



TC05879

Appeal number: TC/2016/00994

EXCISE DUTY – civil evasion penalties – section 8, Finance Act 1994

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MINDAUGAS VAIVADA

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE Rachel Mainwaring-Taylor
Mrs Caroline de Albuquerque**

Sitting in public at Fox Court, London on 21st October 2016

The Appellant did not attend and was not represented.

**Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The Tribunal was satisfied that the Appellant had been notified of the hearing.
5 The Appellant had communicated to the Tribunal his agreement that the appeal should be heard in his absence as he said he was unable to travel from his home in Lithuania. We decided that on balance it was in the interests of justice to proceed with the hearing in the absence of the Appellant.

2. The Appellant lodged his appeal late, citing as reasons a hospital stay, the length
10 of time it took HMRC's review decision to reach him in Lithuania by post and the difficulty for him of obtaining translations of the documents. HMRC did not object to the appeal being made late.

Background

3. On 16th July the Appellant arrived at London Heathrow airport (LHR) having
15 travelled from Russia via Berlin.

4. The Appellant was stopped in the green 'nothing to declare' channel by UK Border Force officer William Imeson.

5. Upon searching the Appellant's luggage, Officer Imeson found 16,200 cigarettes (16,000 more than the personal allowance for an individual travelling outside the EU).

20 6. The Appellant was advised that the tobacco would be seized and he was given Notice 1 and 12A and BOR156 (Seizure Information Notice) and BOR162 (Warning letter).

7. The matter was referred to HMRC and HMRC Officer Charles Krajic wrote to the Appellant on 22nd April 2015 notifying him of his intention to investigate the matter
25 and in particular the Appellant's conduct with a view to establishing whether it was appropriate to issue a penalty and inviting him to respond.

8. On 6th May 2015 Officer Krajic issued a reminder letter to the Appellant, having received no response to his first letter.

9. On 15th May 2015 the Appellant wrote to HMRC confirming that he had read and
30 understood Public Notices 300 and 160 and Factsheet CC/FS9 and HMRC acknowledged receipt of this letter on 26th May 2015.

10. On 18th August Officer Krajic wrote to the Appellant requesting additional information and on 7th September the Appellant replied stating that he had bought the cigarettes in Kaliningrad and travelled to meet a friend who was helping him seek
35 employment.

11. On 10th November Officer Krajic wrote to the Appellant stating that HMRC has decided the Appellant's actions of 16th July 2014 were dishonest and that a penalty was appropriate. The letter stated that the total revenue evaded was £4,853, the

penalty issued was £2,182 (customs civil evasion penalty of £472 and Excise civil evasion penalty of £1,710).

12. On 2nd December the Appellant wrote to HMRC requesting a review of the decision.

5 13. On 14th January Officer Dakers wrote to the Appellant stating that the decision had been upheld upon review.

14. On 22nd February 2016 the Appellant filed a Notice of Appeal with the Tribunal.

Relevant law

10 15. Cigarettes are subject to customs duty and standard rate VAT under various provisions of UK and EU law. Under the Travellers' Allowance Order 1994, an individual who has travelled to the UK from a country outside the EU is entitled to bring certain goods free of VAT and excise duty in his personal luggage, including 200 cigarettes.

15 16. Under section 8(1), Finance Act 1994: "where any person engages in any conduct for the purpose of evading any duty of excise and...his conduct involves dishonesty...that person shall be liable to a penalty of an amount equal to the duty evaded...or sought to be evaded".

20 17. Under section 8(4), Finance Act 1994, where a person is liable to a penalty under section 8(1), "the Commissioners or...an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper".

18. Although partially repealed by Finance Act 2008, section 8 Finance Act 1994 remains in force in relation to any conduct involving dishonesty entered into for the purpose of evading excise duty which is not subject to schedule 41, Finance Act 2008.

25 19. Sections 24, 25 and 29, Finance Act 2003 contain similar provisions for imposition and reduction of a penalty where a person engages in any conduct for the purpose of evading "any relevant tax or duty" and his conduct involves dishonesty.

30 20. Section 16(6)(a), Finance Act 1994 states that on an appeal against such a penalty, the burden of proof to demonstrate that the person has engaged in conduct for the purpose of evading a duty of excise and that his conduct involves dishonesty falls on HMRC and that the burden of proof to show that the grounds of any appeal have been established falls on the appellant.

35 21. Although civil penalties for the dishonest evasion of VAT and excise duties are criminal charges for the purposes of Article 6 of the European Convention of Human Rights, they are not criminal proceedings for other domestic purposes. Accordingly, the standard of proof is the ordinary civil standard of the balance of probabilities (*Han (t/a Murdishaw Supper Bar) v CCE* [2001] EWCA Civ 1048).

22. The Privy Council's conclusion in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, that, when considering dishonesty in civil proceedings, a person's "knowledge of the transaction had to be such as to render his participation contrary to the normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were" was held to be correct by Arden LJ in *Abou Rahmah v Abacha* [2006] EWCA Civ 1492.

Grounds of Appeal

23. In the Appellant's absence, we looked carefully at the grounds of appeal contained in his Notice of Appeal and understand them to be as follows:

(1) The Appellant co-operated fully with the investigation, providing all the information requested promptly and answering all questions truthfully.

(2) The only questions the Appellant did not answer were those asking who else was involved in the smuggling and this was because no-one else was involved.

(3) The Appellant has never tried to import alcohol or tobacco to the UK before. He purchased the cigarettes as a gift for his friend. He made full and unprompted voluntary disclosure and tried to understand and co-operate despite his poor grasp of the English language.

(4) Customs Officers in Kaliningrad told him he was permitted to fly to the UK with the cigarettes as he had the appropriate documents.

(5) He cannot afford to pay the penalty.

HMRC's submissions

24. To establish dishonesty, HMRC need to show that, on the balance of probabilities, the Appellant's knowledge of the facts was such that his conduct was contrary to normally acceptable standards of honest conduct. It is not, however, necessary to show that he knew what those normally acceptable standards were.

25. HMRC concluded that the Appellant did engage in dishonest conduct for the following reasons:

(1) The number of cigarettes in his possession when he was intercepted by Officer Imeson was 810 times his personal allowance, yet he entered the green channel showing that he had 'nothing to declare'.

(2) The Appellant must have been aware of his personal allowance from the signs posted around LHR. The signs use pictures so poor English is not a barrier to understanding them. It is not credible that a person would believe they could carry such a quantity of cigarettes into the UK duty free.

(3) The Appellant stated that he had checked his luggage with a customs officer in Kaliningrad. However, it is the passenger's responsibility to comply with the rules relating to goods that are subject to duty and it would have been

reasonable to expect him to check with officers at LHR instead of entering the green channel.

(4) To enter the green channel with such a large quantity of cigarettes, so far in excess of his personal allowance, was dishonest.

5 26. The only explanation provided by the Appellant was that the cigarettes were a gift for his friend. This is not relevant to the question of whether a penalty arises. The legislation is not concerned with the reason for bringing goods into the country, only with whether there has been evasion of tax or duties and dishonesty connected with that evasion.

10 27. For these reasons, HMRC were correct in imposing a penalty.

28. Turning to the level of penalty imposed: HMRC discounted the penalty by 55% in accordance with its published guidance in order to take account of the amount of cooperation and disclosure provided by the Appellant. While the Appellant did respond to Officer Krajic's letter, he did not answer all of the questions listed in it. In
15 the circumstances, a greater discount would not be appropriate.

29. The fact that the Appellant may not have sufficient funds to pay the penalty is not a reason to be taken into account when considering whether it ought to be reduced. HMRC referred the Tribunal to section 8(5) Finance Act 1994 and section 29(3) Finance Act 2003 as authority for this assertion.

20 30. The Appellant brought 16,200 cigarettes to the UK from Russia via Berlin, exceeding his personal allowance of 200 cigarettes. By entering the green channel with this number of cigarettes, the Appellant satisfied the test for dishonesty.

Evidence

25 31. We were referred to Officer Imeson's witness statement, which he confirmed, and to copies of the documents he issued to the Appellant at LHR and copies of the relevant entries in the officer's notebook.

32. We heard from Officer Imeson that he wrote up his notes as quickly as possible after stopping and questioning the Appellant. He told us he stopped the Appellant at 20.25 and wrote up his notes at 21.30 the same evening.

30 33. Officer Imeson told us that he asked the Appellant standard initial questions about where he was from, how long he was staying, whether he packed his bags himself, whether he had anything to declare. Officer Imeson told us that he used clear, simple language and believed the Appellant understood him.

35 34. Officer Imeson told us that there were signs alerting passengers to personal allowances at each baggage carousel, on pillars in the arrivals hall and signs at the entrance to the channels. These signs showed the allowances in words and pictures.

35. We heard from Officer Krajic who confirmed his witness statement and explained how he had made his calculation of the duty evaded, on which he based the penalty (set out in the calculation sent to the Appellant on 10th November 2015).

Findings of Fact and Discussion

5 36. We find that the Appellant entered the green channel at LHR on 16th July 2014 carrying 16,200 cigarettes, having arrived from Kaliningrad via Berlin.

37. We find that there is substantial signage in LHR around the arrivals hall and baggage reclaim area and at the entrance to the customs channels alerting passengers to the restrictions on items they are permitted to bring into the UK duty free.

10 38. The personal allowance for an individual bringing cigarettes into the UK from outside the EU is 200.

39. In order to impose a civil evasion penalty HMRC must establish that the Appellant engaged in conduct for the purpose of evading any duty of excise and that his conduct involved dishonesty (section 8(1), Finance Act 1994).

15 40. We find Judge Redston's summary of the test for dishonesty in *Bintu Binette Krubally N'Diave v HMRC* [2015] UKFTT 0380 (TC) from para 42 helpful:

"The test for dishonesty in the criminal law was set out by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053...

20 This is a two-step approach: the action must be dishonest "according to the ordinary standards of reasonable and honest people" and if it is, then "the defendant himself must have realised that what he was doing was by those standards dishonest". The first step is objective, the second subjective"...

25 In *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 the Court of Appeal clarified the test for dishonesty in civil breach of trust cases. Arden LJ...considered...Privy Council decisions...as well as the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] UKHL 12...she said that in *Barlow Clowes [International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476] the Privy Council has considered the authorities and found that:

30 "*it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour*"

35 In other words, the second of the two steps in *Ghosh* does not apply. Although [it] was a decision of the Privy Council, Arden LJ...endorsed the *Barlow Clowes* approach...

However, the subjective is not entirely banished...Arden LJ first summarises *Barlow Clowes* and then says:

"*On the basis of this interpretation, the test for dishonesty is predominantly objective: did the conduct of the defendant fall below the normal acceptable*

standard? But there are also subjective aspects of dishonesty. S 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'."

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41. Following this analysis, this being a civil liability case, we have adopted the *Barlow Clowes* test which is largely objective.

42. We find that the act of entering the green channel with such a large quantity of cigarettes, so far in excess of the personal allowance, amounts to dishonest conduct with the purpose of evading excise duties.

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43. The only argument put forward by the Appellant to counter this is that a Russian customs officer advised him he could travel from Kaliningrad with the cigarettes. We find that it was not reasonable for the Appellant to rely on advice given by a Russian official upon his departure from Kaliningrad when entering the UK.

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44. Therefore, we conclude that HMRC were entitled to issue the penalty.

45. Turning to the amount of the penalty, HMRC stated that the discount they applied was in line with their public guidance, citing Notice 160 which states that the penalty charged can be reduced by up to 40% for "early and truthful explanation" and a further 40% for "fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions".

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46. HMRC applied a 15% discount for disclosure and a 40% discount for cooperation in this case.

47. The Appellant submitted in his grounds of appeal that:

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(1) he had answered all questions truthfully and quickly and cooperated fully;

(2) the only questions he did not answer were those relating to other people involved in the smuggling and that was because there was no-one else involved;

(3) he purchased the cigarettes as a gift for a friend;

(4) he made full and unprompted disclosure;

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(5) his English was not good but he had tried to understand and answer everything properly; and

(6) paying the penalty would cause him hardship.

48. Ability to pay is not a factor we can take into account in considering the appropriate level of the penalty (section 8(5), Finance Act 1994).

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49. Technically, the disclosure was not unprompted; it was prompted by the Appellant being stopped in the green channel, his luggage being searched and the cigarettes discovered.

50. The reason for purchasing the cigarettes is not relevant.

51. Given that HMRC granted the maximum discount for cooperation, the only dispute between the parties is the appropriate level of discount for disclosure. The Appellant claims to have made early and full disclosure; HMRC maintain that he did not.

52. In the absence of the Appellant, we have carefully considered the correspondence between him and HMRC.

53. HMRC's letter of 22nd April 2015 asked the Appellant to provide, within 30 days:

(1) A signed copy of the letter as confirmation the Appellant had read and understood various documents enclosed.

(2) Confirmation of who was involved in the smuggling, exactly what they each did and why they did it.

(3) A full explanation as to how the smuggling was carried out.

(4) Confirmation of how many times and when alcohol and tobacco products were smuggled into the UK and for each occasion the quantity of goods.

(5) Any documentation to support the information provided.

(6) Any other information or explanations that may be useful.

54. The Appellant replied on 15th May 2015, within the deadline set by HMRC:

(1) He enclosed the signed copy letter as requested.

(2) He was silent on other parties involved but has since explained this was because no-one else was involved.

(3) He stated he had checked with a customs officer in Kaliningrad and so thought he had all the documentation he needed.

(4) He stated he had never attempted to import alcohol or tobacco to the UK before.

(5) He stated he was sorry he had broken the rules, was now fully aware and wanted to cooperate.

(6) He asked HMRC not to penalise him, stating he was on income support and enclosing evidence of this.

55. Bearing in mind that the Appellant's first language is not English, his response may be viewed as an attempt to answer HMRC's questions fully.

56. HMRC followed up on 18th August 2015 with a letter asking two clear questions and again requesting a response within 30 days:

(1) Where did you purchase the cigarettes?

(2) What was the purpose of your travel?

57. The Appellant replied on 7th September, within the deadline given by HMRC, stating that he bought the cigarettes in a supermarket in Kaliningrad and had given the relevant documentation 'a voucher' to the customs officer at LHR and that he was coming to London to visit a friend who was looking for a job for him.

5 58. Objectively, it seems to us that the Appellant did answer all of HMRC's questions. The only thing he failed to do in the correspondence was to state categorically that no-one else was involved and that was why he was not giving information about other people. The Appellant's difficulty with the English language, confirmed by Officer Imeson in his witness statement, could explain this omission.

10 59. This said, it does not seem credible to us that a person would believe that they could import 16,200 cigarettes to the UK without paying duty or VAT. Lithuania is a member of the European Union so these concepts should not be alien to the Appellant. The Appellant has failed to put forward any compelling reason for entering the green channel with such a large quantity of cigarettes.

15 60. The decision to apply a discount to the penalty is a matter for HMRC's discretion taking into account all the circumstances. In this case HMRC could have applied a discount of anything between 0 and 80%. The discount applied was 55%.

Conclusion

20 61. The tribunal has power to reduce (or increase) a penalty under section 8, Finance Act 1994 if it thinks proper. However, in this case we do not consider the penalty imposed by HMRC to be inappropriate.

62. We therefore dismiss the appeal.

25 63. 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.

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RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

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RELEASE DATE: 15 May 2017