



[2019] UKFTT 0734 (TC)

TC07492

EXCISE AND CUSTOMS DUTY – importation of shisha tobacco products – appeal against penalty – s25(1) of Finance Act 2003 and s8(1) of Finance Act 1994 – whether dishonestly – yes – whether allowances given to reduce penalties correct – yes – whether amount of penalty correct – yes- appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/01825

BETWEEN

MS SAIDI ZAARI

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KELVAN SWINNERTON
MR CHRISTOPHER JENKINS**

Sitting in public at Taylor House, 88 Roseberry Avenue, London on 19 September 2019.

Ms Zaari, the Appellant.

Mr Evans, counsel for HM Revenue and Customs for the Respondents.

DECISION

INTRODUCTION

1. This is an appeal against an Excise Civil Evasion Penalty in the sum of £2940 issued on 7 November 2017 under Section 8(1) Finance Act 1994 and a Customs Civil Evasion Penalty of £946 under Section 25(1) Finance Act 2003 issued on 7 November 2017 which were confirmed by HMRC on 19 February 2018.

BACKGROUND

2. Ms Zaari arrived at Heathrow airport on 20 November 2016 having travelled from Dubai (United Arab Emirates) via Doha, Qatar. Ms Zaari was travelling with her friend, Ms Namoale. Ms Zaari collected her luggage which consisted of two bags and entered into the Green Customs Channel indicating that she did not have any items to declare and nor did she have any duties or taxes to pay in relation to any items. Ms Zaari was then stopped by Border Force Officer Arif and she confirmed to Officer Arif that she was travelling with another female. Border Force Officer Arif then asked Border Force Officer Broadbent to assist him and Officer Broadbent proceeded to question Ms Namaole, the friend with whom Ms Zaari was travelling.

3. Officer Arif asked Ms Zaari whether or not she had packed her bags herself and she replied that she had packed her bags herself. Officer Arif asked Ms Zaari whether or not she was carrying any cigarettes or shisha tobacco to which Ms Zaari answered “no”. Ms Zaari was asked to open her bags and she replied that she could not remember the code for the lock to her bags. Officer Arif then opened the bags with a cutter after which Ms Zaari refused to answer any more questions and used offensive language according to the note-book entry of Officer Arif. The search of the bags revealed a quantity of 45.5kg of shisha tobacco which is in excess of the personal allowance of 250 grams for a person travelling from outside the EU.

4. Officer Arif informed Ms Zaari that the tobacco would be seized and Ms Zaari was given a Seizure Information Notice (FORM BOR156) and a Warning letter about seized goods (FORM BOR 162) both of which were signed by Ms Zaari. The Seizure Information Notice signed by Ms Zaari details that the description of the things seized was “shisha tobacco” and stated that it was liable for forfeiture. It also has a section containing an agreement, signed by Ms Zaari, that the “description of the things seized is correct”.

5. Ms Zaari was also given Public Notice 12A which advised that the legality of the seizure could be contested. Ms Zaari did not opt to exercise the right to contest the legality of the seizure and the tobacco was deemed to be liable for forfeiture.

6. On 11 September 2017, Officer Crozier wrote to Ms Zaari notifying her of an ongoing enquiry that he was carrying out. In her letter to Officer Crozier of 5 October 2017, Ms Zaari stated (amongst other things) that: “Last year in November I was travelling back from the UAE and was part of a random stop and search by UK customs at Heathrow airport. As a result my bags were searched and it was apparent I was carrying excessive amounts of flavoured tobacco (shisha)”. The letter goes on to state: “I was aware that there were limits and certain restrictions in carrying cigarettes and alcohol to the country but was un[a]ware that shisha fell into that category”.

7. In its review letter dated 19 February 2018, HMRC stated that the tobacco seized from Ms Zaari was 182 times greater than the permitted allowance and that, based upon the facts and evidence, HMRC was satisfied that Ms Zaari had acted dishonestly when attempting to bring tobacco into the UK.

THE LAW

8. Section 8 Finance Act 1994 states:

(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.

(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 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.

9. Parts of section 8 Finance Act 1994 have been repealed by paragraph 21, Schedule 40 of Finance Act 2008. The parts repealed only related to sections involving dishonest conduct which give rise to a penalty under Schedule 4 Finance Act 2008. Article 6 Finance Act 2008 and Schedule 40 of SI 2009/571 preserve the penalty under section 8 Finance Act 1994 in relation to conduct involving dishonesty where the conduct does not relate to an inaccuracy in a document or a failure to notify HMRC of an under assessment. Article 4 Finance Act 2008, Schedule 41 of SI 2009/511 preserves the penalty under section 8 Finance Act 1994 where dishonest conduct does not give rise to a penalty under Schedule 41 Finance Act 2008.

10. Section 25(1) Finance Act 2003 states:

(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.

11. Section 29 Finance Act 2003 states:

(1) Where a person is liable to a penalty under section 25 or 26—

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

(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) These 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.

12. The Travellers Allowance Order 1996 details a set of allowances for travellers including the allowance that applies in relation to this appeal.

THE HEARING

13. The appeal of Ms Zaari was heard together with the appeal of Ms Namoale for whom a separate decision has been provided. Ms Zaari did not provide any documentation in support of her appeal at the hearing. HMRC provided a bundle of documentation for the purpose of the hearing that consisted of 156 pages as well as a bundle of legislation and authorities and a skeleton argument. Included within the documentation provided by HMRC were, amongst other things, the Seizure Information Notice, the Warning letter about seized goods, a duty calculations document, witness statements for Officers Arif and Crozier (relating to the case of Ms Zaari) and the notebook entry of Officer Arif.

14. The burden of proof rests with HMRC to establish a prima facie case that the conditions for issuing a penalty are satisfied which are that the taxpayer has engaged in a course of conduct for the purpose of evading excise duty that involved dishonesty. Once HMRC has established that burden of proof, the burden of proof is then upon the taxpayer to provide evidence to rebut HMRC's case. The standard of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities.

15. The evidence of Officer Arif at the hearing was that he was required to force open the lock on the bags of Ms Zaari by use of a cutter and that he made the note in his notebook relating to the seizure of the shisha tobacco on the same day that the seizure took place, namely on 20 November 2016. Officer Crozier also gave evidence at the hearing and, in explaining the reductions that he had allowed to the amount of the penalty, he referred to his letter of 11 September 2017 to Ms Zaari which stated that Ms Zaari had the opportunity to significantly reduce any penalties that may become due if she chose to co-operate with the enquiry being carried out by HMRC. He explained that, in considering the reductions to the penalties of Ms Zaari, he had taken into account that Ms Zaari had not provided a full version of events and neither had she addressed certain of the issues raised in his letter of 11 September 2017.

16. The Notice of Assessment states that a penalty can be reduced if HMRC are told promptly about what was wrong and why and this is referred to as ‘disclosure’. A penalty can also be reduced depending upon the amount of ‘co-operation’ received during the check carried out by HMRC. In the case of Ms Zaari, a reduction of 20% was allowed for disclosure and a reduction of 20% was allowed for co-operation. These reductions for disclosure and co-operation resulted in a total reduction of 40% being applied such that the Excise Civil Evasion Penalty was reduced to £2940 (from £4900) and the Customs Civil Evasion Penalty was reduced to £946 (from £1577) with the total figure for the reduced penalties being £3886.

17. Ms Zaari gave evidence at the hearing, on cross-examination, that she accepted that it was now apparent to her that the shisha that she was carrying on 20 November 2016 contained tobacco. When asked why she had bought such a large quantity of shisha tobacco, she answered that it was for her personal use. She acknowledged that shisha tobacco was significantly cheaper in Dubai than when bought in the UK because it was highly taxed in the UK. Ms Zaari was asked whether she had said to Officer Arif that he was “pissing her off” and she agreed that she had said something along those lines to him.

18. Mr Evans on behalf of HMRC contended that there had been no challenge to the seizure of the goods by Ms Zaari with the seizure notice clearly describing the goods seized as shisha tobacco and Ms Zaari having agreed to that at the time of the seizure as is evidenced by her signature. There is signage in the airport outlining the restrictions such that Ms Zaari should have been aware of the duty free allowances that apply to travellers from outside the European Union. Furthermore, the conduct of Ms Zaari had been dishonest which is evident from her answers to the questions of Officer Arif.

19. Mr Evans referred to his skeleton argument with respect to the test for dishonesty and to the test for dishonesty being affirmed in the Supreme Court in *Ivey v. Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67* citing a passage from that case (at paragraph 74) which in turn referred to other cases including the case of *Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378*. It was submitted that, having established the knowledge or belief of the individual as to their behaviour, the question is whether the conduct was honest or dishonest by the standards of “ordinary decent people”.

FINDINGS OF FACT

20. In respect of the notebook entry of Officer Arif, this details that Ms Zaari confirmed that she had packed her bags herself and that she was asked whether she was “carrying any shisha tobacco or cigarettes” to which she replied “no”. The notebook record states also that Ms Zaari was asked to open her bags but stated that she was unable to remember the code to the lock. When the bags were opened, Officer Arif stated: “You have a lot of shisha tobacco here. Is this

for yourself” to which Ms Zaari replied: “You’re pissing me off and I’m not answering your questions”.

21. The shisha tobacco was seized and the Seizure Information Notice, in the section entitled ‘Schedule of things seized - Description’, states that the things seized were “shisha tobacco” and that the quantity was 45.5kg. The Seizure Information Notice also contains a section containing an agreement as to the description of the things seized being correct. That section of the Seizure Information Notice contains the signature of Ms Zaari with Ms Zaari having signed the Seizure Information Notice on the same day as the seizure itself. We find that Ms Zaari, indisputably, was carrying 45.5kg of shisha tobacco when she was stopped by Officer Arif.

22. The Seizure Information Notice also contains a section which details that the Warning letter was issued to Ms Zaari. The Warning letter about seized goods dated 20 November 2016 states clearly that HM Revenue & Customs may take action such as issuing an assessment for any evaded tax or duty and a wrongdoing penalty and that other agencies and organisations may wish to take actions including prosecution in relation to the seizure.

23. We find that Ms Zaari was clearly notified of the scope for further action to be taken against her in relation to the seizure.

24. The Seizure Information Notice also referred to Ms Zaari having been issued with Notice 12A which relates to what can be done if things are seized. Notice 12A refers to the option for a person to formally challenge the seizure of something by the Border Force or HMRC and states that a notice of claim must be sent to the Border Force or HMRC within one calendar month of the date of seizure. Ms Zaari therefore had until 20 December 2016 to make a challenge to the seizure of things taken from her. No such challenge or any challenge at all was made by Ms Zaari to the seizure of the shisha tobacco. The complete lack of any challenge by Ms Zaari to the description of the goods seized reinforces further that the goods seized were shisha tobacco.

25. We find that the state of mind of Ms Zaari was that she was fully aware that she was carrying shisha tobacco when she was stopped by Officer Arif which is confirmed by her written confirmation to that effect in the Seizure Information Notice and the lack of any challenge to the seizure of the shisha tobacco. We also find that Ms Zaari, by her own account, was aware of there being limits for importing products such as tobacco and alcohol and we find no reason why Ms Zaari would not have been aware that such limits applied to shisha tobacco and that she was carrying an amount of shisha tobacco very substantially in excess of the permitted allowance.

26. We did not find Ms Zaari to be a credible witness. We accept the account of Officer Arif that he was required to cut open the lock to the bags of Ms Zaari and we find that the approach of Ms Zaari to Officer Arif when asked about the contents of her bag was offensive in terms of the language that she used. We find that, applying the standards of ordinary decent people, Ms Zaari acted dishonestly and that she was fully aware that she was carrying shisha tobacco and fully aware that the quantity of tobacco that she was carrying was considerably in excess of the permitted allowance given that the permitted allowance is 250 grams and Ms Zaari was carrying a quantity some 182 times the permitted allowance. We note also in this respect that Ms Zaari, by her own account, is a frequent traveller internationally and that she had been to Dubai on a number of occasions previously as well as to other non-EU and EU countries such that she would be familiar with the existence of limits for certain goods including tobacco.

27. HMRC provided a document entitled ‘Duty Calculations’ which contained a summary stating that the total excise duty was £4900, the total customs duty was £407 and the total

import VAT was £1170 giving a total figure of £6477. We accept the figures contained in the Duty Calculations document.

28. In respect of the deductions applied to the figure of £6477, these totalled 40%. Ms Zaari was allowed a reduction of 20% in relation to disclosure with the maximum reduction being 40% for disclosure. Similarly, Ms Zaari was allowed a reduction of 20% in relation to co-operation with the maximum reduction being 40% for co-operation. We are satisfied that these reductions are correct in the circumstances and we do not consider that there is any reason to change either of the reductions for disclosure or co-operation.

DECISION

29. Ms Zaari has dishonestly attempted to evade VAT, Excise and Customs duties and penalties are due under s8(1) Finance Act 1994 and s25(1) Finance Act 2003.

30. The penalty reductions of 40% have been calculated correctly.

31. The appeal is dismissed and the Customs Civil Evasion Penalty of £946 is upheld as is the Excise Civil Evasion Penalty of £2940.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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.

**KELVAN SWINNERTON
TRIBUNAL JUDGE**

RELEASE DATE: 04 DECEMBER 2019