



TC06668

Appeal number: TC/2016/00015

*EXCISE DUTY – wrongdoing penalty (para 4 Sch 41 FA 2008) – whether
conduct deliberate*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WINIFRED GARLAND

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MISS SUSAN STOTT FCA, CTA**

Sitting in public at Liverpool on 6 August 2018

The Appellant in person

**R Davies, counsel, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

Introduction

1. This is an appeal against a penalty imposed under paragraph 4 of Schedule 41 to the Finance Act 2008, in the sum of £1,308.

2. The following matters are not in dispute. On 24 July 2014, the Appellant arrived at London Gatwick Airport on a flight from Alicante in Spain. She travelled on the flight with carry-on luggage only. Her carry-on bag contained some 21.65 kg of hand-rolling tobacco and nothing else. She was travelling with her adult daughter, who was also travelling with carry-on luggage only and whose carry-on bag also contained tobacco only. After disembarking from the aircraft, but before reaching the customs channels, the Appellant and her daughter were stopped by UK Border Force officials, who ascertained that they were carrying the tobacco. The tobacco was seized.

3. HMRC subsequently issued the Appellant with an assessment to duty of £3,739, and a wrongdoing penalty of £1,308. The Appellant's daughter was also issued with an assessment to duty and a wrongdoing penalty, but the present appeal is concerned only with those issued to the Appellant.

4. The Appellant appealed to the Tribunal against the assessment and the penalty. HMRC applied for the appeal to be struck out. In a decision dated 21 September 2016, the Tribunal (Judge Chapman) struck out the appeal against the assessment to excise, but allowed the appeal against the penalty to proceed.

5. It is accordingly only the appeal against the penalty that is the subject of the present decision.

Applicable legislation

6. Paragraph 4(1) of Schedule 41 to the Finance Act 2008 provides:

(1) A penalty is payable by a person (P) where—

- (a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
- (b) at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.

7. Subsequent provisions of Schedule 41 provide that the amount of such a penalty will depend on whether or not the conduct of the person is “deliberate” and whether or not it is “concealed”. In cases where the act or failure of the person is “deliberate but not concealed”, the standard amount of the penalty is 70% of the potential lost revenue. In a case where the act or failure is neither deliberate nor concealed, the standard amount of the penalty is 30% of the potential lost revenue.

8. Schedule 41 then provides that the standard amount of the penalty can be reduced where the person discloses the relevant act or failure to HMRC. Where such disclosure is prompted, a standard penalty of 70% can be reduced to a minimum of 35%, and a standard penalty of 30% can be reduced to a minimum of 20%. Where such disclosure is unprompted, a standard penalty of 70% can be reduced to a minimum of 20%, and a standard penalty of 30% can be reduced to a minimum of 10%.

9. Paragraph 14 of Schedule 41 provides that HMRC may allow a special reduction of a penalty if they think it right because of special circumstances. It is specified that ability to pay cannot be special circumstances.

10. Paragraph 17 of Schedule 41 provides that a person may appeal to the Tribunal against a decision by HMRC that a penalty is payable, and/or against the amount of the penalty payable.

11. Paragraph 19 of Schedule 41 provides that in an appeal against the amount of the penalty, the Tribunal may substitute for HMRC's decision another decision that HMRC had the power to make, but that the Tribunal may rely on paragraph 14 to a different extent to HMRC only if the Tribunal considers the HMRC decision to be flawed when considered in the light of the principles applicable in proceedings for judicial review.

12. Paragraph 20 of Schedule 41 provides that in cases where the relevant act or failure of a person is not deliberate, liability to a penalty will not arise if there is a reasonable excuse for that act or failure.

The HMRC evidence

13. Evidence was given at the hearing by HMRC Officer Hayden Lloyd.

14. Officer Lloyd stated in his witness statement as follows. He was the decision maker who issued the excise duty assessment and wrongdoing penalty. The decision to issue the prompted deliberate penalty was based on information given by the Appellant to UK Border Force Officer Gorbell at the point of interview on 24 July 2014. Before issuing the penalty, he issued a preliminary notice of assessment requesting the Appellant to provide any further information by 22 January 2015. As no further information was received from the Appellant, the excise duty assessment and penalty were issued on 23 January 2015.

15. In examination in chief, Officer Lloyd said as follows. In deciding whether to issue a penalty, HMRC act on the seizure notes received from UK Border Force. HMRC imposed a penalty of 35% of the potential lost revenue, having found that the Appellant's conduct was deliberate and not concealed, and that her disclosure to HMRC was prompted.

16. In cross-examination, Officer Lloyd was questioned by the Appellant about the events of 24 July 2014. He responded that he could not comment as he was not there.

17. HMRC also submitted a witness statement of HMRC Officer Grant, who did not attend the hearing to give oral evidence. He states that he checked paperwork prepared

by Officer Lloyd relating to the excise assessment and penalty before it was issued, and describes subsequent correspondence between the Appellant and HMRC.

18. HMRC also relied on relevant pages from the notebook of UK Border Force Officer Gorbell, who did not attend the hearing to give evidence, and from whom there was no witness statement. These handwritten notes indicate as follows. On 24 July 2014 at Gatwick Airport, Officer Gorbell intercepted the Appellant at the “primary contact point” and escorted her to the customs channels. Officer Gorbell then asked the Appellant if she had anything to declare and the Appellant said “tobacco”. The Appellant then entered the green channel where she was questioned. The Appellant said that she had travelled from Alicante where she had spent two days, that she had not travelled anywhere else, that she was paid to do the trip, and that she had not packed her bag herself but that someone had paid her to bring the bag back. The Appellant said that she did not know the person who had given her the bag. The tobacco was then seized.

15 **The Appellant’s evidence**

19. The Appellant did not produce a witness statement, but gave oral evidence at the hearing. She stated as follows.

20. On 24 July 2014, after getting off the aircraft arriving from Alicante, she and her daughter made their way to passport control. All of the other passengers on the plane appear to have gone or been taken elsewhere, as the Appellant and her daughter were the only people at passport control. There was only one counter open at passport control. The officer there stopped the Appellant and her daughter. They were taken to a Perspex box where they had to wait for about half an hour, until 5 or 6 customs officers appeared from offices behind the passport control counters. They asked the Appellant and her daughter to follow them. They were taken to a hallway with metal tables. The Appellant does not know exactly where this hallway was, or whether it was in one of the customs channels. The Appellant was asked what was in her bag, and she said tobacco. She asked if she was under arrest and she was told that she was not. She said that she believed that there was no limit to the amount of tobacco that she could bring into the UK. She was told that the tobacco was being confiscated. She was asked if she was carrying drugs and she said she was not. She was given documents to read, but she could not read them as she did not have her glasses with her and cannot read without them. An officer showed her with a finger where she was required to sign the documents. She was then told that she was free to go.

21. The Appellant denied vehemently that she ever told the officers at the airport that she had been paid to bring the bags to the UK. She said that someone she and her daughter did not know had met them at the airport in Spain and given them the carry-on bags to bring to the UK. They were told by this person that they could only take one carry-on item each onto the aircraft, so that they would have to leave their own bags behind. They therefore gave their own bags to the person who had given them the bags destined for the UK. The Appellant said that her own bag contained only inexpensive clothing worth £30-£50. The Appellant herself does not smoke.

22. In cross-examination the Appellant said as follows. She went to Spain on a 2 day trip because her daughter was interested in looking at horses in Spain and the Appellant knows a lot about horses. When asked who the tobacco belonged to, she said it was a person called Dave Gunn. She said that he was a friend, then said that he was a friend
5 of a friend. The Appellant added the following. The tobacco was given to her at the airport in Spain by a person she did not know. She was asked to bring the tobacco back by Janet Moore, a friend of hers. Janet Moore called her from the UK while she was in Spain, on the second day of her trip just before she was due to come back. She was not
10 told how much tobacco there would be. She did not ask Janet Moore who the tobacco belonged to. She now knows that it belonged to Dave Gunn, who sells tobacco in the UK. She has had arguments with Janet Moore and Dave Gunn because of this.

23. It was put to the Appellant that it seems unlikely that she and her daughter would be willing, in return for no payment, to abandon their own clothes and bags in Spain, in order to bring so much tobacco back to the UK for a person that they did not really
15 know. The Appellant replied that she did not know there was any limit on how much tobacco she could bring back to the UK, and the items she left in Spain were only worth £30-£50. When later asked again to explain her motivation for doing this, she said that she did not know that she was doing anything wrong.

24. The Appellant further said as follows. She expected that the owner of the tobacco
20 would meet them at Gatwick Airport to collect it. However, after being stopped by customs she did not see anyone at the airport. She did not expect to see anyone after she was stopped, as whoever was waiting for her would presume the tobacco had been confiscated and would disappear, thinking that they might be being watched. She was expecting to see Dave Gunn. He is Janet Moore's partner. She did not know at the
25 time what he intended to do with the tobacco, but she now knows that he intended to sell it in the UK. She has known Janet Moore for 18-20 years.

25. The Appellant was asked if she had intended to declare the tobacco when she got to the UK. At first she responded that she did not know what she would have done, and that she could not answer the question because she never made it to the customs
30 channels. Subsequently, she said that if there had been no officer about when she arrived, she would have walked out of the airport with the tobacco without stopping. When she has travelled before she has gone through the green channel without saying anything. However, if she had seen an officer, she would have declared the tobacco.

26. When asked if she was saying that the statement in Officer Gorbell's notebook, that she had said she had been paid for undertaking the trip, was an invention, the
35 Appellant said that this was the case.

27. The Appellant added as follows. Although she had gone to Spain with her daughter to look at horses, she did not look at any horses while she was there. This was because they did not have time. When asked why she did not have time, at first she
40 responded that she could not remember. When asked what she spent her time doing while in Spain, she said sunbathing and finding out where to go to look at horses. She said that the matter has caused a rift with her daughter. She said that when asked by

officers what was in the bag, she immediately declared that it contained tobacco. She was not given a chance to get to the customs channels.

The Appellant's arguments

28. The fine is harsh. She did not know that she was doing anything wrong. She was cooperative with customs, and was told that there would be no further action. She was not a trader. She cannot afford to pay the penalty and it has caused her huge distress. If she had been given an opportunity to do so, she would have declared the tobacco.

The HMRC arguments

29. Immediately before being stopped by customs officers at the airport, the Appellant had already passed the excise duty point for the tobacco, on which UK duty had not been paid. Reliance was placed on *Revenue and Customs v Jacobson* [2018] UKUT 18 (TCC) ("*Jacobson*"). The Appellant failed to challenge the legality of the seizure. Therefore, the legality of the seizure and the underlying reason for this (that the goods were for a commercial purpose and not for own use) has been deemed as a fact. The Tribunal cannot reopen this fact. Reliance was placed on *HMRC v Jones* [2012] Ch 414, [2011] EWCA Civ 824, *Revenue & Customs v Race* [2014] UKUT 331 (TCC) and *Revenue and Customs v European Brand Trading* [2016] EWCA Civ 90. It follows from this deeming that the Appellant was therefore liable to a penalty.

30. The failure to pay the duty was "deliberate", and the Appellant's disclosure was prompted (she disclosed the tobacco only after being stopped), and therefore the minimum penalty was 35% of the potential lost revenue. The maximum reduction was applied by HMRC.

31. The Appellant's account should be considered with scepticism. Although Officer Gorbell did not attend the hearing to give evidence, it is unlikely that such a large amount of evidence in his notebook would be invented.

32. Viewed objectively, the Appellant has no reasonable excuse. She was aware that she was importing a large quantity of excise goods and she was importing the goods for payment for an unknown person in an arrangement that any reasonable person would regard as being highly suspicious. If she did not have actual knowledge that what she was doing was wrong, she had at least constructive knowledge.

33. There are no circumstances that warrant a special reduction.

34. In so far as the Appellant contends that she was told that there would be no further action, this is a matter for judicial review and the Tribunal lacks the jurisdiction to consider it (reliance was placed on *Hok Ltd v Revenue and Customs* [2012] UKUT 363 (TCC)).

The Tribunal's findings

35. The Appellant has not disputed that she disembarked from the aircraft arriving from Spain with 21.65 kg of hand-rolling tobacco in her carry-on bag.

5 36. The Tribunal is satisfied that at the time she disembarked from the aircraft, before she was approached by any officials, the Appellant had passed the duty point for the tobacco. In *Jacobson* at [46], it was held that “it is clear that a person is holding goods in the UK for the purposes of Regulation 13 at the latest by the time they have carried hand-luggage off the aircraft or collected hold-luggage in the terminal”, and that “the excise duty point had occurred in this case before [the appellant] reached the green
10 channel”.

37. The Tribunal is also satisfied that at the time the Appellant disembarked from the aircraft, payment of UK duty on the tobacco was outstanding. This follows from the fact that HMRC issued an assessment to excise on those goods, and that the Appellant’s appeal against that assessment was struck out by Judge Chapman in September 2016.
15 There is no suggestion that there has been any successful appeal against Judge Chapman’s decision. The appeal against the assessment having been struck out, it cannot be challenged collaterally in the present appeal against the penalty.

38. In any event, the Tribunal considers it clear from the evidence that the tobacco was not for the Appellant’s own use. She does not suggest that it was. The goods were
20 accordingly subject to excise duty in the UK. There is no suggestion that excise duty had been paid prior to the Appellant’s arrival.

39. The Tribunal is furthermore satisfied that at the time the Appellant disembarked from the aircraft, for purposes of paragraph 4(1) of Schedule 41 she had acquired possession of the tobacco or was concerned in carrying, keeping or otherwise dealing
25 with it.

40. All of the requirements of paragraph 4(1) of Schedule 41 to the Finance Act 2008 were therefore met at the time she disembarked from the aircraft, before she was intercepted by any official. The Appellant was thus liable to a penalty under that provision.

30 41. As to the amount of the penalty, the first question to be determined is whether the Appellant’s conduct was “deliberate” for purposes of Schedule 41. No statutory definition of that word is provided in Schedule 41 itself.

42. The word “deliberate” might be understood in this context as meaning that it is sufficient that the Appellant deliberately possessed in the UK tobacco which was liable
35 to duty in the UK which had not been paid, whether or not the Appellant knew that it was subject to excise duty in the UK or that it had not been paid. On another reading, the word “deliberate” might be understood as meaning that the Appellant must also have known that the tobacco was subject to duty in the UK which had not been paid. (See, for instance, *McCloskey v Revenue & Customs* [2018] UKFTT 352 (TC) at [92]-
40 [96].)

43. The Tribunal finds that it need not answer this question. This is because, on its consideration of the evidence before it, the Tribunal finds on a balance of probability that the Appellant knew that the tobacco was subject to excise duty in the UK, and intended that the tobacco would be taken out of the airport without the duty being paid.
5 On any view, her conduct was therefore deliberate.

44. In reaching this conclusion, the Tribunal has given minimal weight to the notebook of Officer Gorbell, given that he did not attend the hearing to give evidence. Simply reading his notebook, without any opportunity to ask her questions, it is not clear to what extent his notes are in fact at odds with the evidence of the Appellant.
10 The notes say that Officer Gorbell intercepted the Appellant at the “primary contact point”, but do not explain where this was. It is therefore possible that the “primary contact point” was the passport control barrier, which would be consistent with the Appellant’s account. The notes then say that that Officer Gorbell escorted the Appellant to the customs channels and the Appellant entered the green channel.
15 However the notes do not say whether or not Officer Gorbell made the Appellant aware that she was now at the customs channels, and do not say whether the Appellant was asked to choose which of the channels she wished to enter or whether she was just directed to the green channel. The notes are therefore not necessarily inconsistent with the Appellant’s account that she was escorted to a hallway with metal tables, but was
20 not aware of exactly where it was. The main point on which there is a clear inconsistency between Officer Gorbell’s notes and the Appellant’s account is in relation to whether or not the Appellant said that she had been paid for undertaking the trip to Spain.

45. The Tribunal has given careful consideration to the Appellant’s account. The
25 Tribunal finds that account to be implausible in material respects. In particular, the Tribunal accepts the HMRC submission that it is implausible that the Appellant would be willing, in return for no payment, to abandon her own clothes and bag in Spain, in order to bring such a quantity of tobacco back to the UK for a person that she did not really know. The Tribunal also finds that it is a fact generally known that there are
30 certain restrictions on the amounts of tobacco and goods that can be brought into the UK duty free even by passengers arriving from other EU Member States. Furthermore, the Appellant said in her evidence that she did not expect to see anyone after she was stopped, as whoever was waiting for her would presume the tobacco had been confiscated and would disappear, thinking that they might be watched. This very much
35 suggests that she knew that what she was doing was not permitted.

46. The standard of proof is the balance of probability. A finding of on a balance of probability standard that the Appellant knew that the tobacco was subject to excise duty in the UK and did not intend to pay it does not mean that the Tribunal has found this to be the case beyond reasonable doubt. Rather, it means that the Tribunal is satisfied that
40 it is more likely than not that this is the case, even if it is also possible that this is not the case. The Tribunal is satisfied that the Appellant’s conduct was deliberate for purposes of Schedule 41.

47. HMRC have not suggested that the Appellant’s conduct was “concealed” for purposes of Schedule 41.

48. In accordance with Schedule 41, the standard penalty for conduct that was deliberate but not concealed was 70% of the potential lost revenue.

49. For purposes of Schedule 41, the Tribunal is satisfied on a balance of probability that the Appellant's disclosure was "prompted". She admitted in her own evidence that if there had been no officer about when she arrived, she would have walked out of the airport with the tobacco without stopping. The Tribunal has already found above that the Appellant intended that the tobacco would be taken out of the airport without the duty being paid. The Tribunal is satisfied that she only told Officer Gorbell that she was carrying tobacco because Officer Gorbell stopped her and questioned her, and that she would not otherwise have disclosed the fact that she was carrying the tobacco. The disclosure was therefore prompted.

50. The minimum penalty that HMRC can apply in a case of promoted disclosure is 35% of the potential lost revenue. That is the percentage that HMRC applied.

51. The Tribunal finds that the potential lost revenue was £3,739, being the amount of the assessment to excise. For the reasons given above, the amount of that assessment cannot now be challenged in this appeal. 35% of £3,739 is £1,308.65, which HMRC have rounded down to £1,308. The Tribunal finds that the penalty has been correctly calculated in accordance with the legislation.

52. Given that the Appellant's conduct has been found to have been deliberate, she cannot escape liability to the penalty on grounds of reasonable excuse.

53. In relation to the question whether there are any special circumstances justifying a special reduction, the Tribunal does not consider the HMRC decision to be flawed in respect of this question. In any event, on the evidence before it, the Tribunal finds that there is no basis for a finding of special circumstances. Paragraph 14(2)(a) of Schedule 41 provides that inability to pay the penalty does not amount to special circumstances.

54. The Tribunal finds that this case is distinguishable from *Bowes v Revenue and Customs* [2017] UKFTT 752 (TC). In that case, goods had been seized before the appellant had had an opportunity to reach the customs channels. In that case, the Tribunal found as a fact that it could not be known exactly what the Appellant would have done or said at the customs channel if he had had that opportunity. The Tribunal found that to be a special circumstance justifying a reduction in the penalty, which in that case was only £122. In the present case, Mr Davies accepted that if the Appellant had declared the tobacco at the customs channel, and paid the duty, no penalty would have been imposed. However, in the present case, the Tribunal has found as a fact that the Appellant intended that the tobacco would be taken out of the airport without the duty being paid. The Tribunal is satisfied that she would not have declared it at the customs channel if she had not been stopped by officers. The fact that she did not manage to reach the customs channel in this case is therefore not a special circumstance.

55. In relation to the Appellant's contention that she was told that there would be no further action, the Tribunal is not persuaded on a balance of probability that she was told this. The only evidence to this effect was the Appellant's own evidence, which for

the reasons above the Tribunal has found not to be reliable. The bundle includes a copy of a warning letter that was issued to the Appellant at the time of the seizure on 24 July 2014, which states that HMRC “may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty”. It is inherently
5 unlikely that the officer would, at the same time as handing the Appellant this document, tell her that no further action would be taken. Furthermore, the Tribunal accepts the HMRC submission that this Tribunal has no jurisdiction to discharge a penalty on grounds of unfairness by HMRC.

Conclusion

10 56. The appeal is accordingly dismissed.

57. 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
15 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.

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**DR CHRISTOPHER STAKER
TRIBUNAL JUDGE**

RELEASE DATE: 21 AUGUST 2018

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