing and that he wished the matter to be decided on the papers in his absence. He was advised to write to the Tribunal making any relevant representations. On 5 September 2018, he duly wrote to the Tribunal stating:

“All I can say is the truth. I did bring said cigs back but I did think I was allowed this amount and more ... I admit bringing them through the Green Channel because I thought I was allowed them”.

He also denied the assertions made by the Border Force Officer in regard to sale of cigarettes.

2. I had due regard to Rules 2 and 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Rules”) and decided that it was in the interests of justice and proportionate to proceed with the hearing in the appellant’s absence.

3. The appellant lodged a Notice of Appeal dated 27 March 2017. That appeal was late, however, HMRC offered no objection to the late appeal. I therefore had due regard to Rules 2 and 5 of the Rules and decided that the appeal should be admitted late.

The issue

4. This is an appeal against a decision by HMRC dated 19 August 2016 to issue Excise and Customs Civil Evasion Penalties in the total sum of £3,031 being a penalty of £847 under Section 25(1) of the Finance Act 2003 for the evasion of Customs Duty and £2,184 under Section 8(1) of the Finance Act 1994 for the evasion of Excise Duty. The penalties were issued on the basis that the appellant failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

HMRC’s argument

5. HMRC contend that we can be satisfied on the evidence that the appellant was dishonestly intending to evade Excise Duty and Customs Duty.

The appellant’s argument

6. The appellant alleges that he was not smuggling the cigarettes. He disputes having ever admitted intending to sell the cigarettes.

The Facts

7. On 10 August 2015, the appellant arrived at Edinburgh Airport on a flight from Thailand via Abu Dhabi. Both countries are outwith the European Union (“the EU”)

and classified as “Third Countries” in terms of Article 2 Travellers’ Allowance Order 1994¹ (“the Order”).

8. From disembarkation to clearing Customs there are displayed a number of notices advising which countries fall inside/outside the EU and also the duty free allowances for excise dutiable products acquired outside the EU.

9. Despite the notices, which are also situated in the baggage reclaim area and just before the Customs channel entrances, the appellant chose to exit through the ‘nothing to declare’ Green channel, indicating that he had no goods to declare, at which point the appellant was intercepted by UK Border Force Officer Ann McLean.

10. He was asked from whence he had travelled and whether he understood what his Customs allowance was when travelling from Thailand. He replied “I’ve got 200 cigarettes.”

11. He was asked to place his suitcase and holdall on the x-ray unit and the image showed a large quantity of cigarettes. He was again asked if he understood the restrictions if travelling from outwith the EU and on that occasion he said “I thought you could bring back what you wanted.”

12. The subsequent search of his baggage recovered 8,800 mixed brand cigarettes and half a kilogram of hand rolling tobacco (“HRT”). The quantity seized from the appellant is 44 times the permitted personal allowance in terms of Schedule 1 of the Order.

13. The cigarettes and tobacco were seized and the appellant was issued with a Seizure Information Notice and a Warning Letter. He was also provided with Notices 1 and 12A which explain an individual’s rights upon seizure of goods.

14. The legality of the seizure has not been challenged.

15. The only challenge that the appellant has made to Officer McLean’s witness statement is that at all times he has denied the assertion recorded in Officer McLean’s contemporaneous notebook to the effect that:

“I brought these cigarettes back to sell and to make money for my next trip. I don’t even smoke. I shouldn’t be telling you this. Have you the tape running?”

16. He has not challenged the Witness Statement of HMRC Officer Martyn Davies.

17. On 1 August 2016, Officer Davies issued a letter to the appellant intimating his intention to investigate Customs Duty, Import VAT and Excise Duty and that penalties might be imposed if it was decided that the appellant had acted dishonestly. The appellant signed and returned a copy stating that he had read and understood the Public Notices and Factsheet. Bizarrely, although his signature was dated 4 August 2016, his P.S. stated that he had only received the letter on 5 August 2016. He stated by way of explanation:

“I did not smuggle anything in to (*sic*) I brought cigs back as you already know for my family. I thought my allowance was unlimited amount. Sorry.”

¹ SI 1994/955

18. On 19 August 2016, the penalty in question was issued to the appellant. That showed a reduction of 5% relating to the appellant's cooperation.
19. The valuation of the tobacco and the calculations upon which the penalties were issued has never been disputed.
20. On 15 September 2016, the appellant wrote to HMRC stating that he thought he had been allowed to import the same amount as if he had come from the EU and he could not afford to pay the penalty.
21. On 24 September 2016, the appellant wrote to HMRC stating:

“I did not smuggle cigs. I thought I was allowed 7,500 cigs in. I have not done this before. I am 68 years old on state pension. I cannot pay this £3,031.”
22. By letters dated 24 October, 8 and 9 November 2016 HMRC replied stating that the decisions were upheld and he was offered a further opportunity to have a late review.
23. On 24 November 2016, the appellant sought a further review and on 19 December 2016 he wrote asking that the matter be reconsidered on the basis that he had never “...done this before and I really thought I could bring unlimited cigs in”. He reiterated that he would be unable to pay the penalties.
24. On 24 February 2017, the original decision was upheld. Regrettably the letter was incorrectly addressed so on 3 March 2017 an amended copy of the letter was reissued.
25. On 16 March 2017, the appellant requested a further review indicating that he wished to appeal and HMRC contacted the Tribunal on his behalf requesting that appeal forms be sent to him.
26. The appellant intimated his appeal on 27 March 2017. He indicated that he thought that he was allowed up to 7,000 cigarettes.

The hearing

27. I had the benefit of the oral evidence of Officer McLean who I found to be a wholly credible witness. She clearly remembered Mr Elder because he stood out in her memory because no one had previously so freely admitted that cigarettes were brought into the UK to sell.

The legal framework

28. Section 8 Finance Act 1994 makes provision for HMRC to assess a penalty in relation to evasion of excise duty as follows:

“(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.

...

(4) Where a person is liable to a penalty under this section—

(a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) 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 made by the Commissioners.”

29. The provisions for penalties in relation to evasion of Customs Duty are materially identical and contained in sections 25 and 29 Finance Act 2003.

30. The present appeal is made pursuant to section 16 Finance Act 1994. I have full jurisdiction to consider whether the penalty has been properly imposed and I also have jurisdiction to reduce the penalty if I think it proper to do so, but not on the grounds of inability to pay.

31. Section 16(6) Finance Act 1994 provides that the burden of proof is on HMRC to establish that the appellant has engaged in conduct for the purpose of evading duties and that his conduct involved dishonesty. Otherwise the burden of proof is on the appellant.

32. Although penalties are to be treated as essentially criminal in nature (because of what is loosely described as the Human Rights European Convention) the standard of proof is to the simple civil standard which is on the balance of probabilities, or for the appellant’s benefit, what is more likely than not to have happened. The authority for that, to which I was not referred, is *Khawaja v HMRC*².

What is meant by acting “dishonestly”

33. HMRC relied on *Barlow Clowes International Limited (In Liquidation) & Another v EuroTrust International Limited and Another*³ where it was held that the test laid down in the earlier case of *Royal Brunei Airlines SDN BHD v Tan*⁴ was the correct test and that is summarised as follows:-

“... Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

34. I am also aware of the guidance given by the Court of Appeal in *R V Ghosh*⁵ where a two-step test for showing dishonesty was set out:-

“In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest ... If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he

² 2008 STC 2880

³ 2005 UK PC 37

⁴ 1995 2 AC 378

⁵ 1982 1 Queens Bench, 1053, CA

knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.

For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in what they do, because they know that ordinary people would consider these actions to be dishonest.”

35. Dishonest should be given its ordinary English meaning, namely “not honestly, trustworthy or sincere”.

Discussion

36. As can be seen, even if one disregards the disputed statement that the appellant intended to sell the cigarettes, his various explanations are inherently inconsistent. He has variously alleged that he could bring in unlimited amounts of cigarettes, the same number as he could from the EU, 7,000 and 7,500 cigarettes. In the case of the latter two explanations that still does not explain why he was carrying 8,800 cigarettes to say nothing of the 0.5 kg of HRT.

37. The appellant must have known that he was smuggling. Indeed when stopped by the Officer he did not immediately admit that he had the tobacco and it was only after he saw the X-ray image that he conceded that he was carrying large quantities.

38. In fact, the disputed statement is not disregarded and I accept that he did indeed make that statement to the Officer.

39. In the light of my findings of fact I am satisfied that the appellant imported the cigarettes and tobacco in his luggage knowing that duty was payable. I am satisfied that he went through the Green Channel with a view to evading duty. He did so dishonestly, knowing that it was wrong.

40. The appellant’s inability is not a valid ground of appeal (Section 8(5)(a) Finance Act 1994 and Section 29(30(a) Finance Act 2003).

41. Lastly, Sections 30(1) Finance Act 2003 and 13(1) Finance Act 1984 allow for reductions to be made to penalties if there has been voluntary disclosure and co-operation. His co-operation with HMRC has been minimal so the 5% reduction in the penalty for co-operation is fair and 0% for disclosure is wholly appropriate since there has been no voluntary disclosure by him.

Decision

42. For all these reasons, I confirm the penalties and dismiss the appeal.

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.

**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 09 OCTOBER 2018