[2016] UKFTT 053 (TC)

TC04852

Appeal number: TC/2014/03719

EXCISE DUTY – CUSTOMS DUTY – VAT – penalty for evasion – joint enterprise – penalty charged on appellant – whether penalty should be removed or reduced to take involvement of other person into account – no – appeal dismissed – subsequent application for set aside refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

EROL ARABACILAR **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Fox Court, Gray's Inn Road, London on 23 October 2015

The Appellant did not attend and was not represented

Ms Sadiya Choudhury of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 3 February 2013, Mr Arabacilar entered the UK with more cigarettes than legally allowed. HM Revenue & Customs ("HMRC") issued civil evasion penalties totalling £1,960, which Mr Arabacilar appealed.

2. At the end of the hearing of his appeal, I gave an oral judgment in favour of HMRC. A summary decision was issued on 28 October 2015.

3. On 15 November 2015, Mr Arabacilar sent an email to the Tribunal in which he challenged the basis of the decision. As it is not possible to appeal against a summary decision I have treated his email as a request for full written findings and reasons for the decision made on 23 October 2015.

4. Mr Arabacilar's email also asked that the decision be set aside. I have refused that application for the reasons set out at §82 -§92 below.

5. HMRC's attention is drawn to Mr Arabacilar's repeated requests for a time-to-pay arrangement. This is not a matter over which the Tribunal has any jurisdiction. Mr Arabacilar, that means that if you need time to pay, you must contact HMRC directly and discuss the matter with them.

The April 2015 hearing

6. The hearing of Mr Arabacilar's appeal was originally listed to be heard on 9 April 2015 before myself and Mrs Gill Hunter. HMRC's Counsel, Ms Choudhury, attended the hearing together with her instructing solicitor and two HMRC witnesses. Mr Arabacilar attended, but said he was unable to proceed without an interpreter; his native language is Turkish (North Cypriot dialect).

7. The Tribunal decided that it was not in the interests of justice to proceed and adjourned with directions. These included the provision of dates to avoid and for a court-appointed interpreter to be in attendance.

Mr Arabacilar's failure to attend this hearing

8. The hearing was relisted for 23 October 2015, a date which both parties had confirmed was available. On 13 August 2015 the Tribunals Service informed Mr Arabacilar of the date, time and location of the relisted hearing. This was over two months before the hearing date.

9. The letter from the Tribunals Service told Mr Arabacilar that the hearing of the case would commence at 10am and that he must arrive half an hour before that start time. He was warned that if he did not attend, the Tribunal might decide the appeal in his absence.

10. By 10am on the day of the hearing, Ms Choudhury, her instructing solicitor and the two HMRC witnesses were present. A court-appointed Turkish Cypriot interpreter was in attendance.

11. However, Mr Arabacilar had not arrived. The Tribunal clerk called the mobile phone number on his appeal form, but there was no response: the phone appeared to be switched off. The Tribunal clerk tried once more at 10.30am, again with no response.

12. I considered Rules 2 and 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). Rule 33 reads:

> **"Hearings in a party's absence**
>
> If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal--
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

13. The Tribunal letter sent to Mr Arabacilar on 13 August 2015 was despatched to the address on his appeal form. The same address is shown on all Mr Arabacilar's correspondence with the Tribunal and HMRC. I was satisfied that reasonable steps had been taken to notify Mr Arabacilar of the hearing.

14. I next considered whether it was "in the interests of justice to proceed with the hearing." Rule 2 is relevant here: it says that the Tribunal's overriding objective is to "deal with cases fairly and justly" and that this includes:

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

15. I took into account the following points:

(1) If the hearing went ahead, Mr Arabacilar would be unable to participate in the hearing. In particular, he would be unable to give oral evidence, cross-examine HMRC's witnesses, put his own case or challenge that put by Ms Choudhury.

(2) Although not particularly complex, the issue before the Tribunal was a serious matter, involving dishonesty.

(3) Mr Arabacilar has submitted that the size of the penalty was significant to him as his "earnings are not as good as they used to be" following an accident in 2006.

(4) I am required to avoid delay, "so far as compatible with proper consideration of the issues." I had copies of Mr Arabacilar's letters to HMRC and his appeal letter to the Tribunal, explaining his view of the matter. In particular, as I explain further below, he did not deny that he was involved in smuggling. His main ground of appeal was that some of the cigarettes belonged to a third party with whom he was travelling. This was therefore not a case where the appellant was denying the offence.

(5) Given the issues in dispute and the submissions provided, I decided that the issues could be properly considered, despite Mr Arabacilar not being present.

(6) I must deal "fairly and justly" with HMRC as well as with Mr Arabacilar. HMRC had sent Ms Choudhury to represent them at the hearing; her instructing solicitor was in attendance. Of the two HMRC witnesses, one had come from Stanstead and the other from Newcastle upon Tyne. It was the second time they had all come to a hearing of Mr Arabacilar's appeal. Another adjournment would take a further day or so of their time, and require further expenditure on travel costs and legal fees. HMRC have statutory responsibilities for the efficient management of the tax system and repeated adjournments waste their time and public money.

(7) The Court of Appeal has recently reminded courts and tribunals (albeit in a different context) that the interests of justice extend beyond the parties themselves. In *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506, Davis LJ (with whom Sullivan LJ and Laws LJ agreed) said at [28] that the interests of justice include:

> "the interests of other court users: who themselves stand to be affected in the progress of their own cases by satellite litigation, delays and adjournments occurring in other cases..."

(8) Mr Arabacilar had not informed the Tribunal as to why he was not present at the hearing; although the Tribunal clerk had tried to contact him, his phone appeared to be switched off. This hearing had been listed taking into account both parties dates to avoid, unlike many basic cases, and Mr Arabacilar had confirmed to the Tribunal that he was available to attend.

16. Taking all these matters into account, I decided it was in the interests of justice to proceed with the hearing.

The evidence

17. HMRC had provided the Tribunal and Mr Arabacilar with a bundle of documents, which included the correspondence between the parties (with attachments) and between the parties and the Tribunal. It contained in particular:

(1) pages from the notebook of Officer Andrew Kemp, the Border Force Officer who seized the cigarettes; and

(2) a Seizure Information Notice and a Warning of Liability to Prosecution Notice, both dated 13 February 2013.

18. Witness statements were provided by Officer Kemp and by Ms Margaret Batey, the officer who carried out HMRC's enquiry into the seizure. Both Officer Kemp and Ms Batey gave oral evidence and answered questions put by the Tribunal. I found both to be transparently honest and credible witnesses.

19. From the evidence provided to the Tribunal I find the facts set out in the next part of this decision.

The facts

20. On 3 February 2013 Mr Arabacilar travelled from Ercan in Northern Cyprus to Stansted Airport, via Istanbul. He had travelled overseas on 13 previous occasions in the last five years.

21. Officer Kemp was on duty in the green channel. He had joined Customs & Excise over 30 years previously and had spent around half this time working in the passenger areas of the airport. However, in the period before the seizure he had been assigned to the freight areas, although he was occasionally asked to provide cover or support for short periods in the passenger areas. In the period from January to April 2013 he worked in the passenger areas for around 15-20 hours in total, usually for around an hour or so at a time. As a result, it was relatively rare, in that period, for him to make a seizure. He told the Tribunal that he had a clear recollection of this seizure.

22. Officer Kemp recorded the seizure in his Notebook. He told the Tribunal that he wrote all the notes recording the conversation between him and Mr Arabacilar, immediately after he had discovered the cigarettes; he then recorded Mr Arabacilar's address and asked Mr Arabacilar to sign the Notebook. He said that Mr Arabacilar read through the Notebook before signing it, and that the signature on the page was that of Mr Arabacilar.

23. The evidence before the Tribunal included letters from Mr Arabacilar, and I find that the signature on those letters is the same as that on the Notebook, with a large and distinctive "E" for "Erol."

24. Mr Arabacilar did not deny signing the Notebook but submitted that some facts were wrong and others were omitted from the record. Those disputes of fact are dealt with below.

25. At this stage, I find as facts that (a) Officer Kemp wrote up the Notebook when he said he did, so contemporaneously with the seizure, and (b) Mr Arabacilar signed the Notebook.

The seizure

26. Mr Arabacilar's flight landed very late in the evening. He entered the arrivals area. Above each luggage carousel are signs setting out the customs limits; there are further signs at the entrance to the green channel.

27. At 23.30 Mr Arabacilar came through the green channel accompanied by three children. They had two baggage trolleys between them. Officer Kemp's Notebook records his observation that Mr Arabacilar was travelling "with three children as part of family" and that he asked Mr Arabacilar whether they were "together," to which Mr Arabacilar answered "yes." Mr Arabacilar's evidence is that the children were not his children.

28. I find as a fact, in reliance on the credible contemporaneous evidence recorded by Officer Kemp, that the Mr Arabacilar did say that he and the three children were "together" even though I also find that they were not his children.

29. Officer Kemp's Notebook goes on to record this conversation:

> "Officer Kemp: Do you realise you are in the green nothing to declare channel?
>
> Mr Arabacilar: Yes.
>
> Officer Kemp: Are you aware of the customs allowances?
>
> Mr Arabacilar: Yes.
>
> Officer Kemp: And do you have anything to declare?
>
> Mr Arabacilar: I have got some cigarettes.
>
> Officer Kemp: How many?
>
> Mr Arabacilar: About 40.
>
> Officer Kemp: Large or small?
>
> Mr Arabacilar: Large."

30. When Officer Kemp examined the bags, he found 12,060 cigarettes in excess of the 200 allowed. This was over 60 large cartons. Officer Kemp said "you have more than 40" and Mr Arabacilar said "40 or 50."

31. Mr Arabacilar did not dispute that this conversation occurred, and in his letter of 16 June 2014 he explicitly confirmed "yes I did say I was aware of my allowances."

32. I find as a fact that the conversation between Officer Kemp and Mr Arabacilar as set out in the preceding paragraphs occurred and was accurately recorded.

33. Officer Kemp told the Tribunal that the reference to "large or small" was to the size of the boxes: "small" was a single packet of cigarettes, while "large" was a carton of 10 packets (200 cigarettes). I accept that evidence, which is consistent with Mr Arabacilar's statement, after the cartons had been discovered, that he had "40 or 50."

34. I also find as a fact that Mr Arabacilar knew that at least 40 cartons of cigarettes were in the luggage he was taking through customs, because, before it was opened, he told Officer Kemp that it contained "about 40" cartons.

35. Officer Kemp told the Tribunal that he then formally seized the cigarettes and issued Mr Arabacilar with the Seizure Information Notice, stating that 12,060

cigarettes had been seized. That Notice has the signatures of both Mr Arabacilar and Officer Kemp, and is date stamped 3 February 2013. Officer Kemp also issued Mr Arabacilar with a "Warning of Liability to Prosecution" Notice, which also has the signature of both individuals and the same date stamp.

36. Mr Arabacilar accepted in the letter he submitted to the Tribunal with his grounds of appeal, that the Border Force seized 12,060 cigarettes which were in the luggage he was taking through customs. I find as facts that 12,060 cigarettes were seized from the luggage and that both Mr Arabacilar and Officer Kemp signed both Notices.

Mr Pastirmacioglus

37. Mr Arabacilar's evidence is that, when he was in the green channel, he was also accompanied by another individual, Mr Osman Pastirmacioglus, and that Officer Kemp had said that they should use only one person's name even though two of them were involved in the smuggling. In Mr Arabacilar's letter of 16 February 2014, he said he used his name because he was "the eldest." In his letter of 24 March 2014 he said he used his name because his English was better than that of Mr Pastirmacioglus.

38. Before the Tribunal, Officer Kemp gave clear, convincing evidence that the only passengers in the green channel at the time of the seizure were Mr Arabacilar and the three children; he said that there were other passengers in the main arrivals hall but no-one else had made their way into the green channel. He also told the Tribunal that if goods were seized from two people together, the standard procedure was to issue separate Seizure Information Notices and Warning Notices to each individual, unless they were a couple living at the same address, in which case both names would be on a single Notice. Office Kemp said that had goods been seized from Mr Arabacilar and another adult at the same time, he would have followed that standard procedure.

39. In weighing up the evidence on this issue, I take into account that:

(1) Officer Kemp wrote up his Notebook contemporaneously with the seizures in question;

(2) he described the seizure clearly and convincingly to the Tribunal;

(3) the reason given by Mr Arabacilar as to why his name was used is not the same in his two letters, although I accept that they are not necessarily inconsistent;

(4) the existence of a standard procedure when goods are seized from more than one person together; and

(5) the serious nature of a "Warning of Liability to Prosecution Notice."

40. In my judgment it is also extremely unlikely that a Border Force officer would ignore one of two owners of the goods, and instead issue a Warning Notice to only one of them, in breach of standard procedure. It is even more unlikely that he would allow the two owners to choose between them as to who should receive that Notice. That would be arbitrary, unreasonable and unfair.

41. I therefore accept Officer Kemp's evidence that (a) the only passengers in the green channel at the time were Mr Arabacilar and the three children and (b) Officer Kemp did not say that only one of Mr Pastirmacioglus and Mr Arabacilar need give his name and address and sign the Notebook and the Notices.

Who owned the cigarettes?

42. Mr Arabacilar ended his letter of 16 February 2014 by saying:

> "after this unpleasant situation I have never, and never will do anything like this again."

43. In his letter of 24 March 2014 he said that he "was not involved in the vast majority of this incident" and that "the large majority of cigarettes found were not mine…they were Mr Pastirmacioglus who has got away with this incident." In his appeal letter of 16 June 2014 Mr Arabacilar said that "the suitcase that was checked which contained 12,060 cigarettes was not mine" but belonged to Mr Pastirmacioglus, and that he was "merely helping to translate." However, at the end of the same letter Mr Arabacilar says that he was being punished for "a crime that was not genuinely all mine."

44. These statements are inconsistent: at times Mr Arabacilar is saying that *none* of the cigarettes were his, and at others that *most* of them were not his. If none of cigarettes were his, he would not refer to the "large majority" of the cigarettes as belonging to Mr Pastirmacioglus, or that he was not involved in "the vast majority" of the incident or that the crime was "not genuinely all mine." It is also difficult to understand why he would be promising not to "do anything like this again."

45. I find on the basis of Mr Arabacilar's evidence that some of the cigarettes belonged to him and some belonged to another person. I make no finding as to whether or not Mr Pastirmacioglus was that other person. This is because Mr Pastirmacioglus was not called as a witness and I am reluctant to make a finding of fact about his ownership of the smuggled cigarettes when he has not had any opportunity to respond to Mr Arabacilar's accusations.

The enquiry and the penalties

46. On 6 February 2013, the Border Force referred the seizure to HMRC. On 20 January 2014, Ms Batey wrote to Mr Arabacilar to inform him that an enquiry had been opened into the smuggling and inviting his co-operation. In particular, she asked him a list of questions, including the cost of the cigarettes, how the purchases had been financed and what plans there were for the cigarettes had the smuggling succeeded.

47. A reminder letter was sent on 10 February 2014. Mr Arabacilar replied, saying that he had received the first letter but his response must have been lost in the post. He provided certain information and made submissions, which are considered below. However, his letter did not answer the questions set out in the previous paragraph.

48. On 17 March 2014, Ms Batey sent Mr Arabacilar a Notice of Assessment. This said that he was charged with a customs civil evasion penalty of £162 (including an

import VAT penalty of £57) and an excise civil evasion penalty of £2,855, making a total of £3,017. HMRC have subsequently accepted that there were errors in this Notice, and I return to these at the end of this decision.

49. The penalties were mitigated by 35% (10% for co-operation and 25% for disclosure) so that they reduced to £1,960. Ms Batey told the Tribunal that while the exact split between co-operation and disclosure might be inexact, she remained of the view that 35% was the appropriate mitigation percentage.

50. Mr Arabacilar asked for a statutory review. The HMRC Review Officer upheld the penalties and issued his letter on 30 May 2014.

51. On 7 July 2014 Mr Arabacilar appealed to the Tribunal. This was after the 30 day deadline imposed by Finance Act ("FA") 1994, s 16(1C)(b).

The late appeal

52. I considered the principles set out by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that decision.

53. Although Mr Arabacilar's appeal form did not explain why his appeal was late, the period of delay was short, being just over a week; HMRC did not object to the late appeal and the prejudice to Mr Arabacilar in not being able to appeal the decision significantly outweighed the prejudice to HMRC if the appeal was allowed to proceed. I found that it was in the interests of justice to allow the appeal to proceed.

The law

54. FA 1994, s 8 comes under the subheading "civil penalties" and so far as relevant to this decision reads as follows:

> **"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.
>
> (2)-(3)…
>
> (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 funds available to any person for paying any duty of excise or for paying the amount of any penalty…"

55. Similar provisions apply in relation to import VAT and customs duty penalties. Finance Act 2003, s 25(1) provides that where a person has engaged "in any conduct for the purpose of evading" customs duty and/or import VAT and that conduct involves dishonesty, he is liable to penalties up to the value of the duty or VAT evaded.

56. FA 1994, s 16(6) provides that the burden of proving dishonesty rests on HMRC. The standard of proof was considered in *Krubally N'Diaye v HMRC* [2015] UKFTT 380 (TC) ("*N'Diaye*") at [51]ff, a case in which I was also the presiding judge. Having considered the authorities, the Tribunal in that case decided that the standard of proof is the balance of probabilities. I do not repeat that analysis here, but import it by reference and follow it.

The test for dishonesty

57. In *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 ("*Abou-Ramah*"), the Court of Appeal clarified the test for dishonesty in civil breach of trust cases. Arden LJ, giving the leading judgment, first considered the Privy Council decisions in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 ("*Barlow Clowes*"), as well as the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] UKHL 12.

58. At [59] Arden LJ said that in *Barlow Clowes* the Privy Council had considered the authorities and found that:

> "it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour."

59. Although *Barlow Clowes* was a decision of the Privy Council, Arden LJ said it "gave guidance on" the earlier decision of the House of Lords in *Twinsectra*, which had been interpreted as requiring that a person needed to realise that his conduct was dishonest. She then endorsed the *Barlow Clowes* approach, see [68]-[69] of the decision.

60. However, the subjective is not entirely banished. In *Abou-Ramah* at [66], Arden LJ first summarises *Barlow Clowes* and then says:

> "On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has 'a strong subjective element in that it is a description of a type of

> conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.'"

61. At [68(iv)] she said that the test as formulated in *Abou-Ramah* applied "in the context of civil liability (as opposed to criminal responsibility)."

62. I have therefore applied the test set out by Arden LJ to Mr Arabacilar's case, namely was his behaviour dishonest when assessed in the light of what he actually knew at the time, as distinct from what a reasonable person in his position would have known or appreciated.

The parties' submissions

63. Mr Arabacilar said that:

(1) he was unable to pay the penalty;

(2) he was "happy to pay some kind of fine but this is absolutely extortionate" particularly taking into account that not all the cigarettes were his; and that

(3) he made "a huge mistake" but has never been involved in anything similar previously.

64. For HMRC, Ms Choudhury said that:

(1) the excise duty penalty provisions did not only apply to the owners of the smuggled goods, but to a person who engages in "any conduct for the purpose of evading any duty of excise" and the same applies to the penalty for evading import VAT and customs duty. Knowingly carrying someone else's smuggled goods through customs is "conduct for the purposes of evading" excise duty, customs duty and import VAT;

(2) the Tribunal is not allowed by law to take into account whether or not Mr Arabacilar was able to afford to pay; and

(3) the penalty had already been reduced from the initial £3,017 to £1,960 and any further reduction would not be justified on the facts.

Discussion and decision on dishonesty

65. Apart from the single assertion that he was only acting as a translator for Mr Pastirmacioglus, Mr Arabacilar has consistently admitted his involvement in the smuggling of the cigarettes, see §42-§44 above, and I have found as a fact that he knowingly tried to bring cigarettes through customs which were well in excess of his allowance.

66. There is therefore no doubt that he "engaged in conduct" for the purposes of evading customs duty, excise duty and import VAT. Mr Arabacilar also accepted, when questioned by Officer Kemp, that he knew the customs limits and he confirmed this in correspondence.

67. I find that Mr Arabacilar's behaviour was dishonest according to normally accepted standards of behaviour, taking into account what he knew at the time.

The amount of the penalty

68. I also have to decide the amount of the penalties. There are two issues to consider. The first concerns a mistake in the Notice of Assessment issued to Mr Arabacilar. The second is whether the penalties should be reduced or increased, taking into account the parties' submissions and all relevant factors.

The mistake in the assessment

69. The mistake can most easily be explained by setting out the Notice issued to Mr Arabacilar:

	Duty liable to penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty	£162	35%	65%	£105	£1,960
Excise civil evasion penalty	£2,855	35%	65%	£1,855	

70. Ms Choudhury said that the Notice had erroneously included £476 of import VAT within the figure for excise duty and that HMRC should instead have included that import VAT amount in the figure for customs duty, showing the two as a single figure. The Penalty Notice would then have looked something like this:

	Duty liable to penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty including import VAT evasion penalty	£638	35%	65%	£414	£1,960
Excise civil evasion penalty	£2,379	35%	65%	£1,546	

71. In other words, the amount shown as an excise civil evasion penalty should have been reduced by £476 (before mitigation), and that for customs duty should have been increased by the same amount.

72. Ms Choudhury asked that the Tribunal infer from the Notice that HMRC intended to charge £476 for the evasion of import VAT. I agree and find as a fact that HMRC's intention was that Mr Arabacilar should pay a penalty reflecting his evasion of import VAT as well as his evasion of duties.

73. Under FA 1994, s 8(4) the Tribunal can reduce an excise duty penalty "to such amount (including nil) as they think proper." I find that it is "proper" to reduce the excise duty penalty so as to remove the part relating to the evasion of import VAT.

74. The legal provisions relevant to the customs duty penalty and import VAT penalty were considered in *N'Diaye* at §139ff. In advance of the hearing, Ms Choudhury provided the Tribunal and Mr Arabacilar with detailed submissions to the

effect that the same analysis should apply in this case. Mr Arabacilar did not respond to those submissions.

75. For the same reasons as set out in *N'Diaye*, I have increased the customs duty penalty shown on the demand notice to take into account Mr Arabacilar's import VAT penalty liability of £476, which was wrongly included in the excise duty penalty.

76. As a result, the total amount of the penalties charged on Mr Arabacilar is unchanged, but the component parts are slightly different.

Whether the penalty should be reduced, increased, or stay the same

77. I considered Mr Arabacilar's submissions that the penalties should be reduced. His first reason was because could not afford to pay the penalties. I agree with Ms Choudhury that the law is clear: insufficiency of funds is not a matter that can be taken into account.

78. Mr Arabacilar's second reason was that the penalties were "absolutely extortionate" and failed to take into account the fact that "the large majority" of the cigarettes were not his. I do not agree that the penalties should be reduced for this reason. Mr Arabacilar was fully aware that the luggage he was carrying through customs contained a very significant number of cigarettes, many times in excess of his allowance. The legislation, rightly, does not distinguish between (a) smuggling carried out by the owner of the goods, and (b) smuggling knowingly carried out by other people on behalf of the owner. Were it otherwise, it would be an easy matter for smugglers to reduce the cost and risk of their illegal activities by asking others to carry smuggled goods on their behalf. I therefore find that the penalty should not be reduced on the basis that someone else owned "the large majority" of the cigarettes.

79. Mr Arabacilar's third reason was that he had accepted he had made a "huge mistake" and had never done this before. However, when invited by Ms Batey to provide information about the cost of the cigarettes; how the purchases were financed and what plans there were for the cigarettes had the smuggling succeeded, Mr Arabacilar did not respond. In other words, although he expressed contrition, that did not extend to providing a complete picture of what had happened.

80. Ms Batey has already reduced the penalties by 35%. Given the very small amount of information provided by Mr Arabacilar in response to the questions asked in her letter, in my judgment 35% was generous. However, I decided not to interfere with her decision and have not further increased the penalties.

Decision

81. As a result of the foregoing, I dismiss Mr Arabacilar's appeal and decide that he has to pay penalties totalling £1,960.

Application to set aside the decision

82. By his email sent on 15 November 2015, Mr Arabacilar applied to have the decision set aside.

83. Rule 38 of the Tribunal Rules says:

> "(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision, or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) is satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Tribunal at an appropriate time;
>
> (c) there has been some other procedural irregularity in the proceedings; or
>
> (d) a party, or a party's representative, was not present at a hearing related to the proceedings."

84. Mr Arabacilar's email reads:

> "I would like to apologise for missing my appointment and for the misfortune of not letting you no [sic]. I rushed to Cyprus due to a family emergency in saying that I received no post from you. I was not given the chance to explain."

85. Mr Arabacilar also asked the Tribunal to obtain CCTV evidence which he says would support his case, and he provided a further account of what, on his submission, happened at the airport.

86. Of the four conditions set out in Rule 38 as being necessary before the Tribunal can consider setting aside a decision, Mr Arabacilar has therefore submitted that both (a) and (d) are satisfied: he received "no post" from the Tribunal and he was not present at the hearing. He may also be submitting that the absence of CCTV evidence amounts to a "procedural irregularity," so engaging condition (c) of Rule 38.

87. Taking the last of these three possibilities first, the absence of CCTV evidence is not a "procedural irregularity" within the meaning of the Rule 38. Instead, it is for each party to provide the evidence on which they seek to rely.

88. In relation to condition (a), I note that that Mr Arabacilar gives two reasons for not being present at the hearing: a "family emergency" in Cyprus and the absence of notification. I do not find either to be particularly credible – the former is wholly unparticularised and the latter surprising, given that the letter was sent to the same address as other correspondence. I note that had the letter never arrived, Mr Arabacilar would not need to explain his absence by citing an unexpected foreign emergency.

89. Having said that, Mr Arabacilar does, of course, satisfy condition (d) in that he was not present at the hearing. I thus moved on to considering whether it was in the interests of justice to set aside the decision, taking into account the following:

(1) Mr Arabacilar has consistently accepted that he was smuggling cigarettes through customs, and his email of 15 November 2015 does not resile from that: he says "I apologise for the cigarettes that I had in my case."

(2) The only issue of fact in dispute related to Mr Pastirmacioglus. Mr Arabacilar's email of 15 December repeats his earlier correspondence: he says that his share of the cigarettes "was not the enormous amount Mr Pastirmacioglus had in his case." In the decision I found as a fact, on the basis of his earlier written submissions, that "some of the cigarettes belonged to him and some belonged to another person" see §45, so this is not a case where a vital new fact was not before the Tribunal when the decision was made.

(3) The substantive dispute concerns whether or not Mr Arabacilar should suffer a penalty, and if so, how much. His email says that the lead actor was Mr Pastirmacioglus. But this is not a new submission and was fully taken into account in the decision about the penalty, see §78.

90. Thus, although Mr A was not present at the hearing, there is nothing in his email which indicates that the Tribunal took a wrong turning as a result of his absence.

91. If this decision were set aside, a further hearing would be required. This would involve costs for HMRC and the Ministry of Justice and a consequential delay to the administration of justice for other court users.

92. I find that the interests of justice are firmly in favour of refusing the application. The application is therefore REFUSED.

Appeal rights

93. This document contains full findings of fact and reasons for both the decision to uphold the penalty and the decision to refuse a set-aside.

94. Any party dissatisfied with either or both of these decisions has a right to apply for permission to appeal under Rule 39 of the Tribunal Rules.

95. The application for permission to appeal must be received by this Tribunal not later than 56 days after these decisions are 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.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 1 FEBRUARY 2016