



Neutral Citation: [2024] UKFTT 00229 (TC)

Case Number: TC01908

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Taylor House, London

Appeal reference: TC/2022/12611

CUSTOMS AND EXCISE EVASION PENALTIES – was Appellant “dishonest” – was HMRC’s reduction in penalty amount appropriate – appeal dismissed – section 8 Finance Act 1994 and section 25 Finance Act 2003

Heard on: 4 July 2024

Judgment date: 18 March 2024

Before

**TRIBUNAL JUDGE VIMAL TILAKAPALA
TRIBUNAL MEMBER MICHAEL BELL**

Between

ALI KHAZAAL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ali Khazaal in person

For the Respondents: Cordelia Akanmu, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This is an appeal against a Customs Civil Evasion Penalty of £784 and an Excise Civil Evasion Penalty of £1,942 imposed in respect of 14,400 cigarettes seized at Heathrow Airport.
2. The notice of assessment for these penalties was issued to the Appellant on 8 March 2022.
3. We were provided with a hearing bundle of 402 pages. At the hearing we heard evidence from the Appellant, via an interpreter, and from HMRC Officer Neil Roberts (Officer Roberts) the decision making Officer on behalf of HMRC.

BACKGROUND AND FACTS

4. The background to this Appeal, together with our findings of fact based on the evidence presented at the hearing and the documents made available to us are as follows:

- (1) On 8 March 2021 the Appellant was stopped by a Border Force Officer (Officer Williams) in Terminal 2, Heathrow Airport on his return to the UK from Ukraine via Paris.
- (2) The Appellant had been visiting Ukraine to view properties for his cousin.
- (3) The Appellant was intercepted by Officer Williams before passing through baggage reclaim and Customs.
- (4) When asked by Officer Williams whether he had any bags, the Appellant replied “No, I had a suitcase in Ukraine but when I arrived in Paris I couldn’t find it”. He then explained to Officer Williams that he had been asked by a friend to take a bag to Paris which he was told contained clothing and shoes. He said that when he arrived in Paris he could not find the bag.
- (5) When the Appellant and Officer Williams arrived at the green (“nothing to declare”) channel, the Appellant was asked whether he had anything to declare, he said no and proceeded through the Customs green (“nothing to declare”) channel.
- (6) A bag with the Appellant’s name was found and brought to him.
- (7) The bag contained 14,400 cigarettes (the “cigarettes”) on which no UK duty had been paid.
- (8) The cigarettes were seized as they exceeded the permitted personal allowance of 200 cigarettes and the Appellant was issued with forms BOR156 (a seizure information notice) and BOR162 (a warning letter about seized goods) which he refused to sign. Notice 12A was also issued to the Appellant. Notice 12A explains that any claim that the goods were not liable to seizure should be appealed to the Magistrates Court within 30 days of seizure. No such appeal was made.
- (9) On 26 January 2022 HMRC wrote to the Appellant informing him of HMRC’s enquiry into the evasion of Customs and Excise duties and inviting him to disclose any relevant information and documents, Public Notices 300 and 160 and factsheet CC/FS9 were sent to him at the same time. The letter also explained that co-operation with the enquiry could reduce any penalties that might become due. A response was requested within 30 days.
- (10) On 18 February 2022 the Appellant wrote to HMRC responding to the initial enquiry questions and explaining what had happened. His explanation in this letter was

that he had been asked by a friend (Ali Haider) to take the suitcase from Ukraine to Paris where it was intended that Mr Haider's brother would collect it. The Appellant's friend (Jaafer) was also asked to do the same by Mr Haider. The letter stated that the Appellant and his friend were also told by Mr Haider that "[w]e could carry 200 packets of cigarettes from Europe without any problems and even showed me on the internet" [sic]. The Appellant explained that due to his lack of confidence with the English language, he mistook the information on the website showed to him by Mr Haider and assumed that references to an allowance of "200 cigarettes" were in fact references to an allowance of "200 *packets* of cigarettes". He added that the suitcase had been searched in Ukraine and he was not prevented from checking it in. He has also asked the Ukraine check-in officer to have the suitcase "dropped in France". It was only when he arrived in France that he was told that the suitcase had gone to London.

(11) On 8 March 2022 HMRC issued a civil evasion penalty (consisting of a customs evasion penalty of £784 and an excise evasion penalty of £1,942). HMRC informed the Appellant that the penalty sum had been reduced by 60% - 30% for disclosure and 30% for co-operation. An HMRC 1 fact sheet ("what you can do if you disagree") was included with the letter together with a duty schedule.

(12) On 18 March 2022, the Appellant wrote to HMRC advising that the cigarettes were for a friend and that he had been misled by that friend into thinking that it was legal to bring in 200 packets of cigarettes in the UK. He stated that his friend had shown him a website but that he had not paid attention to that fact that the allowance referred to was 200 cigarettes and not 200 packets. In this letter the Appellant also stated that he could not afford to pay the penalty and asked for a warning rather than a penalty.

(13) On 5 April 2022 HMRC responded stating that the information provided by the Appellant did not change the decision that had been made on the civil evasion penalty. HMRC also said that the Appellant's financial position could not be taken into account although it was possible that HMRC's debt management team might be able to arrange time to pay. The review and appeal process was also outlined.

(14) On 18 April 2022 the Appellant wrote again to HMRC requesting a review of the decision. In this letter he said that the cigarettes were not intended to be brought into the UK but were meant to go to France. They had been brought into the UK by mistake. He also said that he had intended to declare the cigarettes and to call his friend in Ukraine to pay the duty but he was not given a chance to do so as he was stopped by BF as soon as he got to passport control.

(15) The review was carried out and on 19 May 2022 HMRC informed the Appellant that the decision as to the civil evasion penalty had been upheld.

(16) On 28 May 2022 the Appellant wrote to HMRC expressing disappointment with the review decision. He also challenged the review letter summary of events contending that he had not been asked what was in his suitcase or whether he had anything to declare.

(17) On 6 July 2022 the Appellant appealed to the Tribunal.

(18) The Appellant's main contention as set out in his notice of appeal, is that the suitcase containing cigarettes was inadvertently brought into the UK. It was meant to have been offloaded in Paris but for some reason had not been.

(19) He contends also that he was intending to declare the cigarettes to Customs at the airport but was not given the opportunity to do so as he was intercepted by Border Force prior to collecting the bag and escorted through Customs.

(20) He adds that he was not asked whether he had anything to declare before he went through Customs and that the details outlined in the HMRC review letter of the process followed by Officer Williams are incorrect.

THE RELEVANT LEGISLATION

5. Section 8(1) Finance Act 1994 (“FA 1994”) (as preserved for these purposes by Article 6 SI 2009/571) which provides for a penalty to be imposed in relation to excise duty and for the right of appeal as follows:

... 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 the tax or duty evaded or, as the case may be, sought to be evaded. (...)

6. Section 8(4) FA 1994 which provides, where a person is liable to a penalty under section 8, that:

(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

7. Section 8(5) FA 1994 which provides that:

(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.

8. Section 25(1) of the Finance Act 2003 (“FA 2003”) which provides (in very similar terms to the excise duty rules) for a penalty to be imposed in relation to customs duty and import VAT as follows:

... 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.

9. Section 29(1) FA 2003 which provides where a person is liable to a penalty under section 25 or 26 that:

(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. (...)

10. Section 29(2) FA 2003 which provides that:

(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

11. The Travellers Allowance Order 1994 (SI 1994/955 as amended) which gives the excise duty and VAT allowances for cigarettes and hand rolling tobacco brought into the UK from outside the E.U., those allowances being 200 cigarettes and 250 grammes of hand-rolling tobacco.

12. The burden of proof in establishing that there has been “conduct involving dishonesty” lies with HMRC as provided under section 16(6) FA 1994 in respect of excise duty and section 33(7)(a) FA 2003 in respect of customs duty and import VAT.

SUBMISSIONS

13. HMRC contends that the Appellant, having been intercepted at the immigration/passport control point, was escorted through the Customs green channel after telling Officer Williams who was escorting him that he had nothing to declare and that his bag (which was not in his possession at that time) contained only clothing and shoes.

14. This proved to be a false statement as the Appellant’s bag, when located, was found to be holding 14,400 cigarettes, an amount 72 times greater than the personal allowance.

15. HMRC considers that the Appellant’s declaration that he had nothing to declare followed by his subsequent admission, having passed through the Customs green channel, that he was carrying cigarettes and intended to declare them, together with his differing versions of events satisfy the test for dishonesty.

16. The Appellant has submitted the following grounds of appeal;

(1) That the cigarettes were brought inadvertently into the UK.

(2) That he had mistaken the amount of cigarettes which could be brought into the UK (mistaking 200 cigarettes as a reference to 200 packets of cigarettes).

(3) That he intended to pay duty on the cigarettes but was not given the opportunity to do so.

17. The Appellant also claims that Officer Williams did not in fact ask him whether he had anything to declare or what he had in his suitcase. In addition he states that when he was informed of the cigarettes being found in his bag he was told that it was too late to declare them and pay the tax despite offering to do so. He further disputes the record of the interview,

claiming that he “was not properly interviewed yet there is an interview sheet filled in by Border control officers about my interview”.

18. The Appellant has asked for his financial circumstances to be taken into account and for a warning rather than for financial penalties to be given to him.

DISCUSSION

19. The following issues arise:

- (1) Whether or not the Appellant acted dishonestly.
- (2) Whether the penalty imposed is at an appropriate level.

Dishonesty

20. The main issue in this appeal is whether the Appellant acted dishonestly for the purpose of evading taxes and duties. This depends on whether he knew that he had a bag containing cigarettes which exceeded the personal allowance limit and whether he intended to declare those cigarettes to Customs on entry into the UK.

21. We found Officer Roberts to be a credible witness who had reached his decisions on the basis of the information before him. We found the Appellant to be a less credible witness.

22. On the basis of the evidence that we have heard and reviewed, we find, on the balance of probabilities, that the Appellant knew that he was carrying cigarettes, that he was aware that the amount of cigarettes carried exceeded the UK personal importation allowance for cigarettes, and that he did not intend to declare them to Customs, seeking instead to evade the taxes and duties chargeable.

23. We find also that the Appellant’s conduct was dishonest in that he knew that he was attempting to evade duties and taxes on the cigarettes he was carrying and that such conduct would be regarded as dishonest by the standards of ordinary people.

24. Our determinations have taken into account the following factors:

- (1) The Appellant told Officer Williams unambiguously that he had nothing to declare before being led through the Customs green channel.
- (2) The facts as presented by HMRC are consistent with the contemporaneous record contained in Officer William’s notebook.
- (3) The Appellant has given varying and inconsistent versions of what happened. He said initially that he had a bag containing only clothing and shoes which had inadvertently been brought into the UK, he subsequently admitted that he was carrying cigarettes but only an amount which he had been misled into believing was within his personal allowance. He then said that he was intending to declare the cigarettes but was stopped by Border Force before he had the opportunity to do so.
- (4) The Appellant said he assumed the fact that the bag containing the cigarettes had been examined (and photographed) but still checked in by a Ukrainian airport official, indicated that the Ukrainian authorities considered it permissible to take to the UK. This conflicts with his contention that the bag was always intended to be unloaded in Paris.
- (5) The Appellant could not explain why his personal items were being carried by another passenger which struck us as unusual.
- (6) The Appellant is by his own admission a regular international traveller. He said that between March 2020 and January 2022 he travelled 3 times to Ukraine and 3 times to Lebanon. He would have passed through a significant amount of unambiguous

signage including visual aids containing pictures of dutiable goods including tobacco products. He was likely therefore, in our view and again on the balance of probabilities, to have been aware that the quantity of cigarettes he was carrying, even if it was as he contended 200 packets rather than 720 packets (14,400 cigarettes), significantly exceeded the personal importation allowance.

25. Given our findings as to the Appellant's behaviour, we consider that HMRC have met the burden of proof required in establishing dishonesty on the balance of probabilities in order for the penalties to be imposable.

26. The Appellant stated several times during the hearing as well as in his grounds of appeal that despite offering to pay duty on the cigarettes he was not allowed to. HMRC say that this was not put to Officer Williams at the time, as confirmed by Officer Williams' notebook entries. As we mention above, we prefer HMRC's version of events as we did not find the Appellant to be an entirely credible witness.

27. It is also important for the Appellant to realise that even if he did offer to pay the tax once the cigarettes had been discovered, by passing through the Customs Green channel having said specifically that he had nothing to declare, he would still have contravened the customs and excise duty provisions by attempting to evade the excise duty, customs duty and import VAT on the cigarettes. Put simply, an offer to pay the tax would not have affected his liability as it had already arisen.

The penalties

28. The Appellant considers it surprising to be subject to penalties rather than being given a warning as this is, he contends, the first time he has, in his words; "carried cigarettes at the airport". The fact that this might be the first time has, however, no bearing on the imposition of the penalties. They are imposed as a consequence of attempting to evade duty in circumstances which involve dishonesty.

29. It is also clear as a matter of law that neither HMRC nor on an appeal a tribunal, can take into account a taxpayer's financial position when considering these penalties. This is specifically prohibited. The Appellant's request for the penalties to take into account his financial circumstances must therefore be disregarded. They can, however, be recognised in "time to pay" arrangements details of which we understand will be provided to the Appellant by the Debt Management team at HMRC.

30. Turning to the reduction given by HMRC in mitigation of the penalty, HMRC Notices 160 and 300 set out its policy on mitigation. They allow up to a 40% reduction of a penalty for:

“... an early and truthful explanation as to why the arrears of tax arose and the true extent of them”

and up to a 40% reduction for:

“... fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions”.

31. They conclude by stating that:

“In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.”

32. Officer Roberts explained that the penalties were computed by reference to the revenue sought to be evaded. He also explained his reason for not giving the Appellant the maximum reduction of 80% and instead offering a reduction of 60% (consisting of 30% for disclosure and 30% for co-operation). In short, the maximum reduction has not been given because of the Appellant's failure to provide an honest account as to why he failed to declare the cigarettes.

33. We consider the level of mitigation as reasonable and we see no basis for interfering with it.

DECISION

34. The appeal is therefore dismissed and the Penalties of £2,726 in total, are upheld in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

35. 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.

**JUDGE VIMAL TILAKAPALA
TRIBUNAL JUDGE**

Release date: 18th MARCH 2024