



TC05076

Appeal number: TC/2015/04848

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**

SHARAREH BAZRRIZ

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR NOEL BARRETT**

Sitting in public in Manchester on 25 April 2016

The Appellant did not appear

**Mr Rupert Davies of counsel instructed by the General Counsel and Solicitor of
HM Revenue & Customs for the Respondents**

DECISION

Background

1. The Appellant did not appear at the hearing of this appeal. She had been given
5 due notice of the hearing by letter dated 10 March 2016. We were told that on the
morning of the hearing her husband had telephoned the Respondents' Solicitor's
Office to say that she would be unable to attend because of the school run. He asked if
he could attend in her place and was informed that he could and that whether he did
so or not was a matter for him. He was also given the Tribunal's email address and
10 advised to inform the Tribunal. No email or other contact was received by the
Tribunal, nor was there any application to postpone the hearing. The Appellant had
been given an opportunity to provide any inconvenient dates.
2. The Respondents appeared through counsel together with their witnesses. In all
15 the circumstances we were satisfied pursuant to Tribunal Rule 33 that it was in the
interests of justice to proceed with the hearing.
3. The Appellant lives in Barnsley. On 23 August 2014 she was stopped in the
Green Channel at Manchester Airport having arrived on a flight from Iran via Doha.
She was found to be carrying 7,400 cigarettes in her luggage. The cigarettes were
seized on the basis that duty had not been paid. The Appellant did not challenge the
20 lawfulness of the seizure.
4. On 20 July 2015 a civil evasion penalty assessment was issued to the Appellant
in the sum of £848. This comprised £665 for evasion of excise duty and £183 for
evasion of customs duty.
5. The Appellant has not been assessed to excise duty or customs duty on the
25 seized goods. The total amount of duty which would have been payable on the seized
goods as calculated by HMRC is £2,122. This includes excise duty of £1,663,
customs duty of £82 and import VAT recoverable as customs duty of £377. The
penalty was calculated at 40% of the total duty, having given the Appellant a
reduction of 60% to reflect disclosure and co-operation in HMRC's enquiries.
- 30 6. In this appeal the Appellant challenges the penalty assessment. Her case is
essentially that she was not dishonestly seeking to evade duty. Further she challenges
the calculation of the penalty.
7. HMRC contend that we can be satisfied on the evidence that the Appellant was
35 dishonestly intending to evade excise duty and customs duty. Further, that the duty
sought to be evaded has been correctly calculated and reasonable mitigation given.
8. 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 these limits are
40 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.

9. 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.

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

- 5 “(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),
- 10 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
- 15 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
- 20 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;
- (b) the fact that there has, in the case in question or in that case taken
- 25 with any other cases, been no or no significant loss of duty.”

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

12. The present appeal is made pursuant to section 16 Finance Act 1994. We have

30 full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty if we think it proper to do so, but not on the grounds of inability to pay.

13. 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 her conduct involved dishonesty. Otherwise the burden of proof is on the Appellant.

5 14. We had witness statements from Mr Lee Atkin-Nash and Ms Jacqueline Leach. Mr Atkin-Nash is a Border Force officer who stopped the Appellant at Manchester Airport and who interviewed her. Ms Leach is an officer of HMRC who was the manager of the officer who assessed the penalty. Both were in attendance at the hearing but we only found it necessary to hear from Ms Leach.

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

Findings of Fact

15 16. We have set out above the general circumstances in which the goods came to be seized. When the Appellant was stopped she was in the Green Channel indicating nothing to declare. The Appellant stated in interview that she had packed her bags herself and was aware of their contents. She was asked whether she was aware of the strict limits on importation of certain goods including cigarettes. In response she stated that she had 200 Marlboro cigarettes. That was plainly a lie. When her bags were searched she was found to be carrying 200 Marlboro cigarettes, 200 Kent Switch
20 cigarettes and 7,000 Bahman Slim cigarettes. The Bahman cigarettes are an Iranian brand of cigarettes which are not retailed in the UK.

17. The Appellant's cigarettes were seized and she was provided with copies of Notice 1, Notice 12a, a seizure information notice and a standard warning letter about seized goods.

25 18. On 25 May 2015 the Respondents wrote to the Appellant inviting her cooperation with an enquiry into possible conduct involving dishonesty in relation to the seized cigarettes. There was no response to that letter and a further letter was sent requesting a reply by 2 July 2015.

30 19. The Appellant wrote on 18 June 2015 stating that she had not been smuggling and had not been dishonest. Essentially she claimed that she was unaware that duty was payable on the cigarettes or that there were legal limits on the number of cigarettes that could be imported. She stated that value of Iranian cigarettes was very low, it never occurred to her to declare them and that they were intended for personal use by her and her husband.

35 20. The penalty was assessed by notice dated 20 July 2015 in the amounts set out above. In fact it was calculated on the basis that 7,000 cigarettes had been imported, whereas after deducting the allowance of 200 cigarettes it should have been 7,200 cigarettes. That error was in favour of the Appellant and the Respondents were content that no adjustment should be made.

21. In her Notice of Appeal dated 10 August 2016 the Appellant repeated that she was unaware of the limits on importing cigarettes, that the cigarettes were for personal use and that Iranian cigarettes are worthless. She contended that 7,000 Iranian cigarettes would be the equivalent of 2,500 branded cigarettes.

5 *Decision*

22. We accept Mr Atkin-Nash's evidence as to the circumstances of seizure. It is telling that the Appellant lied about the number of cigarettes she was importing, and also that she admitted to 200 cigarettes which is the limit for importing cigarettes duty free from a third country. We are satisfied that she was well aware of the limit of 200
10 cigarettes and that she was dishonestly seeking to evade duty on the remaining 7,200 cigarettes.

23. The penalty is based on the amount of duty sought to be evaded. We were taken to the calculation of the excise duty and customs duty on the seized goods which totalled £2,122. The only issue in relation to that calculation relates to the values used
15 in calculating excise duty and customs duty on the Bahman cigarettes.

24. Excise duty on cigarettes is charged by the Tobacco Products Duty Act 1979 ("the Act"). Section 2 provides that excise duty is charged at the rates specified in Schedule 1. The rate of duty at the time of seizure was 16.5% of the retail price (the "ad valorem duty") plus £184.10 per 1000 cigarettes.

20 25. The penalty in this case was calculated by reference to an ad valorem duty of 16.5% based on a retail price of £6.49 per 20 cigarettes. That amounts to £374.80. There is no issue about the element of duty based on 7,000 cigarettes at £184.10 per 1,000, which amounted to £1,288.70

26. Section 5 of the Act makes provision for identifying the retail price of cigarettes
25 as follows:

"(1) For the purposes of the duty chargeable at any time under section 2 above in respect of cigarettes of any description, the retail price of the cigarettes shall be taken to be—

(a) the higher of—

30 *(i) the recommended price for the sale by retail at that time in the United Kingdom of cigarettes of that description, and*

(ii) any (or, if more than one, the highest) retail price shown at that time on the packaging of the cigarettes in question,

or

35 *(b) if there is no such price recommended or shown, the highest price at which cigarettes of that description are normally sold by retail at that time in the United Kingdom."*

27. It was not suggested that there was any recommended price for the Bahman cigarettes for sale by retail in the UK or that any retail price was shown on the packaging. Hence we are concerned with paragraph 5(1)(b) and we must seek to identify “*the highest price at which cigarettes of that description are normally sold by retail ... in the United Kingdom*”.

28. Ms Leach’s evidence was that Bahman cigarettes were not retailed in the UK. Bahman are small cigarettes and there is no equivalent sold in the UK. The figure of £6.49 was taken on the basis that it was the lowest retail price of any cigarette in the UK at the time of the seizure. We accept that evidence. However we must consider how section 5(1)(b) applies in the case of cigarettes being imported which are not retailed in the UK. On one view it might be said that if cigarettes “of that description” are not retailed in the UK then no retail price can be ascertained and no ad valorem duty can be charged. We do not consider that is the case. It is clear from section 5(1) that ad valorem excise duty is chargeable on cigarettes “*of any description*”. We accept Mr Davies’ submission that the reference to “*that description*” in section 5(1)(b) is a reference to cigarettes of the closest description being retailed in the UK. It is not necessary for us to identify what was the closest description of cigarettes to Bahman cigarettes being retailed in the UK because the Respondents have taken the lowest retail price of any cigarette in the UK. We are not satisfied therefore that the excise duty has been incorrectly calculated.

29. In relation to customs duty on cigarettes the duty is calculated by reference to the cost price of the cigarettes. In the absence of any evidence as to cost price the Respondents estimated the cost price by taking the lowest retail price of cigarettes in the UK and stripping out the customs duty and excise duty. This gave a figure of 41p per 20 cigarettes giving a customs value for 7,000 cigarettes of £143.50. Using a rate of customs duty of 57.6% this gave duty of £82.66.

30. The burden on establishing that a penalty in excessive is on the Appellant. In the absence of any credible evidence as to the retail price or cost of the Bahman cigarettes we are not satisfied that the duty on which the assessment was calculated was excessive, either in relation to excise duty or in relation to customs duty.

31. Finally we have also considered the extent of mitigation given. In all the circumstances we are not satisfied that any greater mitigation ought to have been given.

Conclusion

32. For the reasons given above we dismiss the appeal.

33. Any application to set aside this decision pursuant to Rule 38 of the Tribunal Rules on the basis that the Appellant was not present or represented should be made in writing within 28 days from the date on which the decision is released and setting out all facts and matters relied upon.

34. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

10

RELEASE DATE: 5 MAY 2016