



[2019] UKFTT 0733 (TC)

**TC07491**

*EXCISE AND CUSTOMS DUTY – importation of shisha tobacco products – appeal against penalty – s25(1) of Finance Act 2003 and s8(1) of Finance Act 1994 – whether dishonestly – yes – whether allowances given to reduce penalties correct – yes – whether amount of penalty correct – yes- appeal dismissed.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/01887**

**BETWEEN**

**MS CHANEL STACEY OWARE NAMOALE**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE KELVAN SWINNERTON  
MR CHRISTOPHER JENKINS**

**Sitting in public at Taylor House, 88 Roseberry Avenue, London on 19 September 2019.**

**Ms Namoale, the Appellant.**

**Mr Evans, counsel for HM Revenue and Customs for the Respondents.**

## DECISION

### INTRODUCTION

1. This is an appeal against an Excise Civil Evasion Penalty in the sum of £2939 issued on 31 October 2017 under Section 8(1) Finance Act 1994 and a Customs Civil Evasion Penalty of £946 under Section 25(1) Finance Act 2003 issued on 31 October 2017 which were confirmed by HMRC on 23 February 2018.

### BACKGROUND

2. Ms Namoale arrived at Heathrow airport on 20 November 2016 having travelled from Dubai (United Arab Emirates) via Doha, Qatar. Ms Namoale was travelling with her friend, Ms Zaari. Ms Namoale collected her luggage and entered into the Green Customs Channel indicating that she did not have any items to declare and nor did she have any duties or taxes to pay in relation to any items. Ms Namoale was stopped by Border Force Officer Arif who then asked Border Force Officer Broadbent to assist with Ms Namoale whilst he attended to Ms Zaari.

3. Officer Broadbent asked Ms Namoale whether or not she had packed her bags herself and she replied that she had packed her bags herself. Officer Broadbent then searched the bags of Ms Namoale which revealed that Ms Namoale was carrying 40kg of shisha tobacco in her suitcases and another 2kg of shisha tobacco in her handbag making a total of 42kg of shisha tobacco which is in excess of the personal allowance of 250 grams for a person travelling from outside the EU.

4. Officer Broadbent informed Ms Namoale that the tobacco would be seized and Ms Namoale was given a Seizure Information Notice (FORM BOR156) and a Warning letter about seized goods (FORM BOR 162) both of which were signed by Ms Namoale. The Seizure Information Notice signed by Ms Namoale details that the description of the things seized was “shisha tobacco, purple Tripp Trolley case” and stated that it was liable for forfeiture. It also has a section containing an agreement, signed by Ms Namoale, that the “description of the things seized is correct”.

5. Ms Namoale was also given Public Notice 12A which advised that the legality of the seizure could be contested. Ms Namoale did not opt to exercise the right to contest the legality of the seizure and the tobacco was deemed to be liable for forfeiture.

6. On 11 September 2017, Officer Crozier wrote to Ms Namoale notifying her of an ongoing enquiry that he was carrying out. In her letter to Officer Crozier of 3 October 2017, Ms Namoale stated (amongst other things) that: “I can confirm that I was genuinely unaware of the personal allowance at the time of the incident as the goods were purely for personal use as I am very fond of smoking shisha and can confirm that faithful day was the first time I have brought tobacco to the UK”.

7. In its review letter dated 23 February 2018, HMRC stated that the tobacco seized from Ms Namoale was 168 times greater than the permitted allowance and that, having considered the evidence, HMRC was satisfied that Ms Namoale had acted dishonestly when attempting to bring tobacco into the UK.

## THE LAW

8. Section 8 Finance Act 1994 states:

*(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.*

*(5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say-*

*(a) the insufficiency of the funds available to any person for paying any duty of excise or for paying 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 duty.*

9. Parts of section 8 Finance Act 1994 have been repealed by paragraph 21, Schedule 40 of Finance Act 2008. The parts repealed only related to sections involving dishonest conduct which give rise to a penalty under Schedule 4 Finance Act 2008. Article 6 Finance Act 2008 and Schedule 40 of SI 2009/571 preserve the penalty under section 8 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. Article 4 Finance Act 2008, Schedule 41 of SI 2009/511 preserves the penalty under section 8 Finance Act 1994 where dishonest conduct does not give rise to a penalty under Schedule 41 Finance Act 2008.

10. Section 25(1) Finance Act 2003 states:

*(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.*

11. Section 29 Finance Act 2003 states:

*(1) Where a person is liable to a penalty under section 25 or 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) These 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.*

12. The Travellers Allowance Order 1996 details a set of allowances for travellers including the allowance that applies in relation to this appeal.

## **THE HEARING**

13. The appeal of Ms Namoale was heard together with the appeal of Ms Zaari for whom a separate decision has been provided. Ms Namoale did not provide any documentation in support of her appeal at the hearing. HMRC provided a bundle of documentation for the purpose of the hearing that consisted of 156 pages as well as a bundle of legislation and authorities and a skeleton argument. Included within the documentation provided by HMRC were, amongst other things, the Seizure Information Notice, the Warning letter about seized goods, a duty calculations document, witness statements for Officers Arif, Broadbent and Crozier and the notebook entries of Officers Arif and Broadbent.

14. The burden of proof rests with HMRC to establish a prima facie case that the conditions for issuing a penalty are satisfied which are that the taxpayer has engaged in a course of conduct for the purpose of evading excise duty that involved dishonesty. Once HMRC has established that burden of proof, the burden of proof is then upon the taxpayer to provide evidence to rebut HMRC's case. The standard of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities.

15. The evidence of Officer Broadbent at the hearing was that Ms Namoale was agitated and argumentative at the time of the search of her bags and that Ms Namoale was not prepared to listen to what Officer Broadbent was saying as is recorded in her notebook entry relating to the search. Officer Crozier also gave evidence at the hearing and, in explaining the reductions that he had allowed to the amount of the penalty, he referred to his letter of 11 September 2017 to Ms Namoale which stated that Ms Namoale had the opportunity to significantly reduce any penalties that may become due if she chose to co-operate with the enquiry being carried out by HMRC. He explained that, in considering the reductions to the penalties of Ms Namoale, he

had taken into account that Ms Namoale had not answered all of the questions that he had raised in his letter of 11 September 2017.

16. The Notice of Assessment states that a penalty can be reduced if HMRC are told promptly about what was wrong and why and this is referred to as ‘disclosure’. A penalty can also be reduced depending upon the amount of ‘co-operation’ received during the check carried out by HMRC. In the case of Ms Namoale, a reduction of 20% was allowed for disclosure and a reduction of 15% was allowed for co-operation. These reductions for disclosure and co-operation resulted in a total reduction of 35% being applied such that the Excise Civil Evasion Penalty was reduced to £2939 (from £4523) and the Customs Civil Evasion Penalty was reduced to £946 (from £1456) with the total figure for the reduced penalties being £3885.

17. Ms Namoale gave evidence at the hearing that she did not know that shisha was a tobacco product or contained tobacco until told so by the Border Force officers. On cross-examination, she acknowledged that shisha tobacco was significantly cheaper in Dubai than when bought in the UK because it was highly taxed in the UK.

18. Mr Evans on behalf of HMRC contended that there had been no challenge to the seizure of the goods by Ms Namoale with the seizure notice clearly describing the goods seized as shisha tobacco and Ms Namoale having agreed to that at the time of the seizure as is evidenced by her signature. There is signage in the airport outlining the restrictions such that Ms Namoale should have been aware of the duty free allowances that apply to travellers from outside the European Union. Furthermore, the conduct of Ms Namoale had been dishonest which is evident from her answers to the questions of Officer Broadbent.

19. Mr Evans referred to his skeleton argument with respect to the test for dishonesty and to the test for dishonesty being affirmed in the Supreme Court in *Ivey v. Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67* citing a passage from that case (at paragraph 74) which in turn referred to other cases including the case of *Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378*. It was submitted that, having established the knowledge or belief of the individual as to their behaviour, the question is whether the conduct was honest or dishonest by the standards of “ordinary decent people”.

## **FINDINGS OF FACT**

20. In respect of the notebook entry of Officer Broadbent, this details that Ms Namoale confirmed that she had packed her bags herself and that Ms Namoale had been argumentative at the time of the search of her bags.

21. The shisha tobacco was seized and the Seizure Information Notice, in the section entitled ‘Schedule of things seized - Description’, states that the things seized were “shisha tobacco” and that the quantity was 42kg as well as reference to a trolley case. The Seizure Information Notice also contains a section containing an agreement as to the description of the things seized being correct. That section of the Seizure Information Notice contains the signature of Ms Namoale with Ms Namoale having signed the Seizure Information Notice on the same day as the seizure itself. We note that the grounds of appeal of Ms Namoale state: “I am appealing against the decision because I was unaware that I was over the tobacco limit and also can not afford to pay the fine”. We find that Ms Namoale, indisputably, was carrying 42kg of shisha tobacco when she was stopped by Officer Arif.

22. The Seizure Information Notice also contains a section which details that the Warning letter was issued to Ms Namoale. The Warning letter about seized goods dated 20 November 2016 states clearly that HM Revenue & Customs may take action such as issuing an assessment

for any evaded tax or duty and a wrongdoing penalty and that other agencies and organisations may wish to take actions including prosecution in relation to the seizure.

23. We find that Ms Namoale was clearly notified of the scope for further action to be taken against her in relation to the seizure.

24. The Seizure Information Notice also referred to Ms Namoale having been issued with Notice 12A which relates to what can be done if things are seized. Notice 12A refers to the option for a person to formally challenge the seizure of something by the Border Force or HMRC and states that a notice of claim must be sent to the Border Force or HMRC within one calendar month of the date of seizure. Ms Namoale therefore had until 20 December 2016 to make a challenge to the seizure of things taken from her. No such challenge or any challenge at all was made by Ms Namoale to the seizure of the shisha tobacco. The complete lack of any challenge by Ms Namoale to the description of the goods seized reinforces further that the goods seized were shisha tobacco.

25. We find that the state of mind of Ms Namoale was that she was fully aware that she was carrying shisha tobacco when she was stopped by Officer Arif. We find no reason why Ms Namoale would not have been aware that the limits for alcohol and tobacco applied to shisha tobacco and we find that she was carrying an amount of shisha tobacco very substantially in excess of the permitted allowance.

26. We did not find Ms Namoale to be a credible witness. We accept the account of Officer Broadbent that Ms Namoale was argumentative at the time of the search of her bags. We find that, applying the standards of ordinary decent people, Ms Namoale acted dishonestly and that she was fully aware that she was carrying shisha tobacco and fully aware that the quantity of tobacco that she was carrying was considerably in excess of the permitted allowance given that the permitted allowance is 250 grams and Ms Namoale was carrying a quantity some 168 times the permitted allowance. We note also in this respect that Ms Namoale, by her own account, is a frequent traveller internationally and that she had been to Dubai on a number of occasions previously as well as to other non-EU and EU countries such that she would be familiar with the existence of limits for certain goods including tobacco.

27. HMRC provided a document entitled 'Duty Calculations' which contained a summary stating that the total excise duty was £4523, the total customs duty was £376 and the total import VAT was £1080 giving a total figure of £5979. We accept the figures contained in the Duty Calculations document.

28. In respect of the deductions applied to the figure of £5979, these totalled 35%. Ms Namoale was allowed a reduction of 20% in relation to disclosure with the maximum reduction being 40% for disclosure. Similarly, Ms Namoale was allowed a reduction of 15% in relation to co-operation with the maximum reduction being 40% for co-operation. We are satisfied that these reductions are correct in the circumstances and we do not consider that there is any reason to change either of the reductions for disclosure or co-operation.

## **DECISION**

29. Ms Namoale has dishonestly attempted to evade VAT, Excise and Customs duties and penalties are due under s8(1) Finance Act 1994 and s25(1) Finance Act 2003.

30. The penalty reductions of 35% have been calculated correctly.

31. The appeal is dismissed and the Customs Civil Evasion Penalty of £946 is upheld as is the Excise Civil Evasion Penalty of £2939.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

32. 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.

**KELVAN SWINNERTON  
TRIBUNAL JUDGE**

**RELEASE DATE: 04 DECEMBER 2019**