TC07688

Penalty – dishonest evasion of import VAT and Excise Duty on tobacco products imported from the Canary Islands – whether the latter penalty imposed within any applicable time limit – whether appropriate mitigation applied – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/20189/01254

BETWEEN

GINO CIFALDI **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE
TERRY BAYLISS

Sitting in public at Centre City Tower, Birmingham on 27 January 2020 with subsequent written submissions

The Appellant did not attend and was not represented.

Joseph Millington of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns the imposition of dishonest evasion penalties totalling £531 imposed on the Appellant in February 2019 in respect of what HMRC considered to have been an attempt to smuggle tobacco products into the UK from Lanzarote in the Canary Islands in January 2018. The products themselves had been seized by the UK Border Force and the Appellant had heard nothing further until nearly a year after the seizure, when HMRC wrote to him warning that they were considering the imposition of a penalty.

2. Apart from assessing whether the conduct of the Appellant had been dishonest, we were mainly concerned with whether the penalty assessment had been raised with too lengthy a delay to be valid and had been subjected to an appropriate level of mitigation.

3. The Appellant failed to attend the hearing but we were satisfied that reasonable steps had been taken to notify him of it. An attempt was made on the morning of the hearing to contact the Appellant by telephone on the mobile phone number given on his notice of appeal, but there was no answer. The Appellant had originally indicated that he could not provide "dates to avoid" for the hearing because he would only know his work rota for two weeks in advance. No contact had been received by the Tribunal in the period running up to the hearing to say that the Appellant would not be able to attend because of his work rota. HMRC's counsel and two witnesses were both in attendance (one of them having had to make an overnight stay in order to attend the hearing). In the circumstances, we were satisfied that it was in the interests of justice to proceed with the hearing.

4. Following the hearing, Directions were issued for further written submissions to be delivered to the Tribunal on the particular point of whether the element of the penalty imposed in respect of non-payment of Excise Duty had been imposed within any applicable time limit. This decision has been issued following the receipt of such submissions from HMRC. No submissions on the point were received from the Appellant.

THE FACTS

5. We received written witness statements and heard oral evidence from Officer Matthew Parker of the UK Border Force (the officer involved in the seizure of goods referred to below) and from Office Brent Hands of HMRC (the officer who imposed the penalty the subject of this appeal). We consider both to be reliable witnesses (though of course their direct memory of the events involved in this appeal, which took place between one and two years prior to the hearing, had faded somewhat). Officer Parker was relying largely on his notebook, which showed he had written the relevant notes within minutes of making the seizure. The Appellant had been given the opportunity to wait while Officer Parker wrote up his notebook, so he could check it for accuracy, but he declined. The Appellant did not appear and therefore did not give evidence. We find the following facts.

6. The Appellant was stopped by officer Matthew Parker the UK Border Force at East Midlands Airport on 23 January 2018 after flying in from Lanzarote. He had walked through the exit channel without stopping to declare any goods at the red point.

7. After his baggage was examined, it was found to contain 2 litres of Smirnoff Vodka, 2.5kg of Amber Leaf hand rolling tobacco, 1.5kg of Golden Virginia hand rolling tobacco and 1,000 Sterling Dual King Size Filter cigarettes. The goods were seized as they were in excess of the allowed quantities for travellers arriving from outside the European Union.

8. When asked by Officer Parker whether he was aware of the allowances when travelling from Lanzarote, the Appellant said that he had checked online and "it said anything for cigarettes, but you would get asked questions if it was over 800".

9. Nearly a year later, on 16 January 2019 a letter was sent by HMRC to the Appellant referring to the incident. In that letter, it was said that "I… have reason to believe that conduct involving dishonesty may have occurred in relation to your EU/UK Customs obligations… The matters that are the subject of this enquiry are your involvement in the smuggling, or attempted smuggling, of alcohol or tobacco products into the UK that have not had the appropriate duty paid on them." There was no specific reference to the seizure on 23 January 2018, but the Appellant was invited to take advantage of "the opportunity to significantly reduce any penalties that might become due" by "making a full and prompt disclosure, providing full details of your involvement in the smuggling or attempted smuggling of alcohol and/or tobacco products into the UK between 23 January 2017 and 16 January 2019." The letter listed various pieces of information and documentation that the Appellant should submit within 30 days if he wanted to co-operate with the enquiry, thereby potentially reducing the penalty chargeable to him, and enclosed a copy of Notice 300 which provided more detail of the process.

10. On 21 January 2019 the Appellant contacted HMRC by telephone in response to the letter. He did not think he had done anything dishonest. He was asked if he had ever had any goods seized and he confirmed he had, about a year earlier. He was told the letter related to this event.

11. On 10 February 2019 the Appellant wrote to HMRC in response. He gave the following details of two occasions on which tobacco/alcohol had been seized from him:

> Occasion 1, I was stopped by customs in November 2017 when coming back from Lanzarote had previously been to Spain on holiday and noticed that cigarettes in Spain are a lot cheaper than in the UK. I took this trip to Lanzarote to enjoy some winter sun as the UK is cold in November, with the perk of being able to bring back cigarettes quite cheap. When I was stopped at customs I had approximately (from what I recall) about 1200 cigarettes and 2 kg of tobacco seized from me. I had purchased the cigarettes for me and my partner for personal use out of my own money. I had bought the tobacco products again from my own money as a gift to my grandparents for Christmas.in addition, I was on a Ryanair flight back to the UK when the flight attendants were selling alcohol at a special offer of 2, 2 litre bottles of blue Smirnoff Vodka, for €30. I thought this was a bargain so bought them, these were also confiscated from me and I was advised I was only allowed to bring 1 litre of spirits back in to the country. I was saddened by this as I was completely unaware and was shocked I was not informed of this by Ryanair. When these items were seized I was advised by customs that the Canary Islands have completely different rules to mainland Spain on bringing tobacco products and alcohol back in to the UK. I was of course very upset as I had spent approximately £500 on these which I had now lost. Although this happened, I did completely understand and apologise to the customs officer and did explain I had no idea these different rules applied. I assured this officer I would not be doing this again and was quite upset. The officer provided me with some leaflets explaining the rules of what I can and can't bring in to the UK.
>
> Occasion 2, in April 2018 we all took a family trip down to Margate in my mother's motorhome. While we were there I realised we were very close to Dover where the ferry crosses to France. I managed to find a cheap return ferry crossing for less than £35 and thought it would be fun to drive through France and Belgium for the day. When I arrived in France, I noticed how cheap tobacco products were and thought I would make the most of the trip. I

> purchased approximately a thousand cigarettes, for personal use only, I had also bought approximately 2 kg of tobacco products, again for my grandparents. When I came back to the UK that evening I was stopped by customs officers at the Dover port, and all of the above goods were seized from me.
>
> After occasion 1 I read the documents provided to me explaining the rules and knew as I was coming back in to the UK from France, there was no legal limit on the amount of tobacco products I could bring, as long as they were for personal use or to be given as a gift to someone. As I had purchased all of the products with my own money with the sole intention of using them for personal use and to give the tobacco products to my grandparents as a gift, I did not think this would be a problem at all. I explained this to the customs officer who was unfortunately not satisfied that I was telling the truth, due to the seize that occurred in November 2017. Again I was absolutely gutted as I had again lost approximately £450 worth of products when I honestly had no idea I was doing anything wrong.
>
> I did travel a lot last year, I went abroad I think approximately 7/8 times (as I love to travel), other than the two occasions above that I have mentioned, I have never brought any tobacco product or alcohol product back in to the UK on any other of these occasion.

12. Officer Hands considered this response. On 25 February 2019 he wrote to the Appellant notifying him that he had been assessed to a civil evasion penalty totalling £531. He had calculated that the import VAT (recoverable as a debt of Customs) which the Appellant had sought to evade on the tobacco products was £347 and that the Excise Duty which he had sought to evade on them was £1172. The total duty evaded was therefore £1519, and the Appellant was potentially liable to a penalty up to that amount. He had however mitigated the penalty by 30% (out of a possible maximum 40%) to take account of the disclosure which the Appellant had made and by 35% (out of a possible maximum 40%) to take account of his cooperation with the enquiry. He therefore imposed a penalty at the rate of 35%, £121 in respect of the VAT on import and £410 on the Excise Duty. The total penalty was therefore £531.

13. On 15 June 2019 (after the appeal to the Tribunal had started), the Appellant wrote a further email to the Tribunal (which was copied to HMRC) which included the following:

> I understand there is some signage in the airport detailing rules as the respondents have outlined, however I was not paying that much attention to this as I just wanted to get out of the airport before I suffered a panic attack. I would like to make all parties aware of my anxiety disorder which I was diagnosed with 2 and a half years ago, and am currently undergoing cognitive behavioural therapy and taking medication; …[details given]. I am not saying this is an excuse for not realising the rules of what has restrictions on quantities that can be brought in to the UK, I am merely saying that this is a huge factor which may have caused me not to be 100% vigilant of the signs which therefore made me not realise I was in possession of items that *required* declaring.

THE APPEAL

14. On 27 February 2019 the Appellant notified an appeal against this penalty to the tribunal. His stated grounds of appeal were as follows:

> I am being charged a penalty of £531. I dispute this as it is based upon the decision that I was dishonest. I was not dishonest as I explained in a letter that I have sent to HMRC. I explained that I had no idea the Canary Islands had different rules to mainland Spain and the amount of products I had brought

> back were quite clearly for personal use. I have never done something like this again after being told of the rules on this occasion and showed extremely sincere apologies as I did not know. I had already lost all of the tobacco products that were seized alongside the £500 that I had spent on them, solely for personal use, it seems ridiculous that I am now being sent these letters saying I owe another £531 for something that happened 25 months ago on which I did not declare the goods as I did not know that had to. I have no idea why the penalty is based on the RRP of the tobacco products in the UK when I had clearly already spent a lot of money on the tobacco products in the first place. In addition, the letters that I received from HMRC insinuated that there had been more occasions of dishonesty as the letter said that they were investigation whether there would be any more potential occurrences of purpose dishonestly bringing tobacco in to the country, over my allowance.
>
> I would like penalty to be judged with special consideration with the hope it being substantially reduced or hopefully disregarded completely as I just can't afford to pay.

15. The Appellant accordingly appears to be contesting the penalty on the following grounds:

(1) that he was not dishonest, so that an essential pre-requisite of any dishonest evasion penalty was absent;

(2) that the goods he imported were for personal use;

(3) that the penalty was excessive;

(4) that the lapse of time since the seizure rendered the penalty invalid;

(5) that the basis of calculation of the penalty was incorrect (i.e. that it was based on UK recommended retail price rather than the price he had actually paid for the goods); and

(6) that HMRC had implied the penalty was also based on him having been guilty of other unspecified smuggling attempts (therefore presumably arguing that inadequate mitigation had been allowed by them).

THE LAW

16. In respect of penalties for unpaid Excise Duty, Section 8 Finance Act 1994 provides, so far as relevant, as follows:

> **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.

(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.

17. Section 8 has been repealed for most purposes, but remains in force in relation to the matters the subject of this appeal.

18. Sections 12 and 13 Finance Act 1994 provide, so far as relevant, as follows:

12.— Assessments to excise duty.

(1) Subject to subsection (4) below, where it appears to the Commissioners—

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that there has been a default falling within subsection (2) below,

the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

…

(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—

(a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

(5) Subsection (4) above shall have effect as if the reference in paragraph (a) to 4 years were a reference to twenty years in any case falling within subsection (5A)(a) or (b).

(5A) The cases are—

(a) a case involving a loss of duty of excise brought about deliberately by the person assessed (P) or by another person acting on P's behalf, and

(b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of duty of excise.

13.— Assessments to penalties.

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.

19. It is worthy of note that there is no express time limit laid down (in contrast to that contained in relation to import VAT penalties under s 31 Finance Act 2003 set out below) for the issue by HMRC of penalties under s 8 Finance Act 1994. We drew this fact to Mr Millington's attention at the hearing and indicated that as the matter had not been clearly addressed (in spite of having been implicitly raised in the grounds of appeal), we wished to give the parties the opportunity of providing written submissions to the Tribunal on the question of whether the Excise Duty penalty might have been issued too late to be valid. Submissions were received from HMRC but none were received from the Appellant.

20. In respect of penalties for unpaid import VAT (a "relevant tax or duty" for these purposes), sections 25 to 32 Finance Act 2003 provide, so far as relevant, as follows:

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.

…

29 Reduction of penalty under section 25 or 26

(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) 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.

…

30 Demands for penalties

(1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person or his representative a notice in writing (a "demand notice") demanding payment of the amount due by way of penalty.

(2) An amount demanded as due from a person or his representative in accordance with subsection (1) is recoverable as if it were an amount due from the person or, as the case may be, the representative as an amount of customs duty. This subsection is subject to—

(a) any appeal under section 33 (appeals to tribunal); and

(b) subsection (3).

(3) An amount so demanded is not recoverable if or to the extent that—

(a) the demand has subsequently been withdrawn; or

(b) the amount has been reduced under section 29.

…

31 Time limits for demands for penalties

(1) A demand notice may not be given—

(a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or

(b) in the case of a penalty under section 26, more than 3 years after the conduct giving rise to the liability to the penalty ceased.

(2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

(3) A demand notice—

(a) may be given in respect of a penalty to which a person was liable under section 25 or 26 immediately before his death, but

(b) in the case of a penalty to which the deceased was so liable under section 25, may not be given more than 3 years after his death.

…

33 Right to appeal against certain decisions

…

(2) Where HMRC give a demand notice to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of —

(a) their decision that the person is liable to a penalty under section 25 or 26, or

(b) their decision as to the amount of the liability.

…

(6) The powers of an appeal tribunal on an appeal under this section include—

(a) power to quash or vary a decision; and

(b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section—

(a) the burden of proof as to the matters mentioned in section 25(1) or 26(1) lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established.

CONSIDERATION OF GROUNDS OF APPEAL

1 - That the Appellant was not dishonest

21. As the Appellant did not attend the hearing, we were unable to consider his demeanour and response to cross-examination to assist us in assessing his honesty. We must therefore draw inferences from the documentary material available to us.

22. The Appellant's essential argument, gleaned from his letter set out at [11] above, was that he believed the duty free limits to be far higher than they actually were, accordingly he had not acted dishonestly in exceeding them.

23. When stopped by Officer Parker, the Appellant said he had "checked online and it said anything for cigarettes, but you would get asked questions if it was over 800." The place he would have checked online (the .gov.uk website) includes the following text: "Although there are no limits to the alcohol and tobacco you can bring in from EU countries, you're more likely to be asked questions if you have more than the amounts below" (it then goes on to refer to the 800 cigarettes figure). We infer this is where the Appellant had said he had obtained his information. However, immediately above the section of the webpage in which this text is contained, which is under the main heading "Arrivals from EU Countries", there is a clear note to the effect that the Canary Islands "are not part of the EU for customs purposes". We consider the Appellant would have seen this statement when consulting the website, but chose to ignore it.

24. In addition, there was a slight oddity in the Appellant's letter to HMRC dated 10 February 2019 set out at [11] above. He referred to a seizure having taken place in November 2017 "when coming back from Lanzarote". Either this was a mistake on his part and he intended to refer to the January 2018 seizure, or there had been another earlier seizure (though his description of the goods seized did roughly match those involved in the present appeal). Officer Hands confirmed HMRC had no knowledge of a seizure in November 2017 (though any records for that would of course be with the UK Border Force). Clearly if the Appellant had been subject to a seizure in November 2017 when returning from Lanzarote and had then exceeded the limits again in January 2018 when returning from the same place, it would put his actions into a wholly different (and extremely bad) light. We therefore assumed that the reference in his letter to the November 2017 date was simply a mistake and he had intended to refer to January 2018. If that were the case, however, then the reference in the letter to the Appellant having bought the tobacco "as a gift to my grandparents for Christmas" looks somewhat odd, since the seizure took place over a month after Christmas. If the Appellant had attended, we would have expected him to be asked to explain this oddity. We would also have expected him to be asked about his luggage on the flight out to Lanzarote, given that the tobacco and cigarettes would, on officer Parker's evidence, have occupied most of a suitcase on the return journey. It is conceivable there may have been some satisfactory explanation for these oddities, but in the absence of any explanation and in the light of his apparent familiarity with the details of the relevant webpage from the .gov.uk website, we infer that the Appellant acted deliberately with full knowledge that he was attempting to exceed his allowances.

25. We are therefore satisfied, on a balance of probabilities, that the Appellant did deliberately attempt to evade paying the relevant duties on his importation of tobacco products, was therefore acting dishonestly, and accordingly reject this ground of appeal.

2 – The goods were for personal use

26. As this exemption would only apply in the case of goods brought in from another EU member state, it could not apply to this case. Furthermore, even if it could apply, it is well established from the case of *HMRC v Jones & Jones* [2011] EWCA Civ 824 that any claim for invalidity of the seizure (on grounds that the goods were not held for a commercial purpose) must be made in condemnation proceedings (usually before the Magistrates Court) and if such proceedings are not instituted then the validity of the seizure (including the fact that it was based on the goods being held for a commercial purpose) cannot be contested before this Tribunal. There was no attempt in this case by the Appellant to challenge the lawfulness of the seizure and accordingly this Tribunal would in any event be bound to reject any claim that the goods were held for personal use (i.e. not for commercial purposes).

27. This ground of appeal must therefore also be rejected.

3 – The penalty was excessive

28. The Appellant did not assert any particular basis for this argument, therefore we take it as an argument that greater mitigation of the statutory penalty should have been allowed.

29. As summarised above, Officer Hands allowed a 30% reduction to the penalty (out of maximum possible 40% reduction allowed under HMRC's policy) on the basis of the Appellant's disclosure and a 35% reduction (out of a possible 40% reduction allowed under that policy) on the basis of his co-operation with the enquiry. The possible reductions and HMRC's policy when applying them was set out in their Notice 300, a copy of which was sent to the Appellant with the initial letter from HMRC.

30. The legislation (see above) confers on the Tribunal the unfettered power to substitute its own decision on the amount of mitigation to be allowed, and there is no statutory guidance on how that power is to be exercised (beyond the fact that the Tribunal can reduce the mitigation applied by HMRC, thereby increasing the penalty, just as it can increase the mitigation, thereby reducing the penalty, or agree with the mitigation applied by HMRC). There are certain things that cannot be taken into account in setting the mitigation but none of those apply to the present case (except possibly the Appellant's lack of funds to pay any penalty, but we do not take account of that as a factor here in any event).

31. When asked why the Appellant did not qualify for HMRC's full 40% reduction for co-operation, Officer Hands said that the Appellant had not provided details of the "7 or 8" other international travel trips he had referred to (including, possibly, copies of pages from his passport showing stamps for relevant countries). He had also continued to deny he had been dishonest. He also mentioned various other matters, but said he had not "marked down" the Appellant for them.

32. When asked the same question in relation to disclosure, Officer Hands again mentioned the lack of complete disclosure of details of all the foreign trips that the Appellant said he had made. He also referred to the fact that the Appellant had not admitted his dishonesty.

33. As Mr Millington pointed out, the Appellant's failure to disclose where he had been on his numerous foreign trips might have been very significant: for example, if he had previously visited the Canary Islands on a number of occasions, that would have weakened his case considerably.

34. One factor that Officer Hands did not say he had taken into account was the fact that the Appellant had already been effectively penalised by the seizure of the tobacco, on which he said he had spent approximately £500.

35. We do not consider it appropriate that the Appellant should effectively be penalised under both the "co-operation" and the "disclosure" headings for not disclosing additional details of his numerous foreign travel trips. Similarly, we do not consider he should be penalised under both headings for not admitting his dishonesty. We therefore consider that whilst the 30% reduction under the "disclosure" head is appropriate, we consider a 40% reduction under the "co-operation" head should be allowed. This would increase the mitigation to 70% from 65%, thereby reducing the penalty from £531 to £455. We would therefore accept this ground of appeal to that extent.

4 – The lapse of time before the penalty was imposed

36. There are two elements to this, dealing with the two parts of the penalty. One part of it (£121) was imposed pursuant to s 25 Finance Act 2003 in respect of the unpaid import VAT. It is clear that the demand for that part of the penalty was made within the statutory period set out in s 31 Finance Act 2003.

37. The other part of the penalty (£410) was imposed pursuant to s 8 Finance Act 1994 in respect of the evasion of excise duty. Unlike the Finance Act 2003 penalty, there is no particular time limit set out in the legislation for the imposition of this penalty. The question therefore is whether its notification, under general principles, was so late as to render it invalid.

38. Mr Millington pointed out that:

(1) There was no explicit time limit for notifying an assessment to a penalty under s 8 Finance Act 1994.

(2) s 13(2) Finance Act 1994 provided that a penalty assessment might be combined with an assessment for duty, which implied that any penalty assessment raised within the time limit for raising an assessment would be in time; s 12 of the same Act imposed a time limit for raising a duty assessment of "*one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"*; even if that time limit applied here (which, on the facts, it did not[1]), it was only when HMRC received the Appellant's letter dated 10 February 2019 that they were in possession of such facts, so the assessment would have been raised well within the twelve month period contemplated in s 12;

(3) the penalty assessment was a joint one under both s 8 Finance Act 1994 and s 25 Finance Act 2003, raised well within the time limit fixed for the latter penalty (and accordingly no unfairness could be said to arise); and

(4) HMRC had followed their own internal policy (which required that the procedure for imposing civil penalties should normally be commenced within 12 months of the seizure, regardless of when the matter was referred to HMRC by the UK Border Force).

39. As mentioned above, no submissions were received from the Appellant.

40. In the absence of any submissions to the contrary, we find Mr Millington's submissions persuasive. We therefore reject this ground of appeal.

5 – The basis of calculation of the penalty was incorrect

41. The basis of Officer Hands' calculation of the duty amount and associated penalty amount was set out in a document headed "Duty Calculations" attached to the Notice of Assessment of the penalty. The Appellant has not disputed any particular aspect of the

[1] This was on the basis, as Mr Millington put it, that no duty assessment could be raised because the goods had not, up to the time they were seized, "travelled beyond the area in which the first customs office inside the customs territory of the Community was situated".

calculation, merely submitted that the result is "excessive", and referred to the fact that he only paid about £500 for the tobacco (and possibly alcohol) products.

42. The bulk of the calculation was carried out by reference to the quantity of cigarettes and the weight of the hand rolling tobacco. The only "ad valorem" element was a duty amount of £71.36 calculated on the basis of the UK recommended retail price of the 1,000 Sterling Dual King Size Filter cigarettes, where Officer Hands had applied a value of £8.65 per 20 cigarettes. In the absence of any specific challenge or evidence as to the precise price paid for the cigarettes from the Appellant, and on the basis that the "ad valorem" element of the duty calculated by Officer Hands was only £71.36 out of a total duty sum of £1,172, we see no basis to interfere with the calculation made by Officer Hands. We therefore reject this ground of appeal.

6 – Implied reliance on other unspecified smuggling offences in reducing mitigation allowed

43. There was nothing in the evidence before us to suggest that the mitigation allowed by Officer Hands had been reduced as a result of any suspicion that the Appellant had been involved in other smuggling attempts on the numerous other foreign trips he said he had taken. As he explained at the hearing, his concern with those other trips was that if detailed evidence about them had been supplied, it might have opened up further questions to be put to the Appellant about his level of knowledge of the relevant limits. By not facilitating a full exploration of such matters, he felt that the Appellant had not provided completely full disclosure and co-operation with his enquiries.

44. We therefore consider there is no substance to this ground of appeal and we reject it.

CONCLUSION AND DECISION

45. As set out above, we consider that the appeal under ground 3 should be allowed in part, to the extent of reducing the total penalty from £531 to £455. All other grounds of appeal are rejected. Overall, therefore, we ALLOW the appeal in part, to the extent of reducing the total penalty from £531 to £455. The penalty is therefore CONFIRMED in the reduced amount of £455.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 28 April 2020