



TC04731

Appeal number: TC/2014/03975

Excise and Customs Duty - importation of tobacco products - appeal against penalties - cross application to strike out - whether dishonesty - yes - whether any reasonable prospect of the Appellant's case succeeding - no - appeal struck out.

FIRST-TIER TRIBUNAL

TAX CHAMBER

ANTHONY MANSOURI

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER CHRISTINE OWEN**

Sitting in public at Leeds, City Exchange, 11 Albion Street, Leeds on 29 June 2015

The Appellant did not attend and was not represented.

Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

5 1. This is an appeal by Mr Anthony Mansouri (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) on 30 April 2013, to issue Excise and Customs Civil Evasion Penalties in the total sum of £795 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty.

10 2. The Appellant did not attend but had written to the Tribunal to say that he was in Iran and unlikely to return for some time. He said that he was content for the appeal to be heard in his absence. The Tribunal was satisfied that it was in the interests of justice to proceed.

15 3. HMRC make a cross application for the Appellant’s appeal be struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 Rules, on the basis that the Tribunal has no jurisdiction to hear the appeal or alternatively that there is no reasonable prospect of the Appellant’s appeal succeeding.

Background

20 4. On 12 January 2013, the Appellant was stopped and questioned by a UK Border Force Officer on entering the Green ‘nothing to declare’ channel at Terminal 3, Manchester Airport, arriving from Tehran, Iran via Doha, Qatar.

5. Iran is a “third country” in respect of which there is a personal allowance of 200 cigarettes for returning travellers.

25 6. Upon being searched, the Appellant’s baggage was found to hold 7,500 Balmain filter cigarettes (“the goods”). That quantity represented more than thirty-seven times the Appellant’s personal allowance of 200.

7. When the stopping Officer, Robert Trendall, asked the Appellant if he was aware of his customs allowances for items such as tobacco and cigarettes, he stated that he was not aware of them. However, there was evidence that the Appellant had made a trip to Iran in the previous twelve months.

30 8. As the goods had not been declared and were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended) Officer Trendall seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 (“CEMA”) and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice ENF156 and Warning Letter BOR 162, both of which the
35 Appellant signed.

9. The legality of seizure was not challenged in the Magistrates’ court and the seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

10. On 6 August 2014, HMRC wrote to the Appellant informing him that a Civil Evasion Penalty was to be imposed under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty. The Appellant was invited to co-operate with the enquiry and advised as to the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on response and co-operation with HMRC's enquires. The Appellant was given the opportunity to provide any relevant information which he thought should be taken into account in calculating the amount of the penalty.

11. On 12 August 2013 the Appellant replied explaining that the he did not know the limits on importing cigarettes, which he said were for personal use and of a brand not available in the UK.

12. On 30 April 2014 HMRC issued a civil evasion penalty to the Appellant. The evaded duties were initially calculated as: Excise Duty of £1,884, Customs Duty of £69 and Import VAT of £37. The corresponding Excise Civil Evasion Penalty was therefore £753 and the Customs (and Import VAT) Civil Evasion Penalty £42, making a total penalty of £795. HMRC had allowed a 30% reduction for disclosure and 30% for co-operation (out of a maximum of 40%). The penalty also took into account the 200 cigarettes personal allowance.

13. One element of the penalty calculation and penalty notification had been described incorrectly. The calculation of the import VAT in respect of the Excise Duty was calculated at 20% but was shown on the penalty notification as part of the total Excise Duty penalty which was incorrect. The total import VAT should be calculated as a single liability and should be included with the Customs Duty penalty.

14. The correctly calculated evaded duties were: Excise Duty of £1,570, Customs Duty of £69 and Import VAT of £351. The corresponding Excise Civil Evasion Penalty after 30% discount was therefore £627 and Customs (and Import VAT) Civil Evasion Penalty £168. This did not affect the overall combined penalty total of £795.

15. On 28 August 2014 the Appellant was notified of the revised penalty calculation.

16. For the purposes of Excise Duty, it is the recommended retail price in the UK which is used as the calculation basis. HMRC say that the retail price (£5.79) of the cheapest known brand has been used to calculate the Excise Duty and that accordingly the Appellant has received the maximum possible benefit in that regard.

The Law

17. The legislation relevant to this appeal is:

Finance Act 1994, Sections 8(1) and 8(4)

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

5 (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—

10 (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. (...)

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Finance Act 2003, Sections 25(1) and 29(1)(a)

s25 Penalty for evasion.

(1) in any case where

20 (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. (...)

25 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

30 (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. (...)

Customs and Excise Management Act 1979, Sections 49(1), 78(3) and 139

35 49(1) Where-

a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

Customs and Excise control of persons entering or leaving the United Kingdom.

5 S78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)

S139 Provisions as to detention, seizure and condemnation of goods

10 (1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

(2) Where any thing is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—

15 (a) deliver that thing to the nearest convenient office of Customs and Excise; or

(b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

20 (3) Where the person seizing or detaining any thing as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

25 (4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say—

(a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

30 (b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

(c) nothing in [section 31 of the Police (Northern Ireland) Act 1998] shall apply in relation to that thing.

35 (5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

40 (6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the Customs and Excise Acts.

(7) If any person, not being an officer, by whom any thing is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of

this section or with any direction of the Commissioners given thereunder; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

5 (8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

Paragraph 5 Schedule 3 CEMA states:

10 If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

Travellers' Allowance Order 1994

1. This Order may be cited as the Travellers' Allowances Order 1994 and shall come into force on 1st April 1994.
- 15 2. (1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage,.
 - 20 (2) For the purposes of this article—
 - (a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;
 - 25 (b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;
 - (c) "third country", in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 30 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991
3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.
- 35 4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

40 HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
- 5 • his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
- The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

The penalty can be mitigated (reduced) to any amount, including nil. Our policy on how the penalty can be reduced is set out in Section 3.

10 3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100 per cent import duties evaded will normally be reduced as follows:

- 15 • Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
- Up to 40 per cent - 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.

20 In most cases, therefore, the maximum reduction obtainable will be 80 per cent of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

HMRC Notice 160 Compliance checks into indirect tax matters

25 2.3 How can penalties be reduced?

It is for you decide whether or not to co-operate with our check, but if you do you should be truthful as making a statement to us you know to be false, you could face prosecution.

If you choose to co-operate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

30 You should tell us about anything you think is relevant when we are working out the level of the penalty. At the end of the check we will take into account the extent of your cooperation.

2.3.1 Reductions under Civil Evasion Penalty Rules

The maximum penalty of 100% tax evaded will normally be reduced as follows:

- 35 • up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them
- up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.

40 In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will

be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

The Appellant's Case

18. The Appellant's grounds of appeal as stated in his Notice of Appeal are that:

- 5
- The cigarettes which are not obtainable in the UK were a gift from his father when he visited Iran. They were for him and his brother.
 - He did not realise that duty was payable on a gift and it was not his intention to be dishonest.
 - He feels that HMRC have overvalued the cigarettes.

10 **HMRC's Case**

19. HMRC contends that the Appellant was stopped in the green channel, which automatically constituted a false declaration that he had no goods attracting Excise or Customs Duty. It is a deemed fact that the goods were legally seized and therefore that he had entered the green channel with goods in excess of his allowances.

15 20. HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty because he acted dishonestly and deliberately took the action to positively evade duty and tax.

20 21. The penalties under these provisions require the Appellant to have been dishonest. A finding of dishonesty requires that the act undertaken (entering the green channel with an amount of cigarettes 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.

22. Entering the green channel with non-duty paid excise goods above the allowance is objectively dishonest by the standards of an ordinary, reasonable person.

25 23. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word 'dishonesty'.

30 "It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of evading tax, then by adding that the conduct must involve dishonesty before the penalty is to attach, Parliament must have intended to add a further element in addition to the mental element of intending to evade tax. We think that that element can only be that when he did, or omitted to do, the act with the intention of evading tax, he knew that according to the ordinary standards of reasonable and honest people that what he was doing would be regarded as dishonest."

35 24. Dishonesty in this context follows the guidance given by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053, CA, where a two-step test for showing dishonesty was set out:

5 “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. . . If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.”

15 25. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest, trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* [2005] UKPC 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 was the correct test and was summarised as follows:

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

26. The Appellant’s actions in attempting to clear customs without paying any duties, by walking through the green channel ‘nothing to declare’ with the concealed cigarettes, demonstrates his intent to positively evade duty and tax.

27. HMRC contends that:

- 30 a. it is well known that tax and duty is payable on imported cigarettes;
- b. the airport has signage which described the allowances. The signage is designed to inform travellers who are not aware of importation restrictions;
- 35 c. Iran is a non-EU country and so there could be no confusion with the “unlimited for own use” provisions which are applicable when importing from EU countries;
- d. the Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes;

- e. the Appellant appears to have been a regular traveller and it is more likely than not that he would have been aware of the allowances. In any event, a reasonable person would check the allowances before importing such a large amount of cigarettes.

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28. The legislation at s 8(1) of the Finance Act 1994 and s 29(1)(a) Finance Act 2003 provide that the Commissioners, or on appeal, an appeal tribunal may reduce the penalty up to nil.

10 29. HMRC exercised its discretion as to the amount of discount to be allowed. A 30% deduction was allowed for early disclosure and a further 30% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable.

15 30. Further, the calculation of the tax and duties were based upon the recommended retail price of the cheapest UK brand. Accordingly the Appellant has been given the maximum possible benefit in the calculation of Excise Duty. The actual purchase price was used to calculate the Customs Duty and VAT. The Appellant does not argue that the rates used were incorrect.

20 31. The Appellant has not put forward any grounds of appeal which could allow the Tribunal to reduce the penalty as assessed. Accordingly the Appeal should be struck out.

Conclusion

25 32. The Appellant imported the cigarettes from Iran, a non EU country, and there are strict limits on the number of cigarettes that can be brought into the UK. The issue as to whether or not the cigarettes were for personal use does not arise. In any event, the facts of the matter are not in dispute and the Appellant did not challenge the legality of seizure of the goods within the statutory time limit. Where there is no timely challenge, the law provides that the goods are deemed to be condemned as forfeited and what that means in practice, is that, in law, the Appellant is deemed to have imported the goods for commercial use. That is a final decision and the Tribunal has
30 no jurisdiction to consider that issue any further.

35 33. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed and for the correct amount. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (*Sahib Restaurant v H M Revenue & Customs* and *Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

34. In determining the Appellant's culpability we take into account that:

- (i) it is well know that tax and duty is payable on imported cigarettes;
- (ii) Iran is clearly a non EU country and so no confusion is possible in respect of the “unlimited for own use” provisions when importing from other EU countries;
- (iii) the Appellant stated that he did not know his allowances. However, the airport has signage which described the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. In any event, a reasonable person would check the allowances;
- (iv) the Appellant appears to have been a regular traveller and would, on the balance of probabilities, have know of the allowances for importing tobacco and cigarettes.

10 35. The Appellant was dishonest if he knew:

- (i) that there were restrictions on the personal import of cigarettes to the UK from Iran, and
- (ii) that he was carrying a greater number of cigarettes than the permissible limit.

15 It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities.

20 36. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax. He entered the green channel, indicating that he had nothing to declare. He should have been aware of the limits on the amount of tobacco that can be brought into the country. The Appellant has not offered any grounds on which he could successfully challenge the decision to issue the penalty.

37. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

25 38. HMRC can reduce a penalty on the basis of the customer’s co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation.

30 39. Mr Davies for HMRC submitted that that Appellant’s grounds of appeal disclosed no reasonable prospect of success and should be struck out.

40. The Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 states:

“Striking out a party’s case

35 8. (3) The Tribunal may strike out the whole or a part of the proceedings if—

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

5 39. 'Reasonable prospects of success' has been subject to case law in the county courts in *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 where the court said:

10 "That prospect must be real, i.e. the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word real means that the respondent [to the application] has to have a case which is better than merely arguable."

40. The Appellant's appeal discloses no reasonable prospects of success and is therefore struck out and the Excise and Customs Civil Evasion Penalties in the total sum of £795 are accordingly confirmed and the appeal dismissed.

15 41. 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
20 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

25 **MICHAEL CONNELL**
TRIBUNAL JUDGE
RELEASE DATE: 25 November 2015

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