



TC05640

Appeal number:TC/2016/00544

EXCISE DUTY – penalties – Finance Act 1994, section 8 and Finance Act 2003, section 25 – importing cigarettes without payment of duty – dishonestly seeking to evade duty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SHAHIN SORORI

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MRS BEVERLEY TANNER**

Sitting in public in Manchester on 17 January 2017

Mr Sorori appeared in person with assistance from Mr Robert Catterall

Mr Rupert Davies of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

Background

1. The Appellant lives in Manchester. On 29 September 2014 he was stopped at Manchester Airport having arrived on a flight from Iran via Dubai. He was found to be carrying 4,960 Bahman cigarettes in his luggage. The cigarettes were seized on the basis that the Appellant had exceeded the duty free allowance of 200 cigarettes imported from a third country and duty had not been paid. The Appellant did not challenge the lawfulness of the seizure.

2. Following correspondence, on 8 January 2016 a civil evasion penalty assessment was issued to the Appellant in the sum of £721. This comprised £565 for evasion of excise duty and £156 for evasion of customs duty.

3. The Appellant has not been assessed to customs duty or excise duty on the seized goods. The total amount of duty which would have been payable on the seized goods as calculated by HMRC is £1,443. The penalty was calculated at 50% of the total duty, having given the Appellant a reduction of 50% to reflect disclosure and co-operation in HMRC's enquiries.

4. In this appeal the Appellant challenges the penalty assessment. His case is essentially as follows:

(1) He was unaware that there was a maximum allowance of 200 cigarettes which could be brought into the UK duty free from a third country.

(2) He had no intention of evading duty.

5. HMRC contend that we can be satisfied on the evidence that the Appellant was dishonestly intending to evade excise duty and customs duty.

6. The principal issue on the appeal is essentially one of fact. It involves the Appellant's knowledge as to the duty free allowance for cigarettes at the time he imported the cigarettes.

7. We can set out the legal background relatively briefly. Travellers arriving in the UK from third countries outside the EU are relieved from excise duty, customs duty and VAT (recoverable as customs duty) on up to 200 cigarettes which are not being imported for a commercial purpose. Where goods in excess of that limit are imported then those goods can be seized. There is also provision for excise duty and customs duty to be assessed and for a penalty to be assessed.

8. In this case the goods were seized but no assessments to excise duty or customs duty were issued. We are solely concerned with the penalties.

9. Section 8 Finance Act 1994 makes provision for HMRC to assess a penalty in relation to evasion of excise duty as follows:

“(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),

5 *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—*

10 *(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.

15 (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;

20 *(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. The provisions for penalties in relation to evasion of customs duty are not materially different. They are contained in sections 25 and 29 Finance Act 2003.

25 11. The present appeal is made pursuant to section 16 Finance Act 1994. We have full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty if we think there are grounds to do so, but not on the grounds of inability to pay.

30 12. Section 16(6) Finance Act 1994 provides that the burden of proof is on HMRC to establish that the Appellant has engaged in conduct for the purpose of evading duty and that his conduct involved dishonesty. Otherwise the burden of proof is on the Appellant.

13. We had witness statements from Mr Michael Jarrett and from Ms Janet Dodd. Mr Jarrett is a UK Border Force officer who stopped the Appellant at Manchester Airport and who interviewed him. Ms Dodd is the HMRC officer who enquired into

the circumstances of the importation and who issued the penalty assessment to the Appellant. We heard oral evidence from both those witnesses.

14. The Appellant gave oral evidence before us. English is not the Appellant's first language and we took steps to satisfy ourselves that his understanding of English was sufficient for him to participate fully in the proceedings. We were so satisfied, and the manner in which the Appellant gave evidence confirmed that this was the case. We also heard from Mr Catterall, although not by way of evidence. Having said that Mr Catterall did tell us that he had known the Appellant for 17 years from when he arrived in the UK as a refugee and had acted as his housing officer at that time. He gave a character reference to the effect that he did not believe the Appellant would have acted dishonestly. We have taken that into account in making our findings of fact.

15. On the basis of the evidence before us and on the balance of probabilities we make the following findings of fact.

15 *Findings of Fact*

16. There were factual issues about the circumstances leading up to the seizure, and to some extent as to what was said in the interview. Before dealing with those issues we set out the correspondence between Ms Dodd and the Appellant in connection with the penalty.

17. On 18 September 2015 Ms Dodd wrote to the Appellant inviting his cooperation with an enquiry into "your involvement in the smuggling, or attempted smuggling, of alcohol or tobacco products that have not had the appropriate duty paid on them". The letter stated that no decision had been taken as to whether there had been dishonest conduct and that she had an open mind as to whether there was an innocent explanation. She asked for certain information including:

- "Confirmation of who was involved in the smuggling (attempt)."
- "A full explanation as to how the smuggling (attempt) was carried out."
- "Confirmation as to how many times and when (the dates) alcohol and tobacco products were smuggled ..."

18. We return to the terms of that letter below. There was no response from the Appellant and on 8 October 2015 Ms Dodd wrote again stating if she did not receive a reply by 21 October 2015 a decision would be taken regarding the imposition of a penalty. The penalty would be reduced if the Appellant co-operated with the enquiry.

19. On 12 October 2015 the Appellant telephoned Ms Dodd asking to know what the enquiry was about. He indicated that he would seek advice from the Citizen's Advice Bureau. The Appellant phoned again on 15 October 2015. The note records that the Appellant stated that he would not answer the questions in Ms Dodd's letter and he would not co-operate with the enquiry.

20. On 13 November 2015 Ms Dodd wrote to the Appellant stating that HMRC considered the Appellant's actions in importing the cigarettes had been dishonest and that a penalty of £1,226 would be charged. A reduction of 15% had been given to reflect disclosure and co-operation.

5 21. On 3 and 4 December 2015 Mr Catterall telephoned HMRC on behalf of the Appellant. He stated that he would do his best to get the Appellant to respond to Ms Dodd's questions. The result was that on 5 December 2015 the Appellant wrote giving his account of the circumstances in which he came to import the cigarettes.

22. A reduced penalty assessment was issued on 8 January 2016 in the sum of £721.
10 The Appellant lodged a notice of appeal to the tribunal on 29 January 2016. The notice of appeal set out that the Appellant had no income or savings and that he did not think the answers he had given in his letter dated 5 December 2015 had been taken into account. As we have said, the law provides that we cannot take into account the Appellant's financial means when assessing the amount of the penalty.
15 We therefore make no findings in that regard.

23. We turn now to consider our findings of fact as to the circumstances in which the Appellant came to import the cigarettes. What is not in dispute is that the Appellant had spent 3 months in Iran visiting his parents. He came to the UK 17 years ago and this was his second trip back to Iran, his first trip being in 2010. The
20 Appellant was travelling alone and was stopped in the green channel at Manchester Airport at approximately 9am, indicating that he had nothing to declare. He had with him one cabin bag and a suitcase which had been carried in the aircraft hold. The suitcase contained 4,960 cigarettes, 4.15kg of honey and 1.4kg of cheese. Travellers from third countries are not permitted to import more than 2kg of honey or any
25 amount of dairy products and they were seized together with the cigarettes. Indeed, the Appellant was more upset that his honey and cheese had been seized than the cigarettes as some of it was intended for his girlfriend who was in hospital.

24. The cigarettes were Bahman cigarettes purchased in Iran for the Appellant's own consumption. Bahman cigarettes are smaller than cigarettes generally available
30 in the UK. They are sold in packets of 20, which are then paper wrapped in sleeves of 500 cigarettes. Officer Jarrett recorded that 8 sleeves were found inside what were otherwise empty cake and sweet boxes. The remaining cigarette packets were spread around the Appellant's clothing in the suitcase.

25. Officer Jarrett's evidence was that he could not specifically recall the
35 circumstances in which he stopped the Appellant or what was said in interview. Given the passage of time that is understandable. He did recall that he had seized honey and cheese from a traveller and the traveller had been upset that the honey and cheese was being seized. That must have been the occasion when he stopped and interviewed the Appellant. He did not recognise the Appellant, which again is understandable.

40 26. Officer Jarrett recorded in his notebook at the time of interview that the Appellant was evasive when asked whether he was aware that the importation of certain items was prohibited or restricted. He recorded that he had to ask a question

about customs allowances three times before the Appellant confirmed that he was aware of the allowances. In evidence Officer Jarrett could not say whether the Appellant was referring to customs allowances for tobacco or other goods. At that stage the Appellant's suitcase was searched.

5 27. We appreciate that Officer Jarrett is an officer trained to deal with international
travellers, both in relation to immigration and customs rules. During the Appellant's
evidence we could see that whilst he has a reasonable grasp of English, it was on
occasion necessary to repeat questions and to deal with certain matters quite slowly.
10 We also take into account the effect of a tiring journey and the anxiety even innocent
travellers might feel when being stopped by customs. Those factors may have
combined to cause the Appellant to appear evasive. In the circumstances we give little
weight to Officer Jarrett's description of the Appellant as evasive.

15 28. The Appellant's evidence was that he had been told by a friend who worked at
an airport in Iran that the customs limit for Bahman cigarettes was 10 boxes, which is
5,000 cigarettes. He said that his family gave him the money to purchase the
cigarettes as a gift. He was unemployed in the UK and struggled to afford cigarettes.
He went out and bought 3 boxes and at the same time he was aware that his brother
had bought another 7 boxes. The total cost of 10 boxes was equivalent to
approximately £175.

20 29. There was no obvious reason to put cigarettes into empty cake and sweet boxes.
It may have been a way to conceal the cigarettes if the suitcase was opened by
customs and that was the view taken by Officer Jarrett. If that is the explanation it
doesn't readily explain why the remaining 960 cigarettes were not effectively
concealed.

25 30. The Appellant's explanation was that his mother had packed his suitcase and
put most of the cigarettes in the boxes as a surprise for when he got home. The
surprise was not that his family had bought him the cigarettes, which he already knew,
but that he would open the case and see only the sweet and cake boxes. He would
think the cigarettes were not there but he would find them in the boxes. Although his
30 mother did not realise it, the Appellant had overheard her planning the surprise and he
had seen his family members putting the cigarettes into the boxes.

31. The Appellant's evidence as to the hiding of his cigarettes for a surprise did not
seem credible. Further, the Appellant's evidence as to his understanding that there
was a customs limit of 10 boxes of Bahman cigarettes was given for the first time in
35 cross-examination. The Appellant went on to say that when asked by Officer Jarrett
whether he knew about the customs allowance for tobacco, he had told Officer Jarrett
that he did and that it was 10 boxes. We are satisfied that evidence was untrue. We are
satisfied that Officer Jarrett would have made a record of it if the Appellant had
referred in interview to a customs allowance of 10 boxes (5,000) cigarettes.

40 32. The Appellant also sought to suggest in cross-examination for the first time that
there were only 7 boxes of cigarettes packed in the cake and sweet boxes. We are
satisfied from Officer Jarrett's evidence that it was 8 boxes. It seemed to us that the

reason the Appellant sought to raise this was an after-thought so as to be consistent for some reason with his evidence that his brother had bought 7 boxes of cigarettes. It may be that he thought his evidence as to the surprise would only make sense if it was the cigarettes purchased by his brother that were hidden. In any event, we do not
5 accept the Appellant's evidence as to the number of cigarettes packed in the cake and sweet boxes or the reason they were there. On the balance of probabilities we find that the Appellant deliberately concealed 8 boxes of cigarettes in the hope that a cursory search would only find the cigarettes loose amongst his clothing.

10 33. The Appellant stated that he had declared the cigarettes in Iran at check-in before he got on his flight. He wanted to know whether he could take them on the plane and assumed that was all the clearance he needed. It is not credible that the Appellant would have accepted that clearance in Iran to take the cigarettes on the flight amounted to clearance that those cigarettes were within EU/UK customs duty allowances. We reject the Appellant's evidence to that effect.

15 34. There are signs on display in the baggage reclaim area prior to entering the green channel. The Appellant stated that he didn't read the signs because he was tired after a long journey and he was struggling with the handle of his cabin bag, which had broken. More likely in the light of our previous findings is that the Appellant was well aware that he was not entitled to import 5,000 cigarettes duty free.

20 35. In the light of all the evidence we are satisfied on the balance of probabilities that prior to entering the green channel the Appellant was aware that the UK duty free allowance for cigarettes imported from Iran was 200 cigarettes.

Decision

25 36. In the light of our findings of fact we are satisfied that the Appellant went through the green channel for the purpose of evading duty. His conduct clearly involved dishonesty and HMRC were entitled to assess a penalty.

37. The penalty is based on the amount of duty sought to be evaded. We have considered the calculation of the excise duty and customs duty on the seized cigarettes. We are satisfied that the Appellant sought to evade duty of £1,443.

30 38. The circumstances in which Ms Dodd came to enquire into the Appellant's importation of cigarettes were less than satisfactory. In conducting her enquiry Ms Dodd appeared to have assumed from the outset that the Appellant had been dishonestly smuggling tobacco. She told us clearly in evidence that the question of dishonesty was not her decision and that at the time she had written her letter dated 18
35 September 2015 the decision on dishonesty had already been taken within HMRC. She said that her instructions were that once a traveller had gone through the green channel with cigarettes in excess of the allowance then the traveller had been dishonest. That approach is plainly wrong. Further, it is inconsistent with the terms of Ms Dodd's own letter which stated:

“No decision has yet been made as to whether there has been dishonest conduct. I will keep an open mind that there may be an innocent explanation for the suspected irregularities.”

39. Ms Dodd’s letter was based on a standard HMRC template. The purpose of the letter was to give persons suspected of dishonesty the opportunity to persuade the officer that there was no dishonesty. It also gives persons who are subsequently found to have been dishonestly attempting to evade duty an opportunity to mitigate the amount of any penalty through disclosure and co-operation. It does not appear to us that Ms Dodd had the distinction between those two purposes clearly in mind, certainly during the course of her evidence. In re-examination Ms Dodd stated that she had in fact made the decision on dishonesty. The template may itself have contributed to Ms Dodd’s confusion. Throughout the letter it refers to the Appellant as having been involved in “smuggling” or “attempted smuggling”. In Mr Catterall’s mind and to our minds use of those words in the letter involved an implicit assumption of dishonesty on the part of the writer. It suggests that the Appellant’s actions had already been determined to be dishonest at the time the letter was written. Ms Dodd’s evidence before us reinforced that view.

40. Smuggling is not a term used in the current legislation. Ms Dodd suggested that the word smuggling was simply intended to convey any act whereby goods liable to duty were not declared on importation, including circumstances where there was an innocent explanation. That is not how people would generally view the word. It is a pejorative word that implies intentional wrongdoing. The verb to smuggle is defined in the Oxford English Dictionary online edition as:

“ To convey (goods) clandestinely into (or out of) a country or district, in order to avoid payment of legal duties, or in contravention of some enactment.”

41. If our jurisdiction on this appeal was limited to testing the reasonableness of the decision in relation to the penalty, then we would have been satisfied that it was unreasonable. Ms Dodd did not properly address her mind to the question of whether the Appellant had been dishonest. However, our jurisdiction is a full appellate jurisdiction and we can make findings of fact and in so far as necessary confirm or set aside the penalty. For the reasons given above we are satisfied that the Appellant was dishonestly seeking to evade excise duty when he went through the green channel and is liable to a penalty.

42. The Appellant has to some extent cooperated with HMRC in their enquiries but he has continued to maintain that he was not seeking to evade duty. In those circumstances we regard a reduction of 50% in the penalty as appropriate. For the reasons given above we confirm the penalty and dismiss the appeal.

43. 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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JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 31 January 2017