



TC06914

Appeal number: TC/2017/04406

Excise and Customs Duty - importation of tobacco products - appeal against an assessment for excise duty pursuant to s 12(1A) of Finance Act 1994 and Civil Evasion Penalties pursuant to Schedule 41 of Finance Act 2008 - whether dishonesty - yes - whether allowances given to reduce penalties correct - yes - whether financial hardship a reason for discharging assessment - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARCIN STZANDERA

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ELIZABETH POLLARD**

**Sitting in public at Court Hearing Centre, 360 High Street Lincoln on 26 April
2018**

Marcin Sztandera the Appellant in person

**Ms Catherine Hardcastle of Counsel, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

5 1. This is an appeal by Mr Marcin Sztandera (“the Appellant”) against a decision by the Respondents (“HMRC”) to raise an assessment for excise duty pursuant to s 12(1A) of the Finance Act 1994 (“the 1994 Act”) in the sum of £2,362 (“the Assessment”) and a wrongdoing penalty in the sum of £427 (“the Penalty”) issued pursuant to Schedule 41 of the Finance Act 2008 (“the 2008 Act”).

10 2. The Appellant’s case is that the cigarettes were for personal use, that the Assessment and Penalty are disproportionate and that he was not given Notice 12A notifying him of his right to appeal the seizure. HMRC’s case is that the appeal must be struck out and/or dismissed.

3. The Respondent’s case, in summary, is that:

15 i. Given that the cigarettes have been condemned as forfeit, the First-tier Tribunal has no jurisdiction to find that the Appellant possessed the cigarettes other than for commercial use.

ii. The amounts owing by the Appellant are properly due, were lawfully calculated, are plainly proportionate and have been determined by the application of the relevant legislative regime.

20 iii. In respect of the Penalty, the Appellant has been awarded the maximum permitted discount. There is no realistic prospect of the Appellant establishing that he had any reasonable excuse for his conduct, nor that special circumstances apply in his case.

Background

25 4. On 2 March 2016 the Appellant arrived from Poland to Dover Eastern Docks where he was stopped by UK Border Force (“UKBF”) Officer Jason McKeen. He was driving vehicle registration BN56 DFV and had a fellow passenger with him.

30 5. The Appellant disclosed to Officer McKeen that he was ordinarily resident in Grimsby and was returning from a three-day trip to Poland. The Officer asked the Appellant what was the purpose of his trip to Poland, to which the Appellant replied that he went to visit family and to buy a sink. On further questioning the Appellant confirmed that he worked in a fish factory, did not have any tobacco and that he owned the vehicle and produced paperwork as confirmation.

35 6. During questioning, the Appellant’s fellow passenger, when asked whether he had any cigarettes or tobacco, confirmed that they were carrying 12 blocks of cigarettes (each). On inspection of the vehicle, Officer McKeen discovered 19,580 mixed branded cigarettes in the Appellant’s and his passenger’s luggage, concealed amongst clothing and in plastic bags in the boot of the car (that is to say 97 blocks of 200). The Appellant did not dispute that the cigarettes were his: rather, he apologised and stated that the
40 cigarettes were for his wife and his passenger’s wife.

7. The UKBF Officer took into account that the Appellant and his passenger did not speak or understand the required standard of English to be interviewed regarding the cigarettes detected. The Officer explained to the Appellant and his passenger that the cigarettes would be detained for 30 days pending investigation and that the Appellant should make arrangements to be interviewed with an interpreter present. The detention procedures were explained to the Appellant and his passenger by the Officer.

8. The Appellant and his passenger were issued with BOR125, Notice of Goods Detained. This states that the goods would be deemed seized after 30 days from the date of that notice. The Appellant endorsed Officer McKeen's notebook.

9. It is relevant to note the following matters in respect of BOR125

- i. The form states that, owing to the Appellant's limited English, the goods were to be detained for 30 days pending interview.
- ii. Underlined in emboldened text it is stated: "These goods will be deemed seized after 30 days from the date of this Notice."

10. The Appellant did not make arrangements to be interviewed. It followed that, on 2 April 2016, Officer McKeen seized the 19,580 cigarettes as liable to forfeiture and issued the Appellant with forms BOR 156, BOR 162, Notice 1 and Notice 12A [this notice gives advice and information about what to do if an individual has had something seized by HMRC or Border Force. It applies to the seizure of goods under s 139 of the Customs and Excise Management Act 1979] and Public Notice 1.

11. The forms were sent to the Appellant's address, as stated on his vehicle's form V5. The Appellant having made no challenge to the legality of the seizure, the goods were condemned as forfeit under the Customs and Excise Management Act 1979 ("CEMA 1979"). Schedule 3 to CEMA 1979 provides a scheme that permits a challenge to the liability to forfeiture of seized goods.

12. The Appellant had one month to contest the legality of the seizure, but opted not to exert that right. The goods were therefore condemned as forfeit.

13. The matter was referred to HMRC for consideration of further action in relation to unpaid Excise Duty on the seized goods.

14. By a letter dated 6 February 2017, HMRC wrote to the Appellant advising him that he had been assessed for one half of the unpaid duty on the cigarettes and that a penalty was being considered. The unpaid duty of £2,362 was assessed on the basis that the Appellant was liable for half of the cigarettes seized.

15. The letter also advised the Appellant of a potential penalty which HMRC intended to issue, in the amount of £472, and invited the Appellant to send any relevant information to HMRC by 8 March 2017. It is relevant to note that the letter set out, in clear terms, that the proposed penalty may be reduced to nil in certain circumstances and gave examples of the sorts of information that would be relevant to a consideration

of whether there were ‘special circumstances’ or whether the Appellant might have a ‘reasonable excuse’ for non-payment. The letter of 6 February 2017 was accompanied by forms CC/FS9 Human Rights and Penalties, CC/FS12 Penalties for VAT and Excise Wrongdoings, a Penalty Explanation, EX601 Notice of Assessment, an Excise Duty Schedule, EX603 Excise Assessment and Explanatory notes, HMRC1 HM Revenue & Customs decisions.

16. By a letter dated 1 March 2017, the Appellant requested a local reconsideration of the Assessment and Penalty notwithstanding that, at the time, the Penalty had not been issued.

17. By a letter dated 9 March 2017, HMRC issued the Appellant with a wrongdoing Penalty for the sum of £472. The Penalty was determined on the basis that the Appellant’s conduct was non-deliberate, that the cigarettes had not been concealed and that he had made a prompted disclosure. The amount of the Penalty was calculated to be an amount equal to 20% of the unpaid excise duty and gave the Appellant the benefit of the maximum available discount.

18. On 13 March 2017, HMRC wrote to the Appellant advising him that after a local reconsideration of his case, no adjustment had been made to the Assessment nor the Penalty.

19. On 22 March 2017, the Appellant’s partner spoke to Officer Rowbottom (on the Appellant’s authority) by telephone and was provided with details of the debt management and banking department in order to discuss the timing of payment.

20. By a letter dated 3 April 2017, the Appellant wrote to HMRC requesting a review of the Penalty and Assessment decisions.

21. On 8 May 2017 Officer Loughridge, of HMRC Appeals and Review Team, issued the Appellant with a review conclusion letter. The Officer found that the decision to issue the Assessment in the amount of £2,362 and wrongdoing Penalty in the amount of £472 should be upheld.

22. The Appellant submitted a notice of appeal to the Tribunal on 7 June 2017.

23. On 6 September 2017, HMRC confirmed that on grounds of hardship, they were content to allow the appeal to proceed, notwithstanding that the Assessment and the Penalty remained outstanding

Evidence

24. The combined bundle of documents included of a copy of the notebook entries of Officer McKeen, the witness statements of Officer McKeen and the decision maker, Officer Caroline Rowbottom, who issued the Assessment and Penalty. The bundle also included the Appellant’s Notice of Appeal, copy correspondence, copy relevant legislation and case law authority.

25. At the request of the Appellant a Polish translator was available at the hearing.

The Law

26. Regulation 13 The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 states:

5 “(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person
10 (a) Making the delivery of the goods;
(b) Holding the goods intended for delivery; or
(c) To whom the goods are delivered”

Paragraph 5 Schedule 3 CEMA 1979 states as follows:

15 “If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied with, the thing in question shall be deemed to have been duly condemned as forfeited.”

20 Section 12(1A) Finance Act 1994 states:

“(1) Subject to subsection (4) below, where it appears to the Commissioners-

(a) That any person is a person from whom any amount has become due in respect of any duty of excise; and
(b) That there has been a default falling within subsection (2) below,
25 the Commissioners may assess the amount of duty due from that person to the best of their judgement and notify that amount to that person or his representative. [1(A) Subject to subsection 4 below, where it appears to the Commissioners-

(a) That any person is a person from whom any amount has become due in respect of any duty excise; and
30 (b) at the amount due can be ascertained by the Commissioners,
The commissioners may assess the amount of due from that person and notify that Amount to that person or his representative.”

Revenue & Customs Commissioners v Jones & another [2012] Ch 414 ruled:

35 “Where goods or vehicles have been condemned by a court, the order for condemnation will usually contain explicit reasons for the order (for example, the goods were intended for commercial not personal use and as such were liable to duty). In such cases it will always be implicit that the goods were intended for commercial use, that they were therefore liable to duty, that duty had not been paid and that, consequently, the goods were liable to forfeiture.”

40 Section 13 of the Finance Act 1994 states insofar as relevant:

“13. - Assessment to penalties.

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

5 (2) An assessment under this section may be combined with an assessment under section 12 above but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty.”

Para 4 Schedule 41 Finance Act 2008 states:

“4(1) A penalty is payable by a person (P) where -

10 (a) After the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and

(b) At the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred

15 4(2) In sub-paragraph(1) -

“excise duty point” has the meaning given by section 1 of F(No2)A 1992, and

“goods” has the meaning given by section 1(1) of CEMA 1979.”

Schedule 41 Paragraph (12) Finance Act 2008 states:

20 (1) Paragraph 13 provides for reductions in penalties under paragraph 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by-

(a) Telling HMRC about it,

(b) Giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

25 (c) Allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure-

(a) Is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

30 (b) Otherwise, is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.”

Section 12(4) Finance Act 1994

(4) An assessment of the amount of duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say-

- (a) subject to subsection (5) below, the end of the period of [4 years] beginning with the time when his liability to the duty arise; and
- 5 (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

But this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the
10 making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment

The Appellant's Case

27. The Appellant's case may be summarised as follows:

- The cigarettes were for personal use (his own and his wife's).
- 15 • The cigarettes were not concealed.
- He cooperated with UK Border Force and provided the information requested by HMRC.
- He was not made aware of how to challenge the seizure and forfeiture of the cigarettes and, had he been so informed, he would have challenged the
20 seizure.
- He was not informed of what might amount to 'special circumstances' for the purposes of reducing the amounts due.
- The amount of the Assessment and the Penalty are disproportionate and unduly harsh as the goods were seized.
- 25 • He would like the amounts owing to be reduced as he faces financial difficulties.

28. At the hearing the Appellant reiterated that he had not received form BOR12A and that had he done so, he would have challenged the seizure.

Conclusion

30 We find the following:

Seizure and forfeiture

29. At the time of the detention, the Appellant was provided with form BOR125. The form explained that the cigarettes were being detained for a period of 30 days to enable

the Appellant to return for an interview with a translator. It also explained that the cigarettes would be deemed seized after 30 days from 2 March 2016. The Appellant was given a telephone number to arrange an interview with a translator (due to the language barrier) within 30 days. The Appellant did not contact Border Force for an
5 interview and therefore on 2 April 2016 the cigarettes were seized and forms BOR156, BOR162, Notice 1 and Notice 12A was issued to the Appellant.

30. The seizure of the goods was not challenged and by operation of Schedule 3 CEMA 1979 the cigarettes are therefore deemed as having been held for commercial purposes. By virtue of paragraph 5 to Schedule 3 CEMA 1979 the seized goods have
10 been condemned as forfeit by operation of law. The First-tier Tribunal has no jurisdiction to go behind that determination, nor can it consider any fact relevant to an assertion that the cigarettes were for the Appellant's personal use. To the extent that the Appellant challenges the seizure of cigarettes and related matters, that part of his case must be struck out pursuant to First-tier Tribunal ("FtT") Rule 8(2)(a).

15 31. The FtT also has no jurisdiction to consider the Appellant's claim that he was not properly informed of how to challenge the seizure of the cigarettes. That is a procedural matter relating to the legality of the seizure and could only be pursued by way of the proceedings envisaged in Schedule 3 CEMA 1979 or proceedings for judicial review. This part of the Appellant's case must also be struck out pursuant to FtT Rule 8(2)(a).

20 *The Assessment*

32. The Assessment was issued pursuant to Regulations 13(1) and 13(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010. Regulation 13(1) provides for the occurrence of an excise duty point and regulation 13(2) identifies the person liable for the duty. In this case it is the Appellant.

25 33. The Appellant was travelling to the UK from within the European Union, the duty Assessment has been calculated on the basis of half the quantity of tobacco seized and the Assessment was also issued within the time limit provided by the 1994 Act, s 12(4).

30 34. Following *Jones and Race*, by operation of paragraph 5 Schedule 3, CEMA 1979 it is clearly established that the cigarettes were held by the Appellant for a commercial purpose. Accordingly, under Regulation 13 of The Excise (Holding Movement and Duty Point) Regulations 2010, excise duty was due and payable at the point at which he held the cigarettes in the United Kingdom. There can be no question that the Appellant has been properly assessed to the amount of excise duty payable and that the Assessment is beyond reproach.

35 35. In any event, the Appellant has advanced no basis on which to challenge the Assessment, save for the suggestion that he considers that it is disproportionate. This point was considered and rejected in *HMRC v Lane* [2015] UKFtT 423 (TC) and in *Marcin Staniszewski v HMRC* [2016] UKFtT 0128 (TC), where it was held that s 12 of the 1994 Act cannot be said to be devoid of reasonable foundation as it simply provided
40 a mechanism for the assessment and is therefore proportionate.

The Penalty

36. Where HMRC are satisfied that there has been a wrongdoing, they are empowered to issue a Wrongdoing Penalty. The Penalty was calculated based on a percentage of the Potential Loss of Revenue (“PLR”), which in this case is the duty amount of £2,362.

37. The range of Penalty is determined based on a number of factors, including whether HMRC believe that the wrongdoing was deliberate or non-deliberate, concealed or non-concealed and whether the disclosure was prompted by HMRC or was unprompted. HMRC also considers the level of co-operation shown by the Appellant during the enquiry.

38. HMRC can reduce the Penalty (within the Penalty range) depending on how much assistance the Appellant provided during the enquiry. This is normally referred to as the “quality of disclosure”, or as “telling, helping and giving”.

39. HMRC Officer Rowbottom found that the Appellant’s wrongdoing was non-deliberate, non-concealed but prompted by HMRC. Therefore the amount of the Penalty was set between 20% and a maximum of 30% of the PLR.

40. HMRC Officer Rowbottom opted to give the Appellant a total reduction of 30% for telling, 40% for helping and 30% for giving, resulting in the Penalty amount being £472. The Appellant has therefore been given the maximum discount.

41. The amount is determined in accordance with paragraph 6 to Schedule 41 of the 2008 Act and in the present case therefore is 20%.

42. Based on the information available, HMRC considered that there were no special circumstances which could lead to further reduction of the Penalty.

43. The Appellant has already been given the benefit of the maximum available discount on the basis that this was a case of non-concealed, non-deliberate, prompted disclosure. The Appellant’s submissions that he has cooperated and did not hide the cigarettes do not advance his case.

44. Nor can it be said that the calculation of the Penalty, according to a statutory formula which provides for the possibility of mitigation by way of reasonable excuse and special circumstances, is devoid of reasonable foundation and disproportionate - *Staniszewski* (supra).

45. The Appellant has submitted that he cannot afford to pay the Penalty. The 1994 Act, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or on appeal the Tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty. The Appellant’s financial hardship cannot be taken into account as regards special circumstances or reasonable excuse.

46. For the above reasons the appeal is dismissed and the Assessment and Penalty confirmed.

47. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 02 JANUARY 2019

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