

[2019] UKFTT 398 (TC)



EXCISE DUTY – civil evasion penalty under section 8 (1) Finance Act 1994 and section 25 (1) Finance Act 2003 – whether appellant dishonest – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TC07213

Appeal number: TC/2018/01049

BETWEEN

KAROLINA LEMBERTAITE

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
IAN ABRAMS**

Sitting in public at Cambridge Magistrates Court, Cambridge on 7 May 2019

Mr Sugar Ali for the Appellant

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

DECISION

INTRODUCTION

1. This is an appeal against a decision of the Respondents (“HMRC”) dated 23 January 2015 to issue an Excise & Customs Civil Evasion Penalty (“the Penalty”) in the sum of £12,990.00 under section 8(1) of the Finance Act 1994 and section 25(1) of the Finance Act 2003.
2. The appellant appeals against the Penalty on the basis that she was unaware that there were cigarettes in the luggage seized by HM Border Force (“Border Force”).

THE FACTS

3. The appellant arrived at Heathrow airport on 28 August 2014, having travelled from Erbil, Iraq, via Vienna, with her partner (Mr Sarkawt Ali Akram) and their two-year-old child.
4. On arrival at Heathrow the appellant and Mr Akram, collected their baggage and entered the Green channel. In other words, they were indicating that they had nothing to declare and had no duties or taxes to pay. The appellant and her partner were stopped and questioned by a Border Force officer (Officer Singh Brar) whilst passing through the Green channel.
5. Border Force officers had previously observed two grey “Mobo” suitcases (“the two suitcases”) and selected them for covert examination. The two suitcases had airline baggage tags in the name of “LEMBERTAITE/KARD”. Both suitcases were padlocked but Officer Brar removed the padlocks and examined the contents. The two suitcases were found to contain a total of 44,780 EESE KSF cigarettes in total. The quantity of cigarettes in the two suitcases exceeded the personal allowance (200) for a person travelling outside the EU.
6. Both suitcases were repacked with their contents and were then relocked. The suitcases remained on the baggage carousel and went round a couple of times. Officer Brar proceeded to the baggage reclaim hall. The appellant, her partner and their child were then intercepted in the Green channel and questioned by Officer Brar.
7. The appellant and her partner confirmed the ownership of the bags on their trolley. According to the appellant, the luggage on their trolley consisted of one suitcase and some hand luggage. The Border Force officer asked the appellant if she had any other bags and she responded that she had two more items of luggage. It is not clear why Officer Brar asked the appellant, rather than Mr Akram, whether the two suitcases were hers but we infer that this was because the airline luggage tabs were in her name.
8. The two suitcases were then brought into the Green channel by another Border Force officer. Officer Brar asked the appellant if these were her bags and, according to his notebook, she replied: “Yes”.
9. Officer Brar then searched the appellant’s and Mr Akram’s baggage, including the two suitcases. Whilst searching the bags containing the cigarettes, Officer Brar found an Iraqi passport in the name of Sarkawt Ali Mawlar.
10. The Border Force advised the appellant that the cigarettes would be seized and she was given Notice 1, Notice 12 A, BOR 156 (Seizure Information Notice) and BOR 162 (Warning letter) both of which she signed.
11. Next, on 20 November 2014, Officer McCann (an officer of HMRC) wrote to the appellant notifying her of her intention to investigate her conduct surrounding the smuggling or attempted smuggling of tobacco into the UK, with a view to establishing whether the appellant’s conduct was dishonest and therefore whether it was appropriate to issue a penalty (and, where appropriate, to recover any duty or tax arrears). The letter stated that no decision

had yet been made as to whether there had been dishonest conduct and the appellant was assured that Officer McCann would keep an open mind “that there may be an innocent explanation for the suspected irregularities.” However, the letter noted that if the suspicions of dishonest conduct were confirmed, HMRC would issue a Civil Evasion Penalty, which could be up to 100% of the duty evaded, or attempted to be evaded.

12. HMRC received no response to the letter of 20 November 2014. Accordingly, on 10 December 2014 Officer McCann issued a reminder letter to the appellant which requested a response by 31 December 2014. It appears that HMRC received no reply to this reminder letter.

13. Next, on 23 January 2015, Officer McCann wrote to the appellant and told her that HMRC had decided that her actions were dishonest and, because of this, HMRC were now going to charge the appellant a civil evasion penalty. The letter recorded that the total duty evaded was £12,990. The letter also explained that the penalty could be reduced if HMRC were told promptly about “what was wrong and why” (“disclosure”). The penalty could also be reduced, the letter explained, on account of the amount of co-operation HMRC had received during the enquiry. HMRC had decided not to allow any reduction and gave no allowance for disclosure or cooperation. The overall penalty was, therefore, £12,990.

14. The penalty liability was then referred to HMRC’s Debt Management Team for recovery action to be commenced. Letters were sent to the appellant regarding the payment of the amount outstanding.

15. On 1 October 2017, the appellant wrote to HMRC explaining her reasons for travel in August 2014 and her reasons why she could not afford to pay. The appellant’s letter included an authority for HMRC to deal with her agent. As far as material, the letter stated:

“1. In 2014 I went to Iraq with my Ex partner MR SARKWAT ALI... and daughter to visit my ex Partner’s family, and on my return at Heathrow Airport I was stopped by HM Customs, and was shocked when I was advised that in two (2) suite [sic] cases were full of cigarettes and this was NOT to my knowledge as I and my daughter had only one suite case and advised the officers that these 2 suite cases belonged to my ex Partner Mr Sarkwat Ali. I told the Officers this was his doing and I was getting the blame. It was his country that we went to and he was in charge of the suite cases, I hardly had much saying in our relationship nor did I have the funds to by [sic] such cigarettes. I am not a smoker nor would I ever intend to smuggle in cigarettes.

2. At the time of the Incident my English was very poor and I wasn’t provided with an interpreter.

3. I wasn’t even able to speak to the officers as they mainly spoke to my Ex Partner.

4. I have No Savings

5 I live in Rented accommodation

6. I have NO assets

7. I am [sic] single mother

8. I have limited funds just to survive on

9. I am on Benefits

10. I have no means to pay any penalty especially for the amount of £12,990.00

11. I am inconsiderable debt

12. Bankruptcy proceedings will not be in anyone's benefit as there is no money to gain from me if you issued bankruptcy proceedings.

13. Life will be even difficult with being bankrupt it will cause considerable amount of financial Hardship to me and my daughter.

14. The cigarettes were my Ex Partners, he had the funds to pay for them, he has his own business, he should be the responsible party for carrying out such an illegal action.”

16. 24 November 2018, Officer Hall (of HMRC) wrote to the appellant's representative setting out the options available to the appellant (e.g. a review, which would in the circumstances be a late review, or an appeal to this Tribunal).

17. Next, on 10 December 2017, the appellant's representative wrote to HMRC including a statement in support of the request for an independent Tribunal to consider the matter.

18. On 22 December 2017, HMRC (Officer Hall) wrote to the appellant's representative explaining how an appeal was made to this Tribunal and gave the representative period of 30 days from the date of that letter to appeal to the tribunal.

19. The appellant filed a notice of appeal with this Tribunal on 27 February 2018.

20. At the hearing, the appellant's evidence was essentially that the two suitcases containing cigarettes belonged to her former partner, Mr Akram. The night before their return to the UK from Iraq she had stayed with Mr Akram's relatives in a different house from Mr Akram – he had stayed with his parents. She said that Mr Akram had packed the suitcases that night, having first given certain items to his family in Iraq. This evidence was not challenged in cross-examination and we accept it.

21. The appellant said she was mainly preoccupied with looking after their two-year-old daughter. She said that Mr Akram had checked in the two suitcases (containing the cigarettes) and the other luggage in her name at Erbil airport. The appellant had one suitcase, one handbag and her daughter. The appellant also referred to the fact that in 2014 her command of English was even poorer than it was today. The appellant hailed from Lithuania. Again, this evidence was not challenged in cross-examination and we accept it.

22. According to the appellant, when she and Mr Akram were stopped in the Green channel at Heathrow, the Border Force officers spoke to Mr Akram who advised them that the suitcases belonged to the appellant. She said that she had explained to the officers that the suitcases and their contents belonged to Mr Akram. She said she had no knowledge of the fact that the two suitcases were full of cigarettes. Officer Brar's notebook contained no reference to these alleged remarks. The appellant also said, and we accept, that as she and Mr Akram proceeded through the Green channel, Mr Akram had possession of one suitcase belonging to the appellant, containing the clothes of the appellant and their small daughter, while the appellant carried the child and a small bag.

23. The appellant described her relationship with Mr Akram as one of being largely “controlled” by him. She added that she had never smoked and did not have the means to purchase the cigarettes in Iraq – Mr Akram controlled the money. She did not speak the Iraqi language and the local townspeople in Iraq had very limited English speaking ability. There was, therefore, no way that she would be able to purchase that quantity of cigarettes in Iraq. This evidence was not challenged in cross-examination and we accept it.

24. She claimed that Border Force officers, after she had been stopped in the Green channel, had said to her that if she smuggled goods again the social services authorities might take her child away. She further said that when she and Mr Akram had been stopped in the Green

channel, Mr Akram had denied that they were living together and had left her to deal with the problem. Officer Brar's notebook contained no reference to these alleged remarks.

25. In cross-examination the appellant was asked whether she thought it was strange leaving two bags behind on the baggage carousel. She said she did not know what was in the bags and she could not remember telling Officer Brar that the two suitcases containing cigarettes were her bags.

26. It was put to the appellant that nowhere in Officer Brar's notes of their interview in the Green channel was it indicated that the appellant had said that the suitcases belonged to Mr Akram. The appellant replied that she was simply shocked by the discovery that the suitcases contained cigarettes. She could not remember what she said. She said that the Border Force officers had told that she could not deny that the suitcases belonged to her because they (presumably the airline luggage tags) were in her name.

27. The appellant also said that Mr Akram had promised her that he would deal with the letters from HMRC and the penalty issue. The letters went to Mr Akram's address. She was living with Mr Akram until March 2015 at which time they split up.

28. Officer Brar had no recollection of the appellant telling him that the suitcases belonged to Mr Akram. Officer Brar also had no recollection of the appellant telling him that Mr Akram had charge of the suitcases, that she had little say in their relationship and that she did not have the funds to purchase the cigarettes. As regards these latter points, Officer Brar thought that if the comments had been made to him he would have made a note of them in his notebook. Officer Brar confirmed that his conversation with Mr Akram was limited to the ownership of the bags, which were confirmed to be the appellant's. It is fair to say, however, that Officer Brar understandably appeared to have little or no recollection of the relevant events save to the extent that they were recorded in his notebook.

THE LEGISLATION AND RELEVANT LEGAL PRINCIPLES

Penalty provisions

29. Section 8(1) and (4) of the Finance Act gives the Respondents the power to impose a penalty in relation to evasion of excise duty and for the right of appeal 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.

Although parts of section 8 of the Finance Act 1994 have been repealed by paragraph 21, schedule 40 of the Finance Act 2008, Article 6 of the Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 (SI 2009/571) preserves the penalty under section 8 of the Finance Act 1994 in relation to conduct

involving dishonesty where the conduct does not relate to an inaccuracy in a document or a failure to notify HMRC of an under assessment.

30. Section 25(1) of the Finance Act 2003 gives HMRC the power to impose a penalty in relation to evasion of customs duty as follows:

“(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.

31. Section 29(1)(a) of the Finance Act 2003 provides for a right of appeal as follows:

“(1) Where a person is liable to a penalty under section 25 of 26 –

(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.”

Powers of the tribunal

32. The powers of the tribunal are provided by paragraph 19 of Schedule 41 of the Finance Act 2008 as follows:

“(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.”

Burden of proof

33. Section 16(6)(a) of the Finance Act 1994 states in relation to the burden of proof:

“On an appeal under this section the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds of which any such appeal is brought have been established”

Dishonesty – the legal test

34. In considering whether an individual's state of mind was dishonesty, it is not necessary to enquire as to their standards of honesty. For conduct to be dishonest, it had to be such as to render their participation contrary to normal acceptable standards of honest conduct (see *Barlow Clowes International Ltd (in liquidation) and other v. Eurotrust International Ltd and others* [2005] UKPC 37 at paragraph 16 and *Abou-Ramah and another v. Abacha and others* [2006] EWCA Civ 1492).

35. The test for dishonesty when issuing a civil penalty is primarily an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. In reaching a judgment as to alleged dishonesty in civil penalty cases, the tribunal must, however, have regard to the fact that while the test is primarily objective, the tribunal's fact finding responsibilities in relation to the taxpayer's knowledge are critical (see *Osman v. HMRC* [2016] UKFTT 534 (TC) (Judge Scott) at [28]-[38] and *Bintu Binette Krubally N'Diaye v. HMRC* [2015] UKFTT 0380 (TC)). In *Abou-Rahmah & Anor v Al-Haji Abdul Kadir Abacha & Ors* [2006] EWCA Civ 1492 Arden LJ at [66] put the matter thus:

“...the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, 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" (page 389 and see generally pp 389 to 391).”

36. This test was re-affirmed by the Supreme Court in *Ivey v. Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 by Lord Hughes, giving the judgment of the Court, at [74]:

“The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v. Tan* and by Lord Hoffmann in *Barlow Clowes* : see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

37. The standard of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (see *Sahib Restaurant v. HM Revenue and Custom*, unreported, February 2008).

HMRC NOTICE 300 CUSTOMS CIVIL INVESTIGATION OF SUSPECTED EVASION

38. Although HMRC have the power to reduce the penalties to nil, their published practice (as set out in Notice 300) is to grant a reduction of up to 40% for disclosure and of up to 40% for co-operation, giving a maximum reduction of 80%. In this case the HMRC have granted no reduction to the appellant on the grounds that there was no disclosure and no cooperation.

SUBMISSIONS

39. Mr Evans, appearing for HMRC, submitted that on the balance of probabilities the appellant's conduct was dishonest. The two suitcases containing cigarettes were in her name and she was aware of their contents. The reason why the bags were left on the baggage carousel made no sense. The real reason why they were left on the carousel, according to Mr Evans, was that the appellant and Mr Akram suspected that Border Force officers were suspicious.

40. Mr Evans noted that the appellant had confirmed to Officer Brar that she had two additional suitcases and, then, that the suitcases were hers. She did not, at the time, say that she was unaware of the contents. The appellant only made this claim much later in 2012. Therefore, Mr Evans argued that the appellant knew perfectly well that she was dishonestly evading duty and that, therefore, she was liable to a penalty.

41. Furthermore, Mr Evans contended that Officer McCann's calculations were correct. There was no response to the letters sent by HMRC and that, accordingly, a 100% penalty without reduction was correct.

42. Mr Ali, on behalf of the appellant, noted the appellant's evidence that the relationship between the appellant and Mr Akram was one of control by Mr Akram. He had checked in luggage at Erbil airport and had control of the passports. He knew that if they were stopped, it would be the appellant who would get into trouble. Mr Akram had packed the suitcases. The appellant's English was poor and would have been even poorer in 2014. The appellant had left Mr Akram shortly after the events in August 2014 but the letters from HMRC continued to go to Mr Akram's address. Mr Akram had promised to deal with the penalty issue but had not done so.

DISCUSSION

43. It was common ground that the cigarettes contained in the two suitcases were subject to duty. The cigarettes had been imported from outside the EU and were considerably in excess of the 200 cigarettes personal allowance limit.

44. In our view, the main issue in this appeal is whether the appellant acted dishonestly for the purpose of evading duty on 28 August 2014. This, in turn, depends on whether she knew that the two suitcases contained cigarettes exceeding the usual allowance for personal consumption.

45. The burden of proof falls on HMRC to establish dishonesty.

46. We accept the appellant's evidence that the cigarettes were not purchased by her but rather by Mr Akram. It seems to us, on balance, improbable that a young, foreign woman who did not speak the language (Arabic), and who had no control over her money, would have been in a position to purchase in Iraq the very considerable quantity of cigarettes contained in the two suitcases.

47. The appellant's evidence was that the suitcases belonged to Mr Akram, he had packed them in another building (his parent's house) in which spent the night separately from the appellant and that she was unaware of their contents. Significantly, this evidence was not challenged.

48. At the airport Mr Akram had checked the suitcases in under the name of the appellant and he had possession of their passports. She was preoccupied looking after their small child. We attach no significance to the fact that the airline labels on the two suitcases containing cigarettes were in the appellant's name rather than Mr Akram's. It is perfectly possible, in our direct experience (of which we take notice), for luggage of family members travelling together

to checked in under the name of one member of the family. We conclude that Mr Akram checked in the two suitcases (as well as her own suitcase) under the appellant's name.

49. Furthermore, the appellant described Mr Akram as a "controlling" (in the sense of a dominating) figure in their relationship. Once again, this evidence was not disputed.

50. The two suitcases were left by the appellant and Mr Akram on the baggage carousel whilst they went through the Green channel with their remaining luggage. Mr Akram perhaps had reason to suspect that Border Force officers had suspicions about the contents of the two suitcases. There is, however, no direct evidence that the appellant knew that the suitcases contained cigarettes. Her evidence was that she did not know - Mr Akram packed the two suitcases at a separate location. The appellant acknowledged, when challenged in the Green channel, that she had two further suitcases. We do not, however, think that this leads to the conclusion that the appellant was aware of the contents of the two suitcases or that the suitcases were actually hers (rather than Mr Akram's). She did not deny that she was aware that there were two further suitcases, just that she was unaware of their contents.

51. Officer Brar's evidence was that the appellant acknowledged that the suitcases were hers. But it was evident from his answers to questions from the Tribunal that he had asked the appellant whether the two suitcases were hers (and did not ask Mr Akram this same question) because the appellant's name was on the airline baggage tags. Officer Brar did not realise that Mr Akram had checked in the two suitcases under the appellant's name at the Erbil airport in Iraq. Nonetheless, we consider it odd that Officer Brar was so readily prepared to accept that all three suitcases belonged to the appellant and none of them belonged to Mr Akram without at least questioning Mr Akram.

52. The appellant clearly knew that there were two further suitcases remaining unclaimed on the baggage carousel. Moreover, we consider it likely that the appellant thought that something strange was going on when the two suitcases were left behind on the carousel. In neither case, however, does that demonstrate that the appellant knew the contents of the two suitcases.

53. Officer Brar's notebook contained none of the conversation which the appellant claimed to have had with him and we accept his evidence that he would have made a note of any such conversation. We should add that, at the hearing, we observed that the appellant's English was far from fluent and was no doubt even less so in August 2014. She evidently misunderstood some of the questions she was asked both by Mr Ali and by Mr Evans. There is no evidence that she was offered an interpreter at Heathrow. We therefore consider it unsafe to attach too much weight to the answers the appellant is said to have given to Officer Brar.

54. On balance, after carefully reviewing the evidence, we are not satisfied that HMRC have discharged the burden of proof of showing, on the balance of probabilities, that the appellant dishonestly engaged in conduct for the purpose of evading duty. It seems to us more probable that it was Mr Akram - a controlling figure in his relationship with the appellant - who organised the importation of the cigarettes in the two suitcases (without the appellant's knowledge), putting those suitcases in the appellant's name at the check-in desk at Erbil airport and leaving her, so to speak, to face the music at Heathrow.

55. We therefore allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

Release date: 19 June 2019