



TC05593

Appeal number: TC/2016/00364

*EXCISE & CUSTOMS DUTIES – Civil Evasion Penalties – Importation of cigarettes -
Whether dishonest conduct – Whether mitigation of penalty appropriate*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Mrs ELHAM AHMADIAN

Appellant

-and-

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mr Simon Bird**

Sitting in public at Centre City Tower, Birmingham on 12 October 2016

The Appellant in person

**Mr Paul Joseph of counsel, instructed by the General Counsel and Solicitor to HM
Revenue & Customs, for the Respondents**

DECISION

1. The Appellant (“Mrs Ahmadian”) appeals against a civil evasion penalty assessed by the Respondents (“HMRC”) in the amount of £5,423.00. The penalty was upheld by a formal internal review dated 24 November 2015. The penalty relates to the import of a large quantity of cigarettes at Birmingham Airport by Mrs Ahmadian on 28 August 2014.

Evidence

2. As well as a bundle of documents we heard oral evidence from (1) Mrs Ahmadian (speaking through a Court appointed interpreter); (2) for HMRC: (a) Mr Andrew Coley (the Border Force officer who stopped Mrs Ahmadian at Birmingham Airport and seized the cigarettes), and (b) Ms Janet Dodd (the HMRC officer who determined the penalty).

Law

3. The Travellers’ Allowance Order 1994 SI 1994/955 (as amended) provides that a person travelling from a third country (ie a non-EU state) is relieved from payment of VAT and excise duty on certain goods obtained in a third country, contained in the traveller’s personal luggage, and not imported for a commercial purpose. The stipulated goods include 200 cigarettes.

4. Section 8 Finance Act 1994 makes provision for penalties for dishonest evasion of excise duties:

“(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.

...

(4) Where a person is liable to a penalty under this section—

(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.

(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—

5 (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.

...”

10 5. Section 25 Finance Act 2003 makes provision for penalties for dishonest evasion of customs duties:

“(1) In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

15 (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.

...”

20 **Facts**

6. Having carefully considered all the evidence presented to us, we make the following findings of fact.

7. On 28 August 2014 Mrs Ahmadian arrived at Birmingham Airport on a flight from Istanbul, Turkey. It was a connecting flight; her trip origin was Kermanshah, Iran. She was accompanied by her two children, aged 4 and 17.

8. At the airport Customs post she entered the Green Channel with three suitcases. Mrs Ahmadian contends that she was stopped before she entered the Green Channel. Having heard Mr Coley’s explanation of the geography of the Customs post, we do not accept that contention. We find that Mrs Ahmadian had voluntarily entered the Green Channel before she was stopped by Mr Coley.

9. Mr Coley asked Mrs Ahmadian the standard questions about her baggage and she confirmed that the bags belonged to her, she had packed them herself, and she was aware of the contents. She confirmed that she was aware of the tobacco allowances and stated that she had six boxes of cigarettes. The cigarettes in question (Bahman cigarettes) are packed 500 to a box so the admitted six boxes would comprise 3,000 cigarettes, which is 15 times the permitted allowance. She said that the Turkish Customs officials had told her this was acceptable as she had paid a charge in Turkey; she showed Mr Coley a receipt given her in Turkey. She

subsequently amended her answer to six boxes for each of herself and her boyfriend. Mr Coley searched the luggage and discovered 30,000 cigarettes – ie 150 times the permitted allowance. They would have weighed around 21 kg. Mr Coley seized the cigarettes. There were so many cigarettes that to bag and seal them he had to use
5 three bags, as Border Force procedures limit the contents of each seizure bag to 10,000 cigarettes. The three bags had identification numbers BA00848767, BA00848768 and BA00848860. Mr Coley explained to us that there are strict procedures for handling of seized goods; after bagging, sealing and labelling the bags are barcoded and scanned; the local office checks all these details before dispatching
10 the bags to the Border Force warehouse; all the details are rechecked at the warehouse; any discrepancies are notified and investigated immediately. Mr Coley gave Mrs Ahmadian a seizure information notice (BOR156) which she signed; it clearly states the goods as 30,000 Bahman, and contains the traveller’s declaration (immediately above the signature block) “I acknowledge receipt of Form BOR156 and agree that the above description of the things seized is correct”. Mr Coley also
15 gave Mrs Ahmadian (i) a warning letter (BOR162) which she signed, stating that the seizure was without prejudice to other possible actions including criminal prosecution or HMRC action “such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty”; and (ii) copies of Information Notices 1 and 12A.

20 10. Mrs Ahmadian contends that the quantity of cigarettes was far fewer than 30,000 – her testimony was variously twelve boxes (6 for each of herself and her boyfriend), eighteen boxes (6 for each traveller in her party), and twenty boxes. She contends she did not know how many cigarettes were in 20 boxes and she erroneously signed the seizure information notice stating 30,000 cigarettes. She contends she did
25 not read the documents given to her by Mr Coley. We consider that the clear details on the seizure information notice and the Border Force procedures applied to log and check the seized goods put it beyond doubt that the seized goods were 30,000 cigarettes, and we make a finding of fact accordingly.

30 11. HMRC decided that further action may be justified and on 31 July 2015 Ms Dodd issued an opening letter and accompanying notices to Mrs Ahmadian. Mrs Ahmadian authorised Ms Dodd to speak with Mrs Ahmadian’s daughter on her behalf. Ms Dodd was told there was a small quantity of cigarettes, purchased for Mrs Ahmadian and her family, and they had cost around £162. Ms Dodd explained that her information was that there was a large quantity of cigarettes. Ms Dodd was told
35 that at the check-in at the airport in Turkey Mrs Ahmadian had paid 136 Turkish Lira in taxes, so there should be no further taxes. Ms Dodd stated that this had no bearing on the UK duties due on import. Ms Dodd concluded that a dishonesty penalty was appropriate; the calculation of evaded duties was performed electronically, using the lowest UK retail price for the goods; she took the import as 30,000 cigarettes and
40 gave an allowance of 200 cigarettes. In calculating the penalty she had allowed mitigation (i) of 20% (out of a possible 40%) for disclosure; and (ii) of a further 20% (out of a possible 40%) for co-operation.

12. At Mrs Ahmadian’s request the penalty determination was internally reviewed by an officer unconnected with the case, and was upheld in full.

Appellant's case

13. Mrs Ahmadian submitted as follows.

14. At the airport she had been stressed because of a long flight and a one hour wait to collect the luggage; also, she had recently learned of her diagnosis with cancer. Mr Coley had told her that as it was her first offence she was just warned and there would be no further action, and she was free to leave. She trusted the British Police and had believed what she had been told.

15. She had been stopped by a Turkish Customs Officer at Istanbul Airport; she told him she was carrying twenty boxes of cigarettes; she paid 136 Turkish Lira and was given a receipt; she was told this would cover any UK taxes. She now realised she had been cheated by the official in Turkey. She had shown the receipt to Mr Coley. She had not kept the receipt as she had been told it was worthless.

16. She was an honest, law-abiding person and had never before been in trouble. She had been very seriously ill and under hospital treatment. These proceedings had a devastating effect on her. She was a single parent with two children, unemployed and on state benefits, and could not afford the penalty.

Respondents' case

17. For HMRC Mr Joseph submitted as follows.

18. Mrs Ahmadian had deliberately chosen to enter the Green Channel rather than the Red Channel, and not seek advice or assistance.

19. At the Green Channel Mrs Ahmadian had conversed with Mr Coley in English and had understood the questions. She had assistance from her daughter, who is a UK University student.

20. Mrs Ahmadian had evidenced a luggage receipt showing total baggage weight of 92 kg – that was adequate to accommodate the 21 kg of cigarettes plus other contents.

21. At Istanbul airport Mrs Ahmadian was in transit from Iran to the UK, so there was no need for her to pass through Turkish Customs. On her own evidence, she had not told the Turkish official the correct quantity of cigarettes she was carrying; she had similarly lied to Mr Coley at Birmingham Airport. Turkish officials cannot collect UK imposts. Mr Coley took the view that Mrs Ahmadian had been taken advantage of by persons in Turkey; he was aware of other similar instances.

22. The personal allowance of 200 cigarettes was confined to each adult traveller; here there was only one such person for the goods imported. Mr Coley had confirmed that Bahmans are less than half the size of standard UK cigarettes; however, the allowance is by reference to number of cigarettes; although the quantity imported was vastly in excess of the allowance, this was relevant to the calculation of the evaded duties.

23. The mitigation of penalty afforded was appropriate. Even at the hearing Mrs Ahmadian was denying that she imported 30,000 cigarettes.

Consideration and Conclusions

Dishonesty

5 24. We must determine whether Mrs Ahmadian's import of the cigarettes was conduct for the purpose of evading excise duties and involving dishonesty. We have adopted the test of dishonesty set out by the Court of Appeal in *R v Ghosh* [1982] QB 1053 and by the Privy Council in *Barlow Clowes International Ltd (In Liquidation) and another v Eurotrust International Limited and another* [2005] UKPC 37.

10 25. In *Ghosh* Lord Lane stated (at 1064):

15 "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

20 If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."

25 26. In *Barlow Clowes* Lord Hoffmann (at [10]) approved the following test (derived from *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378):

30 "... liability for dishonest assistance requires a dishonest state of mind on the part of the person who assists in a breach of trust. Such a state of mind may consist in knowledge that the transaction is one in which he cannot honestly participate (for example, a misappropriation of other people's money), or it may consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge ... Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

40 27. On her own evidence Mrs Ahmadian confirms that she was aware that limits applied to the import of cigarettes. One of her contentions is that she made a payment to Turkish Customs officials, and obtained a receipt which she showed Mr Coley, and thus she believed she was entitled to import the cigarettes without any UK excise duties liability. We do not accept that Mrs Ahmadian honestly believed that payment

of 136 Turkish Lira (less than £50) would entitle her to bring into the UK 30,000 cigarettes which had cost her £162 but had a UK retail value in excess of £9,600. We find that she was dishonest in entering the Green Channel carrying 21 kg of cigarettes, intending to walk through without paying the tax and duties properly due and thus intentionally evade the excise duties.

28. Accordingly, we find that Mrs Ahmadian's conduct was for the purpose of evading excise duties and involved dishonesty. Thus HMRC were entitled to charge the disputed penalties.

29. We should deal with Mrs Ahmadian's objection that when she left the airport she was under the impression that there would be no further action other than seizure of the cigarettes. When Mr Coley told Mrs Ahmadian that there would be no further action, he was referring to the statement on the seizure warning letter (handed to Mrs Ahmadian) concerning possible further action (including criminal prosecution) by Border Force; the letter clearly states that information may be shared with HMRC, who may issue "you with an assessment for any evaded tax or duty and a wrongdoing penalty". That is what has happened here.

Calculation and mitigation of the penalty

30. Mr Coley informed us that Bahmans are less than half the size of standard UK cigarettes. However, the personal allowance is by reference to a stated number of cigarettes (200) and we agree that HMRC's treatment was correct in taking 200 Bahmans as being the permitted allowance.

31. We are satisfied with the calculation of the evaded duties prepared by Ms Dodd.

32. We are also satisfied with the degree of mitigation of the penalties allowed by Ms Dodd. Indeed, we consider the mitigation was relatively generous given that Mrs Ahmadian has throughout denied culpability and disputed the quantity of cigarettes imported.

33. The relevant legislation is clear that insufficiency of funds is not to be taken into account in considering the penalties.

34. Accordingly, we confirm the amount of the penalties at £5,423.00.

Decision

35. The appeal is DISMISSED.

36. 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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PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 9 JANUARY 2017