[2019] UKFTT 231 (TC)

TC07078

Appeal number: TC/2017/07024

EXCISE DUTY, CUSTOMS DUTY & VAT – penalties under s 8 FA 1994 and s 25 FA 2003 – whether dishonest evasion of duties: yes – whether mitigation reasonable: no, increased from 5% to 70% -- whether duty amount correct: no, split between excise duty and customs duty wrong and calculation of customs duty wrong – failure to provide evidence of calculations – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HANIF TALATI **Appellants**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
TONY HENNESSY FCA

Sitting in public at Alexandra House, Manchester on 31 January 2019

The Appellant in person

Rupert Davies, instructed by the Solicitor of Her Majesty's Revenue & Customs, for the Respondents

DECISION

1. This was an appeal by Mr Hanif Talati ("the appellant") against penalties imposed on him under s 8 of the Finance Act ("FA") 1994 and s 25 FA 2003. The penalties were imposed following the seizure from the appellant of 4,600 cigarettes and 6.25 kg of hand rolling tobacco ("HRT") at Manchester Airport where he arrived on a flight from Qatar.

Background Facts

2. We take our account of the background facts from the witness statements of Mr Adrian Ford, an officer of Her Majesty's Border Force and of Ms Amy Kowalczuk, and officer of Revenue and Customs. In relation to evidence after January 2014 when Ms Kowalczuk was transferred to other duties, we take our account from the correspondence and notes of calls that were in our bundle.

3. On 31 October 2012 Officer Ford intercepted the appellant in the green channel at Terminal 2 in Manchester Airport. The appellant had arrived on a flight from Doha, Qatar.

4. Mr Ford asked the appellant a number of questions, and having done so, searched the appellant's baggage and found in it 4,600 cigarettes and 6.25 kilos of HRT, all of which was seized by him.

5. He issued a BOR156 notice of seizure, notice 12A setting out a right of appeal, notice 1 prohibitions, the allowance and guidelines for consumables and a warning letter. The appellant signed the notice of seizure and the warning letter.

6. The appellant did not contest the seizure in the Magistrates Court.

7. On 30 October 2013 Ms Kowalczuk considered the papers referred to HMRC by Border Force, including copies of Officer Ford's notebook entries and the documents signed by the appellant.

8. The same day she wrote to the appellant with an initial letter, though she dated it 31 October 2012 (the date the appellant arrived at Manchester and had his goods seized), inviting disclosure from the appellant.

9. On 4 November 2013 the appellant phoned her in response asking what action he should take, and was told to write in response to Ms Kowalczuk's letter.

10. On 7 January 2014, no further communication having been received, Ms Kowalczuk issued a notice of assessment of a penalty in the sum of £3,412 to the appellant, using, she said, the HMRC calculation tool to establish the duty which should have been paid. The appellant was told of his right to ask for a review or appeal to the Tribunal within 30 days.

11. On 10 February 2014 the case was marked as closed.

12. On 28 October 2014 the appellant spoke to Mrs Angela White an officer of HMRC to ask about the penalty. He was told he could make an application for a late review or appeal, and Mrs White sent him copies of various documents.

13. On 12 December 2014 the appellant spoke on the phone to another officer of HMRC and said he would send in information.

14. On 28 January 2015 the appellant emailed Ms White and explained his case and circumstances.

15. On 10 February 2015 Mrs White told the appellant his request for a late review was denied, but that he could make a late appeal.

16. On 19 November 2015 the appellant asked for the decision to be reviewed, and this time a Mrs Jane Hall replied upholding Mrs White's decision not to allow a late review.

17. In June 2017 the appellant submitted an appeal notice to the Tribunal but it was returned as incomplete.

18. On 7 July 2017 the appellant's MP wrote to HMRC asking for another opportunity to appeal or seek a review.

19. On 20 September 2017 the appellant submitted an appeal to the tribunal which was accepted. The notice gave reasons for the late appeal.

20. HMRC were asked if they had any objections to the appeal as being late. They made no reply and in their statement of case did not mention lateness.

Law

21. In relation to excise duty, the power to impose a penalty for the appellant's conduct is in FA 1994:

> "*8 Penalty for evasion of excise duty*
>
> (1) Subject to the following provisions of this section, in any case where—
>
> (a) any person engages in any conduct for the purpose of evading any relevant 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 the duty evaded or, as the case may be, sought to be evaded.
>
> …
>
> (4) Where a person is liable to a penalty under this section—
>
> (a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
>
> (b) an appeal tribunal, on an appeal relating to a penalty reduced by the Commissioners under this subsection, may cancel the whole or any part of the reduction made by the Commissioners.
>
> (5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—

(a) the insufficiency of the funds available to any person for paying any duty of excise or 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.

22. In relation to customs duty and import VAT, the power to impose a penalty is in FA 2003, in very similar terms:

"*25 Penalty for evasion*

(1) In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

…

29 Reduction of penalty under section 25 …

(1) Where a person is liable to a penalty under section 25 …—

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith."

23. It will be noted from both these provisions that the essential element that HMRC has to prove on the balance of probabilities is that the appellant dishonestly evaded the duty or tax involved. HMRC submitted, and we agree, that the only test for dishonesty that the Tribunal must consider is the test in *Barlow Clowes*, as approved by the Supreme Court in *Ivey v Genting Casinos Ltd*.

24. We were also shown the Travellers' Allowance Order 1994 (SI 1994/955) as amended which gives the excise duty and VAT allowances for cigarettes and HRT brought into the UK from outside the EU, and that these allowances are 200 cigarettes and 250 grams of HRT.

Submissions

25. HMRC argues that by his conduct in entering the green channel the appellant made a false declaration that he had no goods attracting excise or customs duties. Because it is a deemed fact that the goods were lawfully seized, it is also a deemed fact that he entered the green channel with goods in excess of the allowances.

26. In this case the appellant's subjective state of mind was that he knew he was importing a large quantity of excise goods and did not intend to pay any duty or tax on them. Judged objectively by the standards of "ordinary decent people" that conduct is dishonest.

27. The discount given by HMRC from the base penalty is in accordance with its policy though HMRC recognise that the Tribunal is not bound by it.

28. Accordingly the appeal should be dismissed.

29. In his notice of appeal the appellant makes the following points:

(1) He did not respond to Ms Kowalczuk's letter of 31 October 2013 as he never received the penalty assessment in writing.

(2) He received a caution at the airport and thought nothing further would be heard of the matter.

(3) If he had known that the "caution was a conviction" he would have defended himself as the cigarettes were worth only £500 and were brought back from Dubai for personal use, not for sale.

(4) This is a first time offence and he was a man of good character who did not like to break laws.

Discussion

30. A crucial matter in the hearing was the cross-examination of the appellant by Mr Davies as to the appellant's knowledge. In the course of that the appellant made the following admissions:

(1) He had gone to Qatar for a religious meeting, and it was his first time there.

(2) He flew to India every year .

(3) He was a smoker then but was not now. He smoked 30-40 a day then and smoked Silk Cut or HRT as it was cheaper.

(4) Some of the tobacco was for his brother.

(5) He bought the tobacco at the airport as he was told it was cheaper.

(6) He had little luggage as he stayed with his parents.

(7) He did not smoke in India in front of his parents.

(8) 4,600 cigarettes would have lasted him a year.

(9) It was the first time he had imported tobacco.

(10) He did not see the notices in the airport; he just followed the other passengers into the green channel.

(11) He though there was no duty on tobacco for personal use. He was told this when he asked at the shop in Qatar airport, although he said that the first person he asked in the shop had told him that it didn't matter what the intended use was, there was a limit.

(12) He had not sought to ask Border Force/HMRC at Manchester what the correct position was, despite getting conflicting advice in Qatar.

(13) He did not recall if he was asked whether he knew his allowances.

31. We consider on the basis of what we heard from the appellant that he was aware that there was a limited allowance even if he did not know the precise quantities and that his purpose in going through the green channel with so much tobacco in excess of those allowances was to seek to evade the taxes and duties chargeable on such amounts.

32. We also consider that such conduct involves dishonesty in that he knew that because there was only a limited allowance he was trying to evade duties and taxes on the substantial amounts he was carrying. We also consider that his conduct would be regarded as dishonest by the standards of ordinary people.

33. We have come to this conclusion because:

(1) the appellant is an experienced traveller to and from destinations outside the EU and it is common knowledge among such travellers that all countries impose limits on the amount of tobacco that may be brought in to them.

(2) Creating luggage space for so much tobacco suggest pre-planning.

(3) the appellant was told by one person in Qatar that he could not bring so much into the UK, but made no attempts to check what he had been told.

34. We turn now to the reduction given by HMRC in mitigation of the penalty. HMRC Notices 160 and 300, which set out HMRC's policy on mitigation, allow up to 40% for an early and truthful explanation as to why the "arrears of tax" arose and the true extent of them and up to 40% for fully "embracing" and meeting responsibilities under "this"[1] procedure" by eg supplying information promptly, quantification of irregularities, attending meetings and answering questions.

35. In his skeleton Mr Davies submitted that the discount was properly considered and was reasonable given the lack of response by the appellant. Mr Davies noted that the appellant had been tardy and incomplete in his replies to correspondence.

36. We cannot tell if the discount was properly considered, because Ms Kowalczuk's letter of 7 January 2014 gives no information whatever about her thought processes. So we look at what is said in the Notices 160 and 300 and see how it applies to the facts of this case.

37. Ms Kowalczuk allowed no mitigation at all for "an early and truthful explanation as to why the arrears of tax arose and the true extent of them". We have considered whether this was because she realised that there were no arrears of tax in this case (even if "duty" is included in the word "tax") because no duty can be charged on goods which have been seized and forfeited on their first port of arrival in the EU and there was for

[1] The word "this" is used in Notice 160, whereas Notice 300 says "the" before procedure, yet it is only Notice 300 which says what procedure is meant, and that is the "civil evasion penalty procedure".

this reason no assessment to duty or tax on the appellant. If that was the reason then the logical response is to given maximum mitigation, as is done in relation to the three aspects of disclosure in eg Schedule 41 FA 2008.

38. But if we assume that what is meant in the Notices by "this procedure" in these circumstances is that the person being investigated should give every facility to enable HMRC to calculate the tax or duty on which the penalty is based, the "potential lost revenue" in Schedule 41 FA 2008 parlance, he had done that at Manchester Airport. Officer Ford had checked with him and he had signed the notice of seizure specifying exactly what the goods were and what the quantities were. That was the information from which Ms Kowalczuk calculated the amount of tax and duty she showed in her letter of 14 January 2014.

39. As to an early and truthful explanation of why the arrears arose, we need to consider what the appellant told Officer Ford. Mr Ford's witness statement says that the appellant understood that he was in the green channel, that he knew what his allowances were, that he packed his bags himself and that no one had given him anything to bring back. That is an early and truthful explanation of why the tax and duty (theoretically) arose – there is no issue about intention or purpose to be decided.

40. Taking the Notices at face value we therefore give a 40% reduction.

41. 40% is also due for full embracing and meeting responsibilities under the civil evasion penalty procedure. A person can only embrace and meet responsibilities if they have been placed on them, and the Notices give examples of what those responsibilities might include. There is no question here of any meetings being asked for by HMRC: the appellant was told he could have a meeting if he wished. We need to look then at what the appellant was asked to do by HMRC. In her letter of 31 October 2013 Ms Kowalczuk asked the appellant to provide 10 items of information (we have discounted the first request which was that the appellant return a sign and date a copy of the letter to acknowledge that he had read and understood a Human Rights Act Factsheet and "Public" Notices 160 and 300. He cannot be penalised for not doing that).

42. The other questions asked about the appellant's smuggling activities between 30 October 2012 and 29 October 2013, though given the gap in the letter between the statement of these dates and the questions, a recipient cannot be blamed for not grasping this.

43. This period included the date of the interception and seizure at Manchester Airport which led to the penalty. Thus the appellant was being asked to reply to questions about what he had admitted to doing and about which HMRC were in full possession of the facts and to questions about what other smuggling he had participated in. No definition of "smuggling" was attempted by HMRC, so it its open to the recipient to decide what consists in their attempts at smuggling. Many people would think of Poldark and Dr Syn in this context, and the bringing ashore of casks of brandy, or in more recent times of lorry loads of alcohol and cigarettes, not their own attempts to bring in a holdall of cigarettes or tobacco.

44. Thus the appellant here was being asked to turn himself in so far as he attempted to smuggle goods in after his interception at Manchester Airport.

45. He had said in his phone calls and emails to HMRC that he had answered the questions. He later said he hadn't because he had not received the penalty notice. HMRC have exhibited little or no concern that the appellant had not replied about his subsequent smuggling, so we are left with the impression that the letter was little more than a standard request to anyone whose goods are seized. If HMRC had some evidence that there had been subsequent smuggling there no doubt would have been further repercussions. The real complaint by them is that the appellant did not tell them what they already knew about the importation from Qatar. The appellant did not really "embrace" the spirit of the procedure, and we do not think his reasons for not replying stack up, so we cannot give him 40% mitigation, but we think he is entitled to 30%, making 70% in all.

46. But 70% of what?

47. We raised this point with Mr Davies. The only information we had about the penalties in the bundle was in the letter of 7 January 2014 from Ms Kowalczuk. That showed that the "Customs civil evasion penalty" was £1,087, the total duty, reduced by 5% to be £1,032 and the "Excise civil evasion penalty" was £2,506, the total duty, reduced by 5% to be £2,380, making a total of £3,412. Nothing in the letter suggested that the calculations of duty that Ms Kowalczuk's witness statement suggested she had prepared using HMRC's tools was sent to the appellant, nor were they in our bundle. We therefore directed that HMRC provide them.

48. This had a surprising outcome. By an email of 21 February from HMRC Solicitor's Office, HMRC submitted a witness statement of Mr Brett Hands, an officer of HMRC. This stated that Mr Hands had examined the calculations that were he says issued with the letter of 7 January 2014 and he had found them to be wrong. This was because in the calculation of the customs duty that would have been payable had the goods not been seized, customs duty had not been deducted when arriving at the price per packet of 20 for cigarettes or the recommended retail price for HRT that was required to be used in the calculations.

49. Mr Hands illustrated this error by showing the original calculations and his revised ones. The original calculations he exhibited showed the following amounts:

Excise duty	£2,088
Customs duty	£728
Import VAT	£777
Total	£3,593

50. The letter of 7 January 2014 from Ms Kowalczuk however showed:

Excise penalty: duty liable to a penalty	£2,506
Customs penalty: duty liable to a penalty	£1,087
Total	£3,593

51. Mr Hands revised figures were:

Excise duty	£2,088
Customs duty	£431
Import VAT	£631

Total £3,150

52. The email requested that HMRC be permitted to amend the penalty assessment to show a figure of £2,992 (ie 95% of £3,150). (This calculation is correct).

53. This is a situation similar to that which was covered in depth by Judge Anne Redston in *Bintu Binette Krubally N'diaye v HMRC* [2015] UKFTT 380 (TC) ("*N'Diaye*"). The discussion there of this matter started in that decision at [125]:

> "125. The other issue can most easily be explained by setting out the Penalty Notice issued to Ms Krubally N'Diaye:
>
> | | Duty liable to penalty | Reduction allowed | Penalty charged | Amount of penalty | Total penalty |
> |---|---|---|---|---|---|
> | Customs civil evasion penalty | £42 | 50% | 50% | £21 | £563 |
> | Excise civil evasion penalty | £1,085 | 50% | 50% | £542 | |
>
> 126. Ms Choudhury said that the Penalty Notice had erroneously included import VAT within the figure for excise duty and that HMRC should instead have included the import VAT amount in that 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 | £223 | 50% | 50% | £111 | £563 |
> | Excise civil evasion penalty | £904 | 50% | 50% | £452 | |
>
> 127. In other words, the amount shown as an excise civil evasion penalty should have been reduced by £181 (before mitigation), and that for customs duty should have been increased by the same amount.
>
> 128. Ms Choudhury asked that the Tribunal infer from the Penalty Notice that HMRC intended to charge a penalty for the evasion of import VAT. We agree and find as a fact that HMRC's intention was that Ms Krubally N'Diaye should pay a penalty reflecting her evasion of import VAT."

54. In this case we cannot understand what Ms Kowalczuk did to arrive at the excise duty figure of £2,506. It is greater by £418 than both the original computation and Mr Hands' revised one which so far as excise duty is concerned shows no change. £418 does not appear to be an amount of VAT or customs duty but Ms Kowalczuk's figure for customs duty is clearly £418 less than Mr Hands' figure for combined customs duty and VAT on the original computation.

55. In the light of Judge Redston's decision in *N'Diaye* we can first accept that the references to a customs penalty include a VAT penalty (see *N'Diaye* at [182]) and we are permitted to vary the customs penalty upward to reflect Mr Hands' figure (see *N'Diaye* at [192] to [103]). It also follows from *N'Diaye* at [131] that we can accordingly reduce the excise duty penalty to £2,088.

56. Having done that we have no doubt that we can also reduce the customs duty figure in the penalty assessment under s 25 FA 2003 to be that which Mr Hands says is correct, namely £1,062, and we do so.

Decision

57. The amount of the penalties that we determine is therefore:

(1) Excise duty £2,088 @ 30% = £626.40

(2) Customs duty (inc VAT) £1,062 @ 30% = £318.60.

Appeal rights

58. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 08 APRIL 2019