



Neutral Citation: [2023] UKFTT 28 (TC)

Case Number: TC08687

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/01000

EXCISE DUTY – civil evasion penalty – tobacco – whether dishonesty – yes – whether penalties correct – yes

**Heard on: 14 November 2022
Judgment date: 06 January 2023**

Before

TRIBUNAL JUDGE VIMAL TILAKAPALA

Between

TERESA McGOWAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant appeared in person

For the Respondents: Tom Hoskins of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against the decision of the Respondents (**HMRC**) to issue an Excise & Customs Civil Evasion Penalty (the **Penalty**) of £2,015.00 under section 8(1) Finance Act 1994) and section 25(1) Finance Act 2003.
2. The Appellant (**Ms Teresa McGowan**) appeals against the Penalty on the basis of her finances and her mental health situation.
3. The Appellant's appeal was notified to the Tribunal after the end of the statutory appeal period but as HMRC made no submissions to suggest that the late appeal was disputed I have allowed the appeal to proceed.

THE FACTS

4. On 13 September 2020 Ms McGowan arrived at Manchester Airport having travelled from Egypt. On collecting her luggage she chose to enter the green channel indicating that she had nothing to declare and had no duties or taxes to pay. She was stopped by a Border Force officer (Officer Fenton) and questioned.
5. Initial questions were asked and Ms McGowan confirmed that she had packed her own bags, was not carrying anything for anyone else and was also aware of the restrictions. When asked if she was aware of her customs allowance she replied "*not really*".
6. Officer Fenton then examined Ms McGowan's bag which contained 400 cigarettes and 16kg of hand rolling tobacco. The amount of tobacco was 66 times the permitted customs personal allowance, the allowance being 200 cigarettes or 250g of tobacco.
7. Ms McGowan was issued with forms BOR156 and BOR162 which she signed. Notices 1 and 12A were also issued to her – Notice 12A explaining that any claim that the goods were not liable to seizure should be appealed to the Magistrates Court within 30 days of the seizure.
8. The seizure was not challenged within the 30 day period and the goods were accordingly deemed to be liable to forfeiture.
9. The matter was referred to HMRC for consideration of further action due to possible conduct involving dishonesty for the purposes of evading Customs and Excise duty.
10. On 2 August 2021 HMRC wrote to Ms McGowan informing her of HMRC's enquiry into the evasion of customs and excise duties and inviting her to disclose any relevant

information. The letter also explained that the co-operation with the enquiry could significantly reduce any penalties that may become due. A response was requested within 30 days. Public Notices 300 and 160 and factsheet CC/FS9 were sent to Ms McGowan at the same time

11. On 6 August 2021 Ms Mcowan contacted HMRC by telephone, asking whether she would be required to attend a physical meeting as she suffers from social anxiety. She was advised that no physical meeting was necessary but that she should send a written response to HMRC.

12. As no response had been received, HMRC wrote to Ms McGowan on 16 August 2021 asking her to provide a response by 1 September 2021.

13. On 19 August 2021 HMRC received a letter from Ms McGowan providing further information about the seized goods. In this letter she confirmed that she had read the public notices and understood their contents.

14. On 31 August 2021 HMRC wrote to Ms McGowan primarily giving advice on mental health services available to her and advising her of the “time to pay” arrangements and other support available.

15. On 8 September 2021 after consideration of the facts, HMRC officer Loader issued to the Ms McGowan a Civil Evasion Penalty of £5,376. This consisted of a customs evasion penalty of £2,028 and an excise evasion penalty of £3,348. The information sent to Ms McGowan stated that the penalties had been reduced by 10% for her disclosure and 10% for her co-operation (a reduction of 20% in total). Fact Sheet HMRC1 and a duty schedule were also enclosed.

16. On 10 September 2021 Ms McGowan contacted HMRC by telephone confirming receipt of the 8 September letter but stating that she did not have funds to pay the penalty. She was given details of time to pay arrangements and options if she did not agree with the decision.

17. On 22 September 2021 HMRC received a letter from Ms McGowan dated 14 September 2021 requesting reconsideration of the penalty decision and providing details as to why it should be reconsidered.

18. On 4 October 2021 Officer Loader wrote to Ms McGowan issuing a recomputed penalty with a 35% reduction for disclosure and a 35% reduction for co-operation (a total reduction of 70%) with the penalty being reduced from £5,736 to £2,015. The recomputed reductions took into account the additional information which had been provided by Ms McGowan.

19. On 28 October 2021 HMRC received a letter from Ms McGowan requesting a review of the decision.

20. On 12 November HMRC Officer Ramsay acknowledged the review request. The letter stated that that if Ms McGowan had any additional evidence that she would like to provide she should send it within 10 days of receipt of the letter.

21. On 6 December 2021 a review conclusion letter was issued to Ms McGowan by Officer Reid confirming that the decision of 4 October 2021 to issue the penalty would be upheld. The letter also informed Ms McGowan that she could apply for alternative dispute resolution.

22. On 4 February 2022 Ms McGowan sent a Notice of Appeal to the Tribunal which was acknowledged by the Tribunal on 23 May 2022. In her Notice of Appeal Ms McGowan gives as the reason for her late appeal her “mental health problems” and her need for more time “to get my head around it” due to her anxiety and depression.

THE LEGISLATION AND RELEVANT LEGAL PRINCIPLES

Penalty provisions

23. Section 8(1) and (4) Finance Act 1994 (**FA 94**) (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. (...)

24. Section 8(4) FA 94 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

25. Section 8(5) FA 94 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.

26. Section 25(1) of the Finance Act 2003 (**FA 03**) 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.

27. Section 29(1) FA 03 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.
(...)

28. Section 29(2) FA 03 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*

29. 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

The legal test of dishonesty

30. In *Abou-Rahmah and Another v Al-Haji Abdul Kadir Abacha & Others* [2006] EWCA Civ 492 Arden LJ summarised the position as follows (see 388-390):

“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 dishonest. 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” (see 388- 390).

31. The test was reaffirmed by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, as per Lord Hughes:

“When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by

applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

The burden and standard of proof

32. The burden of proof in establishing conduct involving dishonesty lies with HMRC under section 16(6) FA 94 for excise duty and section 33(7) FA 03 for customs duty and import VAT.

33. The standard of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (see *Bintu Binette Krubally N'diaye [2015] UKFTT 380*).

SUBMISSIONS

34. HMRC argues that by entering the green channel Ms McGowan made a false declaration that she had no goods attracting excise or customs duties and has satisfied the test for dishonesty. If she had not been stopped by Border Force she would have successfully imported dutiable goods into the UK without payment of that duty.

35. HMRC has reduced the standard penalties payable by a total of 70% in accordance with its mitigation policy, though HMRC recognise that the Tribunal is not bound by that policy.

36. Ms McGowan does not dispute the facts of this case but has asked for the imposition of penalties to be reviewed by the Tribunal taking into account her mental health and financial situation.

DISCUSSION

37. As there is no dispute as to the facts of this case the main issue in this appeal is whether Ms McGowan acted dishonestly for the purpose of evading taxes and duties. This depends on whether she knew that her baggage contained cigarettes and tobacco exceeding the personal allowance limit.

38. Having heard evidence from Ms McGowan and from HMRC and having reviewed the material provided to the Tribunal in the hearing bundle I find, on the balance of probabilities, that Ms McGowan was aware that there was a limited allowance for tobacco products even if she did not know the precise quantities, and that her purpose in going through the green channel with tobacco in excess of those allowances was to seek to evade the taxes and duties chargeable.

39. I also find that Ms McGowan's conduct involved dishonesty in that she knew that she was attempting to evade duties and taxes on the tobacco she was carrying and that conduct would be regarded as dishonest by the standards of ordinary people.

40. My determinations have taken into account the following factors:

(1) To arrive at the customs clearance channel, Ms McGowan would (as noted by HMRC) have passed through a considerable amount of unambiguous signage including visual aids containing pictures of dutiable goods including tobacco products. She would have been likely therefore to be aware of the fact that tobacco was dutiable.

(2) Ms McGowan confirmed that she had travelled internationally several times (both within and outside the E.U. and it is common knowledge amongst such travellers of the existence of customs allowances for tobacco products.

(3) The amount of hand rolling tobacco carried by Ms McGowan was so large (16kgs) that it would be surprising for any reasonable person to expect it not to be declarable.

(4) Ms McGowan's version of events has not been consistent. In her first letter to HMRC (undated but appearing to be the letter sent 19 August 2021 she states that purchasing the tobacco was not something that she had really thought about:

"I was in the duty free and noticed people buying a lot of tabbaco so I thought with Egypt not being in E.U. country I brought back extra tabbaco back with me without thinking"

However, in her subsequent letter to HMRC dated 14 September 2021, a different explanation is given as follows:

"both me and Mohiy decided to purchase a box of tabacco as well as a box of cigarettes. As we were queuing to purchase the goods we recognised that people were purchasing more boxes of tabacco and cigarettes than we had. We finally got through the queue and served by a cashier named George. He asked us where we were travelling and unbeknown to me, out of small talk, I told him that we were flying back to the U.K. He had recognised the tabacco we had set aside on the till for him to scan and he mentioned that it was a possibility to able to take more tabacco through for an additional fee. He discussed with us that if we paid him £200 and purchased the 16kg of tabacco each and a quantity of 2 boxes of marlboro gold cigarettes he would gladly provide us with more hand luggage, get the cleaners to pack the hand luggage for us and additionally help us to our gate with our now extra bags. We had to make a quick decision ..."

This is clearly not a decision made without much thought (as mentioned in her first

letter).

- (5) The Appellant also told the Tribunal that the £200 was paid in cash directly to the airport shop employee, no receipt was given and it was not a transaction that “went through the till”. This is not the type of arrangement that I would expect a reasonable person to regard as honest.

41. Having taken into account the evidence presented (including hearing the Appellant’s oral evidence) I do not consider that the Appellant’s social anxiety issues prevented her from understanding that her behaviour was dishonest. I find that she understood clearly what she was doing and that she saw it as a means of addressing what she described in her letter of 14/9/21 as her “financial difficulty”.

42. Given my findings as to Ms McGowan’s behaviour, I 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.

Reduction of the penalties

43. It is 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.

44. Ms McGowan’s financial circumstances must therefore be disregarded in this appeal. They can, however, be recognised in the “time to pay” arrangements details of which have been provided to Ms McGowan by HMRC.

45. 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”. 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.”

46. On 4 October 2021 HMRC (Officer Loader) gave Ms McGowan reductions of 35% for disclosure and 35% for co-operation (so giving her a 70% reduction in total. This was further to Officer Loader’s original determination of 8 September 2021 in which he gave an initial reduction of 10% for each category (so giving a reduction of 20% in total).

47. Officer Loader has set out in his witness statement his reasons for his initial reduction and his subsequent increase of the penalty reductions. His initial reduction was based on the limited information provided by Ms McGowan in her response of 19 August 2021 which did not answer all of the initial questions raised by HMRC. The further reduction was based on the additional information provided by Ms McGowan in her considerably more detailed response of 14 September 2021.

48. Officer Loader noted that although Ms McGowan had answered all of the questions raised by HMRC she did not provide any explanation as to why the information was provided late or why it had not been included in her response of 19 August 2021. It appears to be for this reason that he has not applied the maximum reduction of 40%. I agree that this supports Officer Loader’s decision to not award the maximum reduction for “co-operation” as the information was not supplied “promptly”. It also supports his decision not to award the maximum reduction for disclosure as it was not “early disclosure”. I note also that given the inconsistency in the Appellant’s statements I would not regard her disclosure as being entirely truthful. I regard the penalties and the reductions applied as appropriate.

DECISION

49. The appeal is therefore dismissed and the Penalty (of £2,015) is upheld in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

**VIMAL TILAKAPALA
TRIBUNAL JUDGE**

Release date: 06th JANUARY 2023