[2019] UKFTT 28 (TC)

TC06924

Appeal number: TC/2017/06025

CUSTOMS DUTY – EXCISE DUTY – customs civil evasion penalty and excise civil evasion penalty – whether or not conduct dishonest

FIRST-TIER TRIBUNAL
TAX CHAMBER

YOSEF KOPLOWITZ **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR TONY HENNESSEY FCA

Sitting in public at Manchester on 10 July 2018

No appearance by or on behalf of the Appellant

R Davies, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

(Remade pursuant to rule 38(1) of the Tribunal's Rules)

Introduction

1. This is an appeal against a civil evasion penalty imposed under s 25(1) of the Finance Act 2003 for the evasion or attempted evasion of customs duty and/or import VAT, and under s 8(1) of the Finance Act 1994 for the evasion or attempted evasion of excise duty.

2. The following matters are not in dispute.

3. On 8 February 2016, the Appellant arrived at Manchester Airport on a flight from Tel Aviv. As he was exiting the arrivals hall via the green ("nothing to declare") channel, he was stopped by UK Border Force Officer Quine, who ascertained that he was carrying 28 kilograms of hand rolling tobacco and 4,000 cigarettes in his bags. The tobacco was seized by Officer Quine under s 139 of the Customs and Excise Management Act 1979.

4. Subsequently, on 12 January 2017, HMRC notified the Appellant of their intention to investigate whether his conduct was dishonest and whether it was appropriate to issue a civil evasion penalty. That letter invited the Appellant to make disclosures and to cooperate in the HMRC enquiry, noting that any penalty imposed could be reduced if he did.

5. In a subsequent letter to the Appellant dated 26 January 2017, HMRC noted that the Appellant had not responded to the 12 January 2017 letter, and said that he would be treated as not intending to cooperate if he did not respond by 12 February 2017.

6. In a letter to HMRC dated 7 February 2017, the Appellant's wife stated that the Appellant had still not returned from holiday, and that he would respond when he did.

7. On 10 March 2017, HMRC notified the Appellant of their decision that his action was dishonest and that it was appropriate to impose a penalty equal to the amount of duty that the Appellant had sought to evade. In other words, no reduction in the penalty was given for disclosure or co-operation. The overall penalty was assessed at £9,174.

8. In a letter dated 15 March 2017, the Appellant provided his account of the matter, and his reasons why he considered the penalty should not be imposed.

9. In a letter dated 5 April 2017, HMRC replied, informing him that he was being given a discount on the penalty of 40% (20% for disclosure and 20% for cooperation), such that the penalty was now £5,504.

10. In a letter dated 19 April 2017, the Appellant requested HMRC to reconsider the decision.

11. On 5 May 2017, HMRC responded that the Appellant could request a review.

12. On 12 May 2017, the Appellant requested a review.

13. In a review decision dated 28 June 2017, HMRC decided to uphold the penalties.

14. In a letter to HMRC dated 16 July 2017, the Appellant requested HMRC to reconsider the decision.

15. On 6 August 2017, the Appellant appealed to the Tribunal.

16. This appeal was heard on 10 July 2018 in Manchester. At the hearing there was no appearance by or on behalf of the Appellant, and the Tribunal decided to hear the appeal in the Appellant's absence. At the end of the hearing it reserved its decision, and subsequently issued a full written decision dated 17 July 2018 dismissing the appeal.

17. On 17 July 2018, the Appellant requested that the Tribunal's decision be set aside on the ground that it failed to take into account the contents of an e-mail sent by the Appellant to the Tribunal on 20 February 2018. That 20 February 2018 e-mail had been sent by the Appellant to the Tribunal, and a Tribunal judge had directed that it be forwarded to HMRC. However, for one reason or another, it appears not to have come to the attention of those in HMRC responsible for this appeal, and it had not been included in the hearing bundle. The Tribunal granted this application, having found that the Appellant's 20 February 2018 e-mail was material that should have been taken into account when deciding the appeal. The Tribunal accordingly set aside its 17 July 2018 decision, which it now remakes.

The issue in this appeal

18. The Appellant has not disputed that the amount of the penalty now imposed is equal to 60% of the duty that was payable on the tobacco that he was bringing into the UK. That is to say, the Appellant has not disputed HMRC's valuation of the tobacco or calculation of the duty.

19. A requirement for the imposition of the penalties is that the Appellant's conduct involved dishonesty. The Appellant contends that his actions were not dishonest. That is the main issue in this case.

Applicable legislation

20. Section 8 of the Finance Act 1994 relevantly provides:

> **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.

…

(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.

21. Section 25(1) of the Finance Act 2003 provides:

25 Penalty for evasion

(1) 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.

22. Section 29 of the Finance Act 2003 provides:

29 Reduction of penalty under section 25 …

(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

(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 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,

(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.

23. The burden of proof is on HMRC to prove the matters mention in s 8(1)(a) and (b) of the Finance Act 1994 and s 25(1)(a) and (b) of the Finance Act 2003, but it is otherwise for the Appellant to establish his grounds of appeal (see Finance Act 1994, s 16(6); Finance Act 2003, s 33(7)).

The hearing

24. At the hearing, there was no appearance by or on behalf of the Appellant. The Tribunal requested the Tribunal clerk to telephone the Appellant on the telephone number given in his notice of appeal to ask whether he intended to attend. The clerk reported that the telephone number was not a functioning number.

25. The Tribunal was satisfied that it should proceed to hear the appeal in the Appellant's absence. In a letter to the Appellant dated 6 June 2018, addressed to the address on the notice of appeal, the Appellant had been advised of the date and place of the hearing. The Tribunal was satisfied that reasonable steps had been taken to notify the Appellant of the hearing, and that the requirement of Rule 33(a) of the Tribunal's Rules was therefore met. For purposes of Rule 33(b), the Tribunal was also satisfied that it was in the interests of justice to proceed with the hearing, having regard to the following. There was nothing to indicate that the Appellant wished to attend a hearing, or that he would do so if the hearing were postponed. Unnecessary adjournments or postponements on the day of hearing are inconsistent with the public interest in judicial efficiency. Rule 38 of the Rules makes provision for a decision of the Tribunal to be set aside in circumstances where the Appellant or his or her representative were not present at the hearing, if it is in the interests of justice to do so (rule 38(2)(d)). The Tribunal accordingly proceeded with the hearing.

26. Subsequent to the hearing, the Tribunal became aware for the first time of an e-mail sent by the Appellant on 9 July 2018, conveying his apologies that he was currently not in the country and unable to attend the hearing, stating that further correspondence should be sent to him by e-mail, and observing that he was "waiting to hear the outcome of the court case" and that he hoped "my testimony will be taken into account in a fair and just way". The Appellant thereby affirmed that he was content for the Tribunal to determine the appeal in his absence.

27. Given that neither the Appellant nor a representative attended the hearing to cross-examine witnesses, there was no oral evidence.

The Appellant's case

28. The Appellant's case is set out in correspondence with HMRC.

29. The Appellant's wife's 7 February 2017 letter states amongst other matters as follows. The Appellant is an honest and upstanding person who did not know the law, and has never done this again since being told that it was illegal.

30. The Appellant's 15 March 2017 letter states amongst other matters as follows. He is a truthful and upstanding person who has never committed any crimes, and would not do so as he has a wife and child to think about. When he was at the airport in Israel someone asked him to take cigarettes for him to Manchester. This person told the Appellant that it was legal to take the tobacco to the UK since it was purchased at the airport. This person gave the Appellant a mobile number to contact him when he arrived in Manchester. The Appellant would never have done this if he had known that this was illegal, and since then he has never brought anything over the limit into the UK despite travelling many times. This person at the airport took advantage of his naivety at a vulnerable time, as a close family member was ill and he had just come back from visiting them.

31. The Appellant's 19 April 2017 letter states amongst other matters as follows. The only reason why the Appellant did not go through the red channel on arrival in the UK was because he thought it was legal to bring what he was carrying into the UK without declaring it. If he had known that this was not legal, he would not have brought these items into the UK.

32. The Appellant's 12 May 2017 letter states amongst other matters as follows. He is an honest and upstanding person. He is innocent. He is embarrassed that another person took advantage of his naivety and the fact that he did not speak English. He did not know the legalities of the amounts allowed into the UK. Since this incident he has not brought anything over the limit into the UK.

33. The Appellant's 16 July 2017 letter states amongst other matters as follows. An evil man had preyed upon his naivety and clouded his judgment. His only wrongdoing was believing a fraudulent man. The event happened over a year ago, and in that time he has travelled numerous times and not once brought anything into the UK over the limit. He does not have any previous crimes on his record. This is a first offence and he should be let off with a warning. It would ruin his family to pay this fine.

34. The Appellant's 20 February 2018 e-mail states amongst other matters as follows. When he was a teenager his father passed away, and this was a difficult and dark time. He was introduced via an organisation that assists orphans to a volunteer who helped the Appellant with everything he needed. This person ("A") became the only person that the Appellant could trust, and was a father figure. The Appellant had less contact with A once he got married. In January 2016 the Appellant met A again in Israel when attending a family wedding, and the Appellant confided to A that he had no job or real social life in Manchester at the time. A gave the Appellant the phone number of a friend in Manchester ("B"), who A said might assist the Appellant

in finding a job there. The Appellant called B, who said that he was travelling to Manchester on the same day as the Appellant, and that he had an uncle who might be able to assist the Appellant to find a job. When the Appellant got to the airport, he bumped into B. After some small talk, B asked the Appellant if he would take the cigarettes that he had just bought to Manchester. At first the Appellant was hesitant as he had "heard stories about people bringing packages" and he "didn't want to have any trouble". B showed the Appellant the receipt and told him that he had brought all the cigarettes in the airport after passing security so that there was no reason for it to be illegal. The Appellant had not travelled much in his whole life and so did not have any clue about these things. There was no reason for the Appellant not to trust B, who was a good friend of A, the only person that the Appellant had trusted his whole life. When the Appellant was stopped at Manchester airport and asked what he had in his bags, he did not lie. When he later tried to call B, the telephone number had been disconnected. When the Appellant asked A for more information about B, A confided to the Appellant that he had heard that B had also stolen from other people and run away. No one has heard from B since. This incident broke the Appellant's trust in everyone and put a strain on his marriage. The incident has taken a toll on the Appellant and he cannot afford to pay the fine.

The HMRC witness evidence

35. UK Border Force Officer Quine gave a witness statement describing how she stopped the Appellant in the green lane on arrival at Manchester airport, and seized the tobacco.

36. HMRC Officer Gibson gave a witness statement describing the HMRC enquiry leading up to the decision to impose a penalty, and the subsequent review decision.

The Appellant's arguments

37. The Appellant's arguments are as stated above.

The HMRC arguments

38. Seeking to enter through the green channel of itself constitutes making a false statement that the Appellant had no goods attracting excise or customs duty.

39. The penalties require that the Appellant has been dishonest. The test of dishonesty is an objective one (reliance was placed on *Royal Brunei Airlines v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust* International Ltd [2006] 1 WLR 1476), and involves assessing whether the acts of the person were dishonest by the standards of ordinary and honest people.

40. HMRC contend that the Appellant knew of the allowances, or at least knew enough that he ought to have made enquiries. It is well known that duty is payable on excise goods entering the UK, and that Israel is outside the EU. The airport has signage describing the allowances. The cigarettes and tobacco would take up a considerable amount of luggage space, suggesting a degree of pre-planning rather

than naivety. Even if the Appellant did not know the precise limits of duty free allowances, he must have known that the amount he was carrying was likely to be over the limit, and a reasonable and honest person would at least have made enquiries. It is not credible that a person could be asked to take such a large quantity across a border at the behest of an anonymous and unknown individual without realising that this was illegal, or at the very least realising that there was something untoward.

41. The Appellant has not established grounds for further mitigation of the penalty. The Appellant's insufficiency of funds is not a reason for reducing the penalty (s 29(2) and (3) Finance Act 2003; s 8(5) Finance Act 1994). The penalties have been calculated in accordance with the legislation.

42. The details given by the Appellant in his 20 February 2018 e-mail make his case no more credible. That e-mail fails to explain why the person described in it would ask the Appellant to import 4,000 cigarettes and then disappear without seeking to recover them in the UK. Its contents should not be regarded as credible without cross-examination of the Appellant.

The Tribunal's findings

43. The burden of proof is on HMRC to establish all of the matters mentioned in s 8(1)(a) and (b) of the Finance Act 1994 and s 25(1)(a) and (b) of the Finance Act 2003. Thus, HMRC must prove that the Appellant engaged in conduct involving dishonesty for the purpose of evading tax or duty.

44. The applicable legal test for dishonesty has been expressed 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. (*Barlow Clowes International Ltd v Eurotrust* International Ltd [2006] 1 WLR 1476 at [10].)
>
> Honesty … [has] 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. (*Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389.)
>
> It would seem that a claimant in this area needs to show three things: first, that a defendant has the requisite knowledge; secondly, that, given that knowledge, the defendant acts in a way which is contrary to normally acceptable standards of honest conduct (the objective test of honesty or dishonesty); and thirdly, possibly, that the defendant must in some sense be dishonest himself (a subjective test of dishonesty which might, on analysis, add little or nothing to knowledge of the

> facts which, objectively, would make his conduct dishonest). (*Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 at [16].)
>
> A finding of dishonesty requires that act undertaken (entering the Green channel with an amount of excise goods above the allowance) was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what he was doing was, by those standards, dishonest. (*Yosefi v Revenue and Customs* [2017] UKFTT 814 (TC) at [34].)

45. The standard of proof is the balance of probability. This means that the Tribunal must establish whether it was more likely than not that the Appellant was acting honestly, or more likely than not that he was acting dishonestly. A finding of dishonesty on a balance of probability standard does not mean that the Appellant has been found to be dishonest beyond reasonable doubt. Rather, it means that even if it is possible that the Appellant may have been acting honestly, on the evidence before the Tribunal, considered as a whole, the more likely explanation is that he was acting dishonestly.

46. The Tribunal finds that it is a fact generally known by international travellers that all or most countries have limits on the amount of goods that can be brought into the country duty free by arriving passengers, that passengers arriving on international flights go through a customs barrier on arrival, and that arriving passengers are warned that they face penalties for bringing in goods in excess of the duty free allowance without declaring them.

47. It is possible that there are adult international passengers who are totally oblivious to this fact. However, the Tribunal is satisfied that this would be very uncommon.

48. The quantity of tobacco carried by the Appellant exceeded, by some 132 times, the 250 gram personal allowance for tobacco for passengers arriving from places outside the European Union. It is unlikely that an international traveller would fail to know that it is not permitted to bring in such a quantity without declaring it, or even appreciate that this might not be permitted.

49. The Appellant says that when he was at the airport in Israel, B asked him to take cigarettes for him to Manchester, and told him that it was legal to do so. The Appellant says that he trusted B because B was a good friend of A, and A was a father figure to the Appellant. The Appellant said that he was naïve and ignorant of the law, but was not acting dishonestly.

50. The most detailed account given by the Appellant is in his 20 February 2018 e-mail. However, even that account is not especially detailed (for instance, it does not reveal the identities of A and B). Furthermore, that account gives rise to various questions. From the account given, it appears that the Appellant bumped into B at the airport in Israel after he was already airside, since the Appellant says that B provided a receipt showing that the goods had been purchased after he had already passed security. The e-mail says that B was travelling to Manchester on the same day as the Appellant, and it therefore seems that the Appellant bumped into B when both were

already airside and about to board a flight to Manchester. It therefore seems odd that the Appellant did not question why B could not simply transport the goods to Manchester himself. If the Appellant did indeed ask himself this question, he makes no mention of this fact in his e-mail.

51. However, what the Appellant does say is that he was initially hesitant as he had "heard stories about people bringing packages" and he "didn't want to have any trouble". This indicates that the Appellant was aware of a potential issue, and this is difficult to reconcile with his claim that he did not have any clue about these things. The fact that he was initially hesitant is also difficult to reconcile with his claim that he had no reason not to trust B. The mere fact that he was hesitant and was aware of the potential for trouble would have been a reason for him to question whether he could trust B's claim that it was legal to bring this quantity of tobacco products into the UK. A traveller who was conscious of a potential issue about whether items could be brought into the UK could presumably have easily obtained information about this this at the airport. Furthermore, the claim that the Appellant had not travelled much in his life does not sit easily with his claims in other correspondence that he has since this incident travelled internationally many times and never brought goods into the UK over the duty free allowance.

52. It is not known exactly what was the Appellant's luggage allowance for the flight, but 28 kilograms of hand rolling tobacco and 4,000 cigarettes was likely to have been a very large part of, if not nearly all or in excess of, that luggage allowance. Furthermore, 28 kilograms of hand rolling tobacco and 4,000 cigarettes would have taken up a very considerable amount of space. Even if the Appellant was keen to grant a favour to B on the basis that he hoped B would assist him to find a job in Manchester, it is questionable whether the Appellant would have even been capable of getting such a quantity of tobacco products onto a flight when asked spontaneously at the airport to do so. This would especially be the case if the Appellant was only asked to do so when he was already airside, after any checked luggage had already been checked in, at which time he could only take hand luggage on to the aircraft. Indeed, there is a question as to whether it is even plausible that he could have succeeded in taking 28 kilograms of hand rolling tobacco and 4,000 cigarettes onto the aircraft as hand luggage. It seems much more likely that a degree of pre-planning would have been required in order to get such a quantity of tobacco products onto the aircraft.

53. Furthermore, the witness statement of Officer Quine states that when asked on arrival in the UK whether anyone had asked him to bring anything to the UK for them, the Appellant had answered "no".

54. Had the Appellant attended the hearing, he could have been asked questions about these matters and other questions raised by his account. His answers to these questions may have strengthened or weakened his case. The Tribunal makes allowance for the fact that the Appellant is a litigant in person, who probably does not have much knowledge about the way that legal proceedings are conducted. However, that does not mean that the Tribunal must give more weight to his evidence than it otherwise would. The Tribunal has considered the accounts that he has given in the

correspondence referred to above. However, only so much weight can be given to his relatively brief accounts, when the Appellant has not himself attended the hearing to answer questions about his claims.

55. Even if the Appellant's account is not entirely impossible, it is on its face certainly more than a little implausible. Without further explanations as to the various questions raised by his account, the Tribunal finds that it must conclude that it is more likely that the account is not true than that it is true.

56. Having concluded that it does not accept the Appellant's account, the Tribunal finds that it is more likely than not that the Appellant did know that he was carrying more than the duty free allowance of tobacco, and knew that it was illegal to bring that quantity of tobacco into the United Kingdom without declaring it, and that the Appellant sought to pass through the green channel in the hope that he could bring the goods into the UK without declaring them and without being detected. The Tribunal is satisfied that this was dishonest by the standards of an ordinary, reasonable person and that the Appellant must have realised that what he was doing was, by those standards, dishonest. In reaching that conclusion, the Tribunal takes into account that a finding of dishonesty is a serious matter, and that all the evidence must be considered carefully.

57. The Appellant appears to argue in the alternative that the penalty should have been given greater mitigation.

58. While the burden of proof is on HMRC to establish the matters referred to in the first sentence of paragraph 43 above, the Appellant bears the burden of establishing an entitlement to mitigation.

59. According to the HMRC policy, the Appellant is entitled to up to 40% mitigation for disclosure, where there is an "early and truthful explanation". It follows from the above that the Tribunal is not satisfied that the Appellant gave a truthful explanation, and the Tribunal is not persuaded that greater mitigation should have been given for disclosure.

60. According to the HMRC policy, the Appellant is entitled to up to 40% mitigation for co-operation, in cases of "fully embracing and meeting responsibilities under the procedure by, for example; supplying information promptly, providing details of the amounts involved, attending meetings and answering questions". The Tribunal considers that in the circumstances of this case, given the very large amount of tobacco products involved, full cooperation would have involved giving HMRC a far more detailed account than the Appellant has. The most detailed account given was in his 20 February 2018 e-mail, and this was provided only after HMRC had already issued its decision and the review decision, and after the Appellant had already commenced this Tribunal appeal. He did not provide full details promptly. The Tribunal is not persuaded that greater mitigation should have been given for cooperation.

61. The Tribunal therefore concludes that the Appellant has not established that in the particular circumstances of this case any further mitigation is warranted.

62. Apart from the issue of the percentage mitigation to be given, the Appellant has not challenged the way in which HMRC has calculated the penalties. Nevertheless, at the hearing Mr Davies gave the Tribunal an explanation of the way in which they had been calculated. The Tribunal found no error in this explanation.

Conclusion

63. The appeal is accordingly dismissed.

64. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 08 JANUARY 2019