



TC05740

Appeal number: TC/2016/01858

*EXCISE DUTY, CUSTOMS DUTY AND VAT – civil evasion penalties –
whether conduct involving dishonesty – no, appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TESFANICHAEL WELDU GILANKIEL

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE VICTORIA NICHOLL
JANET WILKINS**

Sitting in public at Fox Court, London on 21 February 2017

The Appellant in person

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

DECISION

1. This appeal is against an excise duty civil evasion penalty imposed under section 8(1) Finance Act 1994 and a customs duty and import VAT penalty imposed under section 25(1) Finance Act 2003 in the total sum of £2,925 (“the Penalties”) in respect of the attempted smuggling of 9,800 cigarettes.

Background and facts found

2. The Appellant (“Mr Gilankiel”) presented his case and gave evidence. UK Border Force Officers Noel O’Leary and Sam Easton also gave evidence. We find the following facts from the evidence in tribunal bundle and the oral evidence.

3. Mr Gilankiel lives alone in London and travels to visit his family in Sudan via Eritrea every year or two. He is unemployed and claims benefits because of his health problems. Mr Gilankiel can speak and understand basic spoken English but he has significant problems reading or writing in English.

4. On 31 July 2014 Mr Gilankiel arrived at London Heathrow Airport, having travelled from Eritrea via Cairo. He had met another passenger in Cairo airport while waiting for his transfer to London. The two men had a coffee together and got on well. Mr Gilankiel did not buy any duty free goods at Cairo airport. Mr Gilankiel agreed to help the other passenger with his luggage as he had three suitcases in the hold and two carry-on bags. As Mr Gilankiel only had a small backpack to carry, he took one of the carry-on bags into the plane with him. They sat separately on the flight. When the passengers were collecting their luggage from the flight the other passenger asked Mr Gilankiel to take one of his three suitcases on his trolley. The suitcase was locked and Mr Gilankiel did not ask or know what was inside.

5. Mr Gilankiel and the other passenger then walked through the green “nothing to declare” channel pushing their trolleys. The other passenger was younger than Mr Gilankiel and walked quickly ahead of him. Officer O’Leary stopped Mr Gilankiel as he walked through the green channel as he had selected him for questioning. The other passenger walked on and did not stop to assist Mr Gilankiel.

6. Officer O’Leary asked Mr Gilankiel some questions but cannot recall his answers. Mr Gilankiel claimed that he did not understand English or what Officer O’Leary was saying. Officer O’Leary could see from the tags that the luggage had been checked-in in Egypt. As Mr Gilankiel did not have a key for the large suitcase, it was opened with lock cutters. There was a small carry-on bag inside the large suitcase. This was also locked and it was also opened with lock cutters. Officer O’Leary found 9,800 cigarettes inside duty free bags inside both the small carry-on bag and the suitcase. Officer O’Leary’s notebook states that all of the cigarettes found appeared to have been purchased in Cairo. The notebook does not mention Mr Gilankiel’s backpack and concludes “nothing else found of BF interest”. We note that Officer O’Leary recalls that Mr Gilankiel had a backpack on his shoulder, but we find that it did not contain any of the 9,800 cigarettes purchased in Cairo.

7. The 9,800 cigarettes were seized. Officer O’Leary gave Mr Gilankiel two notices and asked him to sign a seizure notice and a letter warning him that in addition to the seizure, HMRC could issue an assessment and wrongdoing penalty. We noted that the letter signed by Mr Gilankiel recorded his house number as number 86, but
5 that on the seizure notice Officer O’Leary had mistakenly written down house number 85.

8. Mr Gilankiel walked out of the airport and met the other passenger. The other passenger was angry about losing the cigarettes and told Mr Gilankiel that he had paid some \$1,000 for them in Cairo airport. Mr Gilankiel was angry with the other
10 passenger for not telling him that he had put cigarettes in the suitcase and that it would cause a problem. They have not seen each other since that day. After Mr Gilankiel returned to his home in London, he found out from friends that there are limits on the number of cigarettes that can be bought duty free overseas and brought into the UK without payment of duty. He has not brought cigarettes into the country
15 before or since this event.

9. On 20 May 2015 HMRC wrote to advise Mr Gilankiel that HMRC wished to make enquiries about the attempted smuggling in July 2014 with a view to establishing whether Mr Gilankiel ‘s conduct was dishonest and therefore whether it was appropriate to issue a penalty. In the letter HMRC Officer Claire Taggart asked
20 Mr Gilankiel to provide a list of information required for the enquiry. Two further chasing letters were sent on 3 June and 24 June 2015. As all three letters were addressed to house number 85 none of them was received by Mr Gilankiel.

10. On 30 July 2015 Officer Margaret Batey wrote to advise Mr Gilankiel that HMRC had decided that his actions were dishonest and that civil evasion penalties of
25 £2,925 had been issued. The letter was addressed to house number 85 and it was not received by Mr Gilankiel.

11. On 28 September 2015 Mr Gilankiel was sent a letter, correctly addressed to house number 86, from HMRC’s debt management office in Liverpool. It stated that in the absence of any response from Mr Gilankiel to repeated attempts to contact him,
30 his debt would now be passed to a debt collection agency. Mr Gilankiel contacted his local Citizen’s Advice Bureau (“CAB”) and they requested a review of the decision to impose the Penalties and asked for the debt enforcement to be discontinued. The CAB’s letter explained that the luggage concerned belonged to another passenger and that Mr Gilankiel had not expected any further action after the cigarettes had been
35 seized as he had been given a warning. The letter also noted that Mr Gilankiel had not received any of the correspondence sent to house number 85 and that he is in poor health and suffering financial hardship as he lives on a subsistence benefit.

12. On 17 November 2015 HMRC replied to the CAB’s letter and enclosed a copy of the letter dated 20 May 2015, noting that HMRC would give Mr Gilankiel until 17
40 December 2015 to provide the information requested in that letter and that this was an opportunity to benefit from a reduction in the Penalties depending on the level of his co-operation and disclosure. The CAB asked for this deadline to be extended twice and sent certain medical and financial information about Mr Gilankiel, but none of the

information requested by HMRC in the letter dated 20 May 2015 about the smuggling attempt was provided.

13. On 2 March 2016 the decision of 30 July 2015 was reviewed by Mark Severin of HMRC. The review took account of the additional information provided by the CAB but upheld the Penalties as it was considered that Mr Gilankiel had not made a credible disclosure or co-operated with the enquiry after he was sent a copy of the letter dated 20 May 2015. On 25 March 2016 Mr Gilankiel lodged an appeal against the decision to impose the Penalties.

The law

14. Section 2 of the Tobacco Products Duty Act 1979 imposes excise duty on tobacco products imported into the UK.

15. The Travellers' Allowance Order 1994 sets out what individuals who travel from a country outside the EU to the UK are entitled to bring in free of duty and VAT. The allowance for tobacco products is 200 cigarettes or 100 cigarillos or 50 cigars or 250 grams of smoking tobacco.

16. Section 8 Finance Act 1994 provides:

“(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...”

17. Section 8 Finance Act 1994 was repealed by Finance Act 2008 Schedule 40 paragraph 21, but only insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 Finance Act 2008 and which relates to an inaccuracy in a document or a failure to notify an under-assessment. It therefore remains in force for the purposes of the conduct in this case.

18. Section 16 (5) Finance Act 1994 provides that a penalty assessed by HMRC may be quashed or varied by the Tribunal on appeal and the Tribunal may substitute its own decision for one quashed.

19. Section 25(1) Finance Act 2003 imposes a penalty for the evasion of customs duty and import VAT in any case where:

- “(a) a person engages in any conduct for the purposes 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)”.

20. Sections 29 and 33 Finance Act 2003 reflect the provisions of section 8(4) and 16 Finance Act 1994 and give the Tribunal power to reduce, quash, vary or substitute
5 its own decision on appeal.

21. Section 16(6)(a) Finance Act 1994 (for excise duty) and section 33(7) Finance Act 2003 (for customs duty and import VAT) provide that the burden of proof is on HMRC to prove the matters in section 8(1)(a) and (b) Finance Act 1994 and section 25(1)(a) and (b) Finance Act 2003, including the fact that Mr Gilankiel’s conduct
10 involved dishonesty. The cases of *Han (t/a Murdishaw Supper Bar) v CCE* [2001] EWCA Civ 1048, *Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.) and *Bintu Binette Krubally N’Diaye v HMRC* [2015] UKFTT 0380 (TC) confirm that the standard of proof is the ordinary civil standard as these are civil proceedings. It is then for Mr Gilankiel to establish the grounds of his appeal against the penalties charged.

15 **Submissions**

22. Mr Gilankiel submits that the 9,800 cigarettes were not his but belonged to another passenger who had asked for assistance to carry his luggage. He admits that he made a mistake when he agreed to carry the suitcase for another passenger, but maintains that he was naïve and was not aware of the contents of the suitcase. Mr
20 Gilankiel claims that he has language difficulties in English and poor literacy, and that he was not aware of customs rules or of the implications of carrying another person’s luggage. Mr Gilankiel submits that the Penalties are not fair and breach human rights as he is a poor person. Mr Gilankiel also claims that he has medical problems and that he is unable to work, with the result that he has no means of paying this amount of
25 money.

23. HMRC submit that Mr Gilankiel engaged in dishonest conduct because he entered the green “nothing to declare” channel even though he had 9,800 cigarettes in his possession. There is clear unambiguous signage at the entrance to the channels and it is therefore improbable that Mr Gilankiel did not know his personal limits when
30 importing tobacco. HMRC submit that it would not be appropriate for the Penalties to be discounted as Mr Gilankiel failed to make credible disclosure or to co-operate during the course of the enquiry. This was notwithstanding the fact that HMRC allowed a further period for co-operation, from November 2015 to February 2016, after it became apparent that Mr Gilankiel had not received the earlier
35 correspondence.

Discussion and conclusions

24. Section 8(1) Finance Act 1994 and section 25 Finance Act 2003 provide that if any person engages in any conduct for the purpose of evading any relevant tax or duty and his conduct involves dishonesty, that person shall be liable to a penalty of an
40 amount equal to the amount of tax or duty evaded or sought to be evaded. This appeal is against penalties that were imposed on the basis of HMRC’s decision that Mr

5 Gilankiel’s conduct in walking through the green channel involved dishonesty. We therefore consider first the tests to be applied in determining whether Mr Gilankiel’s conduct was dishonest and second whether HMRC has discharged the burden of establishing dishonest behaviour by reference to these tests on the balance of probabilities.

25. The cases cited by HMRC in this appeal in relation to the test for dishonesty are *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, *Abou Rahmah v Abacha* [2006] EWCA Civ 1492, *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9th April 2008, unreported), *Bintu Binette Krubally N’Diaye v HMRC* [2015] UKFTT 0380 (TC) (“*N’Diaye*”) and *Zuned Osman v HMRC* [2016] UKFTT 524 (TC) (“*Osman*”). In both *N’Diaye* and *Osman* the First-Tier Tribunal considered the case law and reached helpful conclusions on the meaning of dishonesty in relation to customs and excise civil penalties.

26. In *Osman* Judge Scott listed five propositions derived from these authorities. The third proposition is that the test to be applied is primarily objective, by reference to normally accepted standards of behaviour. The fourth is that the objective element is not determined by reference to a reasonable person, but by reference to the actual knowledge of the person concerned. The fifth is that the relevant knowledge is that person’s actual knowledge regarding the facts which (objectively) point to dishonesty. Whether that person regards his behaviour as dishonest by his moral code is not the test and neither is his knowledge of ‘normally accepted standards’.

27. In *N’Diaye* Judge Redston decided that the test to apply in that case was “primarily objective: was her behaviour dishonest according to normally accepted standards of behaviour? We also need to consider what she actually knew at the time, not what a reasonable person in her position would have known or appreciated.”

28. In applying these tests to Mr Gilankiel’s knowledge, we find Mr Gilankiel’s oral evidence to be credible and accept that he did not know what was in the suitcase or that he should have gone through the red channel. By virtue of pushing the suitcase through the green channel Mr Gilankiel was engaging in conduct which could have resulted in the evasion of tax or duty, but we find that he did not enter the green channel with a dishonest state of mind given his actual lack of knowledge of the facts that would otherwise suggest dishonest behaviour according to normally accepted standards of behaviour. We are not satisfied that, on the balance of probabilities, Mr Gilankiel’s conduct was dishonest. Accordingly we find that the Penalties should be remitted.

Decision

29. The appeal is allowed and the Penalties imposed on Mr Gilankiel are cancelled.

30. 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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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 29 MARCH 2017

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