



TC04801

Appeal number:TC/2015/00089

EXCISE DUTY – penalties – Finance Act 1994, section 8 and Finance Act 2003, section 25 – importing cigarettes and shisha tobacco without payment of duty – dishonestly seeking to evade duty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YOUSIF AL-AARAJ

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR MOHAMMED FAROOQ**

Sitting in public in Manchester on 14 October 2015

Mr Yousif Al-Aaraj appeared in person

**Miss Joanna Vicary of counsel instructed by the General Counsel and Solicitor
of HM Revenue & Customs for the Respondents**

DECISION

Background

1. The Appellant lives near Stockport. On 22 September 2013 he was stopped at
5 Manchester Airport having arrived on a flight from Dubai via Heathrow. He was
found to be carrying 400 cigarettes and 69.15 kg of Al Fakher flavoured shisha
tobacco in his luggage. The cigarettes and tobacco were seized on the basis that duty
had not been paid. The Appellant did not challenge the lawfulness of the seizure.

2. On 17 March 2014 the Appellant was again stopped, this time at Gatwick
10 Airport having arrived on a flight from Jordan. He was found to be carrying 800
cigarettes and 6 kg of flavoured shisha tobacco in his luggage. The cigarettes and
tobacco were seized on the basis that duty had not been paid. The Appellant did not
challenge the lawfulness of the seizure.

3. On 8 October 2014 a civil evasion penalty assessment was issued to the
15 Appellant in the sum of £1,968. This comprised £480 for evasion of customs duty and
£1,488 for evasion of excise duty. Following a review which took place on 9
December 2014 the penalty was maintained.

4. The Appellant has not been assessed to the customs duty or excise duty on the
20 seized goods. The total amount of duty which would have been payable on the seized
goods as calculated by HMRC is £9,847. The penalty was calculated at 20% of the
total duty, having given the Appellant a reduction of 80% to reflect disclosure and co-
operation in HMRC's enquiries.

5. In this appeal the Appellant challenges the penalty assessment. His case is
essentially as follows:

25 (1) He was unaware that there was a maximum allowance of 200 cigarettes
and 250g of tobacco, including shisha tobacco, which could be brought into the
UK duty free from a third country.

(2) He was not given the opportunity to declare the seized goods because on
both occasions he was stopped before entering the green channel.

30 (3) He had no intention of evading duty.

(4) He also contends that seizure of the goods was a sufficient penalty and he
should not have to pay a further penalty.

6. HMRC contend that we can be satisfied on the evidence that the Appellant was
dishonestly intending to evade excise duty and customs duty.

35 7. The principal issue on the appeal is essentially one of fact. It involves the
Appellant's knowledge as to duty free allowances at the time of each importation and
the circumstances in which he was stopped.

8. We can set out the legal background relatively briefly. Travellers arriving in the
UK from third countries outside the EU are relieved from excise duty, customs duty

and VAT (recoverable as customs duty) on up to 200 cigarettes and 250g of tobacco which are not being imported for a commercial purpose. Where goods in excess of these limits are imported then those goods can be seized. There is also provision for excise duty and customs duty to be assessed and for a penalty to be assessed.

5 9. In this case the goods were seized but no assessments to excise duty or customs duty were issued. We are solely concerned with the penalties.

10. Section 8 Finance Act 1994 makes provision for HMRC to assess a penalty in relation to evasion of excise duty as follows:

“ (1) Subject to the following provisions of this section, in any case where—

10 (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),

15 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

20 (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.

25 (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.”

30

11. The provisions for penalties in relation to evasion of customs duty are not significantly different. They are contained in sections 25 and 29 Finance Act 2003.

12. The present appeal is made pursuant to section 16 Finance Act 1994. We have full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty if we think it proper to do so, but not on the grounds of inability to pay.

5 13. Section 16(6) Finance Act 1994 provides that the burden of proof is on HMRC to establish that the Appellant has engaged in conduct for the purpose of evading VAT and that his conduct involved dishonesty. Otherwise the burden of proof is on the Appellant.

10 14. Arguments have recently been raised before the First-tier Tribunal that where excise goods have been seized and destroyed no excise duty can be assessed. Further, that where goods have been seized it is disproportionate for HMRC to also assess excise duty as well as a penalty. See *Williams v Commissioners for HM Revenue & Customs [2015] UKFTT 0330 (TC)*. Those issues do not arise in the present case because there has been no assessment to excise duty and we have jurisdiction in
15 relation to the penalty to reduce it to such amount as we think proper, albeit not on the grounds of inability to pay. The Appellant has not suggested that he is unable to pay the penalty and the extent of his travel described below suggests that he is able to pay the penalty without any hardship.

20 15. We had witness statements from Ms Lisa Carter, Ms Jenny Trinick and Ms Jane Hall. Ms Carter is a Border Force officer who stopped the Appellant at Manchester Airport and who interviewed him on that occasion. Ms Trinick is an officer of HMRC who stopped the Appellant at Gatwick Airport and who interviewed him on that occasion. Ms Hall is the officer who issued the penalty assessment to the Appellant.

25 16. We heard oral evidence from Ms Trinick and Ms Hall. Ms Carter was on maternity leave and we did not hear any oral evidence from her. We also heard evidence from the Appellant.

17. On the basis of the evidence before us and on the balance of probabilities we make the following findings of fact.

Findings of Fact

30 18. We have set out above the general circumstances in which the goods came to be seized, which was common ground. However there were factual issues about the detailed circumstances of each seizure. We shall refer to the seizure on 22 September 2013 as the Manchester Seizure and the seizure on 17 March 2014 as the Gatwick Seizure.

35 19. On 9 September 2014 Ms Hall wrote to the Appellant inviting his cooperation into her enquiry into possible conduct involving dishonesty in relation to the two seizures. On 30 September 2014 the Appellant wrote giving his account of the circumstances. The penalty assessment was issued on 8 October 2014 and on 27
40 October 2014 the Appellant replied re-iterating his account of the circumstances. On 12 November 2014 the Appellant asked for a review of the decision to impose the penalty. His ground for seeking a review was that it was not fair that he should have

to “pay money as tax for products were taken and no longer consumed or owned by me”. In a review dated 9 December 2014 the penalty was confirmed.

20. In his Notice of Appeal dated 4 January 2015 the Appellant stated that at the time of the Manchester Seizure he was given a choice of either paying the tax on the goods or they would be seized. The amount of tax was very high so he opted to give up the goods. He did not consider it fair that in those circumstances he should have to pay further money when he “did not get it, use it and sell it”.

21. It is notable that in his request for a review and in his Notice of Appeal the Appellant was not asserting that he had made an honest mistake about liability to duty. At the hearing however he did maintain that he had not been dishonestly seeking to evade duty and we permitted the Appellant to put his case on that basis.

22. The Respondents suggest that in his Notice of Appeal the Appellant was conceding that he was intending to sell some of the tobacco. We do not think it goes that far. The Appellant’s evidence was that on both occasions the goods were for his own use. We have no reason not to accept that evidence. The intended use is not relevant to the liability to duty although it may be a relevant factor in assessing the amount of any penalty. A commercial importation would be an aggravating factor which is not present here.

23. At the time of the Manchester Seizure the Appellant had been visiting a friend in Dubai. He returned carrying the shisha tobacco in three large suitcases each weighing 23kg.

24. Lisa Carter was the officer who stopped the Appellant at the Manchester Seizure. Her evidence was in a witness statement and there was no opportunity for her to be cross examined. The witness statement therefore carries less weight. We must take that factor into account when assessing the weight of her evidence.

25. Ms Carter said in her witness statement that she had intercepted the Appellant in the green channel at Terminal 3, seized the goods and issued a Seizure Information Notice, Notice 1, Notice 12A and a warning letter. The green channel is the means of exit from the baggage reclaim area by which a passenger declares that he or she has no dutiable goods. It is likely that Ms Carter’s witness statement was simply based on the contents of her notebook which recorded these facts. The notebook records that Ms Carter started taking notes at 11.55. It does not identify the time of interception but we infer it was shortly before that time. Ms Carter signed off the notebook entry at 12.00. We accept that it is a contemporaneous record of the interception and seizure.

26. The Appellant’s evidence was that he did not know that shisha tobacco was subject to duty. He also disputes the evidence of Ms Carter that he was stopped in the green channel. The Appellant told us that when he went to baggage reclaim there were customs officers waiting for him and he didn’t have an opportunity to make a declaration. He says that he overheard one of them say “there he is”. They intercepted him immediately after he had taken his baggage off the carousel, some 2½ metres from the carousel and before he had entered any channel. They asked him if he had

anything to declare, said they would search his baggage and took him to a separate room to do so.

27. In his evidence the Appellant stated that he did not notice where the green channel was, but he was stopped next to the carousel. He maintains that to this day he does not know where the green channel is, even though he has passed through Manchester Airport Terminal 3 on two occasions since the penalty assessment was issued. It is not credible that he would not have taken steps on those trips to remind himself of the layout of the baggage reclaim area and the various channels.

28. On the Appellant's own case he claims not to have known that duty was payable and he did not suggest that he intended either to go through the red channel or to make enquiries before entering the green channel. However the circumstances in which he was stopped are relevant in the sense that HMRC rely on his entering the green channel as being conduct for the purpose of evading duty.

29. In support of his case that he was unaware of the allowance in relation to tobacco, the Appellant said that security at Dubai airport were aware that he was carrying a large amount of shisha tobacco and was travelling to Manchester but did not indicate that there might be any problem. Of course even if that is true, and we make no finding to that effect, it would not be their job to give any warnings in relation to UK duties.

30. The Appellant said in correspondence that when he was stopped he was given the option of paying the tax or having the goods seized. HMRC dispute that is the case. The Appellant put questions along those lines to Ms Trinick but subsequently accepted that he may have got confused. It might have been that he had asked them what the duty was and when told how high it was he then said something along the lines that they had better take the goods then.

31. In the absence of oral evidence from Ms Carter the only evidence to support HMRC's case in relation to the Manchester Seizure would have been her untested witness statement and her contemporaneous notebook. However we cannot look at the Manchester Seizure in isolation. In assessing the credibility of the Appellant's evidence we must consider the evidence as a whole, including that in relation to the Gatwick Seizure,

32. At the time of the Gatwick Seizure the Appellant had been visiting his cousin in Amman, Jordan. The Appellant's evidence was that he thought the second importation "would be okay as the quantities were small". The Manchester Seizure had taken place only 6 months previously. By then the Appellant must have been aware from the Manchester Seizure and the Notices given to him at that time that shisha tobacco was subject to duty. The Appellant claimed he had not looked at them but we find that claim implausible. He must have known that the limit on importations of shisha tobacco from a third country was 250g. The information was clear in the notices and was also on notices displayed in the baggage reclaim areas. The Appellant is an intelligent man and would undoubtedly have made himself aware of the limits if, on his case, the Manchester Seizure was the result of an innocent mistake. We do not

accept the Appellant's evidence that he was unaware of the allowances for the importation of tobacco, including shisha tobacco, and that duty was payable on quantities in excess of those allowances.

5 33. The Appellant's evidence in relation to the Gatwick Seizure was again that he did not enter the green channel. He stated that he was stopped at passport control and asked to wait. During that time he said the immigration officer asked him whether he had done anything wrong before. After about 5 or 10 minutes Ms Trinick arrived and escorted him to baggage reclaim and it was there that his bags were searched. Again the Appellant claims that he was given the opportunity of either paying the tax or
10 having the goods seized.

34. Ms Trinick gave evidence that at Gatwick Airport South Terminal the Immigration Hall containing passport control is on the floor below the baggage reclaim area and the Customs Hall. She was adamant that, as recorded in her notebook, she had stopped the Appellant in the green channel. She was also adamant
15 that passengers intercepted with goods liable to seizure were never given the option of paying the duty and keeping the goods. We accept Ms Trinick's evidence in this regard. It is consistent with her notebook and there is no reason for her to be mistaken about such matters, far less to mislead the Tribunal. Ms Trinick's notebook entries are a contemporaneous record of the interception and seizure.

20 35. Ms Trinick's notebook records that the Appellant entered the green channel where he was stopped and questioned. Her notebook entry commences at 00.39 and is signed by her at 01.00. Initially the notebook recorded that the Appellant said that he did not have any tobacco. That was then corrected by an addition which recorded that the Appellant said that he had 4 cartons of cigarettes. 4 cartons is 800 cigarettes so
25 that the notebook records that the Appellant correctly informed Ms Trinick of the amount of cigarettes he was importing. However it indicates that he failed to inform her that he was importing 6 kg of shisha tobacco. It also records "[passenger] could not explain why he ... had not said anything about the tobacco".

30 36. We accept Ms Trinick's evidence that the Appellant failed to inform her that he was importing 6kg of shisha tobacco. We find that his reason for not informing her of the shisha tobacco was that he was aware he had entered the green channel and thereby made a declaration that he had nothing to declare. He knew duty was payable on the goods.

35 37. Ms Trinick accepted that there may be circumstances where an Immigration Officer might stop a passenger and then require a baggage search. However we are satisfied from her evidence that this was not such an occasion.

38. The Appellant made the same claim about being given the option to pay the tax in relation to the Manchester Seizure. Based on Ms Trinick's evidence we do not accept the Appellant's evidence in that regard. We do not consider that the
40 Appellant's explanation in the hearing that he might have been confused about what was said was very convincing. It does not explain why he would suggest that on both occasions he had been given the option to pay the tax. In this regard we consider that

the Appellant was trying to mislead us as to the circumstances in which the goods were seized.

39. In relation to the Gatwick Seizure we find that the Appellant was aware of the personal allowances for importing cigarettes and shisha tobacco duty free. He was
5 stopped in the green channel. His account of the circumstances in which he was stopped was not true.

40. In the light of those findings we cannot accept the Appellant's evidence as to the circumstances of the Manchester Seizure. There is no reason for us not to accept the evidence of Ms Carter in her witness statement, even though it has not been tested
10 by cross examination. She made an official note of the circumstances of the Manchester Seizure. We find therefore that the Appellant was stopped in the green channel making a false declaration that he was not importing goods liable to duty.

41. We must still determine whether the Appellant was aware that duty was payable on the goods at the time of the Manchester Seizure. We accept Ms Trinick's evidence
15 that the limits are described on notices in the baggage reclaim area and at the entrances to the various channels at all UK airports. The Appellant was importing 69 kg of shisha tobacco. He is an intelligent man. An honest person, not knowing if there was any restriction on importing such goods, would have asked for guidance before entering the green channel. On his case he failed to do so. We infer that in fact he did
20 know of the restrictions and was aware that duty was payable on the goods.

42. The Appellant stated in evidence that in addition to these two trips, he had also visited Morocco in August 2014, Turkey in February 2015 and Italy in May 2015. On each occasion he was stopped at passport control, questioned and his baggage was searched. He found the whole process humiliating. We can well understand why, but
25 it is the result of his own actions.

Decision

43. We have set out above the grounds on which the Appellant seeks to appeal.

44. In the light of our findings of fact we are satisfied that on both occasions when goods were seized the Appellant went through the green channel for the purpose of
30 evading duty. His conduct involved dishonesty and HMRC were entitled to assess a penalty.

45. The penalty is based on the amount of duty sought to be evaded. We were taken to the calculation of the excise duty and customs duty on the seized goods which totalled £9,847. The only issue in relation to that calculation related to the customs
35 duty which is based on the customs value of the goods imported. The customs value equates to the price paid. The amount of duty on the shisha tobacco was calculated on the basis of a customs value of £11/kg.

46. Ms Hall explained in evidence that the figure of £11/kg for shisha tobacco had been taken from an HMRC database which showed that figure being the retail price at
40 Dubai Airport. The Appellant had not purchased the shisha tobacco at Dubai Airport

and he contended that he had paid £3-4/kg. In total the goods seized in Manchester had cost him £250-275 and in Gatwick had cost about £70. He said that retailers in the Middle East did not give receipts.

5 47. In the light of our findings in relation to the Appellant's evidence we cannot rely on his uncorroborated evidence. He has no receipts for the shisha tobacco which he purchased and he has provided no other independent evidence as to their cost. The best evidence we have is that of Ms Trinick, based on HMRC's database. Accordingly we accept that the customs duty on the shisha tobacco was correctly calculated.

10 48. The Appellant has to some extent cooperated with HMRC in their enquiries but he has continued to maintain that he was not seeking to evade duty. We have also rejected his evidence as to the circumstances in which he was stopped at Manchester Airport and Gatwick Airport. We regard the reduction of 80% in the penalty given by Ms Hall to be generous. Whilst we have jurisdiction to increase the penalty, HMRC did not invite us to do so. In those circumstances we are not minded to increase the
15 penalty.

49. For the reasons given above we confirm the penalty and dismiss the appeal.

50. By way of postscript we should record that notwithstanding the Appellant had appealed the penalty, HMRC continued taking steps to enforce payment. Debt collectors visited the Appellant's home on 6 October 2015 and threatened to take
20 possession of assets to the value of the debt. He had explained that there was an outstanding appeal. The debt collectors called again on the morning of the hearing and threatened to call back in the afternoon. HMRC should not take such enforcement action in relation to penalties where there is an ongoing appeal and it is a matter of real concern that they sought to enforce in this case prior to the determination of the
25 appeal.

51. 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
30 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.

35 **JONATHAN CANNAN**

Tribunal Judge

RELEASE DATE: 22 DECEMBER 2015