



TC06261

Appeal number: TC/2016/06959

Excise and customs duty – civil evasion penalties – Finance Act 1994, section 8 - Finance Act 2003, sections 25 and 29 – importation of 10,000 cigarettes – whether or not conduct for the purposes of evading duty – yes – whether or not dishonest – yes - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SYED AHMED

Appellant

- and -

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

**TRIBUNAL: JUDGE RICHARD CHAPMAN
 MRS BEVERLEY TANNER**

**Sitting in public at 4th Floor, City Exchange, 11 Albion Street, Leeds, LS1 5ES on
14 September 2017.**

The Appellant in person.

**Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents.**

DECISION

Introduction

5 1. This appeal is against penalties in the total sum of £2,164, comprising a customs
duty evasion penalty in the sum of £427 and an excise duty evasion penalty in the sum
of £1,737 (together, “the Penalties”). The Penalties were notified in a letter dated 22
September 2016 and which was upheld in a review on 3 November 2016. The
Penalties arose from the seizure of 10,000 Derby brand cigarettes (“the Cigarettes”)
10 from Mr Ahmed by the Border Force at Birmingham Airport on 7 September 2015.

The Factual Background

2. The broad factual background was not in dispute. On 7 September 2015, Mr
Ahmed returned from an eight week trip to see his family in Bangladesh. He had
flown via Dubai and arrived at Birmingham Airport with his wife and three young
15 children. After collecting his baggage, he went through the green “nothing to declare”
channel. Whilst in the channel, he was stopped by a Border Force Officer, Mr Syed
Shah, and asked various questions. Mr Ahmed does not dispute Mr Shah’s account of
this and so we set out below the relevant paragraphs from his witness statement (the
contents of which are corroborated by the notes in his notebook):

20 “6. I then asked Syed Jakaria Ahmed the following questions:

(1) Are these all your bags and did you pack them yourself?

(2) Are you aware of all the contents inside the bags?

(3) Are you aware of your customs allowances from outside Europe?
25 200 cigarettes? 250 grams of tobacco? 1 litre of spirits and certain food
allowances?

(4) Are you aware that some items are prohibited and restricted from
importation? Such as controlled drugs? Firearms and explosives?
Offensive weapon? Indecent and obscene material? Certain food
restrictions?

30 7. Mr Ahmed replied by stating that he understood the questions. He
stated that all bags were his and he was aware of all contents. He stated
the bags were packed by himself with the help of his family members.

35 8. Mr Ahmed stated he was aware of his customs allowances and
that he had two or three boxes of cigarettes. He also stated that he had
no prohibited and restricted items.”

3. Mr Shah then proceeded to search Mr Ahmed’s baggage. He found ten thousand
cigarettes, all of which were “Derby” brand. These were spread out amongst a number
of bags. These were all seized. Mr Ahmed was given a seizure information notice, a
warning letter and the relevant public notices. There has been no challenge to the
40 legality of the seizure.

4. On 31 August 2016, HMRC wrote to Mr Ahmed setting out their intention to impose penalties and inviting Mr Ahmed's co-operation.

5. Mr Ahmed replied on 12 September 2016. He stated as follows:

5 "I am writing to admit I did try to bring in cigarettes to the UK. I was told by friends and family it would be ok and was not aware of the exact amount I had as the[y] helped me pack my cases. I can honestly say I did not know the amount I was allowed or what the consequences would be. I did not realise how serious an offence this is.

10 This is the first time I have done anything like this and I have learnt from this mistake. I am truly sorry and can promise this will not happen again. I am really struggling at the moment supporting my family and a fine would ruin us. Please find it in your heart to forgive me."

15 6. HMRC wrote again on 19 September 2016 under the misapprehension that Mr Ahmed had not replied to their previous letter. In any event, a notice of assessment to a civil evasion penalty was sent to Mr Ahmed on 22 September 2016. The assessment was for the Penalties in the sum of £2,164, which included a reduction of 25% to reflect HMRC's view of Mr Ahmed's early disclosure and co-operation.

20 7. Mr Ahmed requested a review of this decision on 7 October 2016. He did not take issue with the calculations underlying the Penalties, but felt that they were too high for a first time offence. By a letter dated 3 November 2016, the assessment was upheld on review. Mr Ahmed appeals pursuant to a notice of appeal dated 25 November 2016. His grounds for appeal are as follows:

25 "I believe the penalty charged is too high for a first time offence. I have co-operated fully with all enquiries and therefore believe the reduction applied for disclosure and co-operation should have been higher."

The Legal Framework

8. The legal framework was not in dispute.

9. Sections 8(1) and (4) of the Finance Act 1994 provide as follows:

30 "8 Penalty for evasion of excise duty
(1) Subject to the following provisions of this section, in any case where -

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

35 (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.”

10 10. Section 8 of the Finance Act 1994 was repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 with the exception of the dishonesty penalty, which was preserved by the Schedule 41 (Appointed Day and Transitional Provisions) Order 2009.

11. Sections 25(1) and 29(1)(a) of the Finance Act 2003 provide as follows:

15 “25 Penalty for evasion

(1) 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),

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.

...

29 Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section 25 or 26 –

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or 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 previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are –

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or 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 or any relevant tax or duty,

5 (c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.”

12. The Travellers’ Allowance Order 1994 provides for the limits for the importation of relevant goods from third countries (whereby a “third country” is defined in relation to relief from excise duties as a place to which Council Directive 92/12/EEC of 25 February 1992 does not apply). The limit for cigarettes is 200.

10 13. The test for dishonesty has been clarified by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords v Genting* [2017] UKSC 67, unifying the principles for civil and criminal cases. Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) stated as follows at [74]:

15 “[74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the

20 fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question

25 is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has

30 done is, by those standards, dishonest.”

Submissions

HMRC

14. Mr Davies submitted that it was a deemed fact that the Cigarettes were legally seized and this could not now be challenged. He said that, from a subjective

35 perspective, Mr Ahmed was dishonest as he attempted to mislead the officer, it was improbable that he would not know how many cigarettes he was carrying and his evidence was inconsistent. He said that this was objectively dishonest, as the ordinary person would realise that this was dishonest. Further, the reduction of 25% comprised a 10% deduction for early disclosure and 15% for co-operation which was fair in the

40 circumstances.

15. Mr Davies correctly referred us to the decision of *Jacobson v HMRC* [2016] UKFTT 0570 (TC) (Judge Richard Thomas and Mrs Susan Stott) which is currently under appeal to the Upper Tribunal and raises questions as to the circumstances in which penalties can be applied where goods are seized in the green channel. However, he stated that this in fact has no bearing upon the present case as *Jacobson* does not deal with the present position where the penalty is for alleged dishonest evasion.

Mr Ahmed

16. Mr Ahmed said that he acted honestly, that he did not realise how many cigarettes he had and that he did not know what the limits were. He also emphasised that this was a first offence, that it was unfairly high, that he could not afford to pay the Penalties and that he was the only person providing financial support for his family.

Discussion

Findings of fact

17. In making our findings of fact, we bear in mind that section 16(6) of the Finance Act 1994 provides that the burden of proof is upon HMRC to establish the matters set out in sections 8(1)(a) and (b) of the Finance Act 1994. The burden of proof is therefore upon Mr Ahmed in all other respects. We also note that the standard of proof is that of the balance of probabilities (see *Khawaja v HMRC* [2013] UKUT 0353 (TCC)).

18. We heard evidence on behalf of HMRC from Mr Syed Shah (who was the border force officer who interviewed Mr Ahmed and searched his bags at Birmingham Airport) and Mr Martyn Davies (the decision making officer). Both witnesses were cross-examined by Mr Ahmed. We also heard evidence from Mr Ahmed himself, who was cross-examined by Mr Davies of Counsel.

19. In short, we find that Mr Ahmed engaged in conduct for the purpose of evading duty and that his conduct was dishonest. We do so for the following reasons.

20. First, we do not accept Mr Ahmed's evidence that he did not know how many cigarettes he was carrying.

(1) Mr Ahmed's oral evidence was that his brother had packed his bag for him and that he had put some cigarettes in his bags as a gift. He assumed that this was two or three boxes. He did not provide any explanation for why he made this assumption, accepted that his brother had not told him how many cigarettes were in his bag and was not even clear whether or not his brother had told him about the gift at all.

(2) Mr Ahmed told Mr Shah that he was aware of all the contents of his bags and that he packed them himself with the help of his family members. This is inconsistent with his oral evidence.

(3) Mr Ahmed said in his letter dated 12 September 2016 that his friends and family said that it was “ok” to bring back cigarettes. He did not explain this in his oral evidence and it is inconsistent with the suggestion that his brother placed the Cigarettes in his bag without reference to him.

5 (4) If, as is suggested by his answers to Mr Shah and his letter of 12 September 2016, he was involved in the packing of his bags, he would have seen that there were more than two or three boxes of cigarettes.

10 (5) Crucially, Mr Ahmed said during cross-examination that he intended to give ten to twelve boxes to friends and family and then, as a heavy smoker, keep the rest himself. When challenged as to how this was possible when he only thought that he had two or three boxes in his bag, he said that this went through his mind for the first time when the bags were opened and he saw how many cigarettes there were. This is improbable and the manner in which he gave this evidence strongly suggested to us that he was fabricating his evidence in this regard as he went along.

21. Secondly, we find that Mr Ahmed knew that there were limits on how many cigarettes he could bring in and that he knew that he had exceeded those limits. Importantly, he told Mr Shah when he was stopped that he knew what the customs allowances were. During cross-examination he said that this was wrong and that he
20 only said this because he was nervous. When pressed as to why he was nervous he said that this was because he had, “so many cigarettes in my baggage.” However, this was before the bags were opened and so, on his own case, he would not need to be nervous about the number of cigarettes he was carrying. We find that Mr Ahmed was telling the truth when he told Mr Shah that he knew what the customs allowances
25 were as we do not believe his explanation that he was nervous.

22. Thirdly, this was subjectively dishonest. For the reasons set out above, Mr Ahmed’s actual knowledge or belief was that he was carrying more cigarettes than the customs allowances permitted.

30 23. Fourthly, this was objectively dishonest. Ordinary decent people would find that importing more cigarettes than the customs allowances permits and then attempting to avoid declaring this by going through the green channel is dishonest.

The Penalties

24. It follows from these findings of fact that the Penalties were properly imposed.

35 25. We agree with Mr Davies that the legality of the seizure is a deemed fact. In any event, Mr Ahmed has not sought to argue otherwise. Similarly, Mr Ahmed does not take issue with the calculation of the Penalties.

26. Mr Ahmed does take issue with the amount of reduction for early disclosure and co-operation. In essence, he argues that as a first time offence and by nature of his co-operation the Penalties should be reduced to nil or at least reduced by more than the

25% reduction applied. We do not accept that there should be any such further reduction. By virtue of our findings of fact, we are of the view that even at the hearing of this appeal Mr Ahmed was giving misleading evidence as to his knowledge of the number of cigarettes which he was carrying. The 25% reduction is generous and (whilst we do not propose to replace this with a smaller reduction as we have not been invited to do so by HMRC) there is no basis for a greater reduction.

27. We do have sympathy for the fact that Mr Ahmed cannot afford to pay the Penalties and that this may affect his family. However, it is clear from section 29(3)(a) of the Finance Act 2003 as set out above that we are not entitled to take into account his insufficiency of funds in order to reduce the Penalties.

28. As regards proportionality, we note that in *Marcin Staniszewski v HMRC* [2016] UKFTT 128 (TC) (Judge John Brooks) (albeit not binding on us and in any event *obiter*), the First-tier Tribunal stated as follows at [51]:

“With regard to proportionality in relation to excise duty penalties, although, not part of this preliminary hearing, I consider that an analogy can be drawn with the VAT default surcharge regime which has been considered by the Upper Tribunal in *HMRC v Total Technology Limited* [2013] STC 681 and *HMRC v Trinity Mirror plc* (see above) in which the regime itself was held to be fair, or as the Upper Tribunal at [100] of *Total Technology* said:

‘...it does not suffer from any flaw which renders it non-compliant with the principle of proportionality’.”

29. In any event, Mr Ahmed has not suggested that the Penalties are disproportionate and he has not presented any evidence or made any submissions in this regard. It follows that there is no basis before us to find that the Penalties are disproportionate.

30. Finally, we agree with Mr Davies that *Jacobson* does not have any relevance to penalties for dishonest evasion. The First-tier Tribunal stated as follows at [128]:

“We consider that our provisional holding on paragraph 4 does not mean that HMRC are powerless to stop smuggling of excise dutiable goods from the EU in aircraft. A civil penalty for dishonest evasion of excise duty remains on the statute book (s8, FA 1994) and is used in cases where goods are imported from outside the EU in excess of allowances and seized from persons bringing them through the green channel. Section 8 is clearly applicable to green channel cases as the “offence” is simply evasion or attempted evasion of duty, without any need to consider excise duty points or particular acts like carrying etc. Thus HMRC would not be without protection in airport cases like this. It also applies even if the goods have been seized and so no liability to excise duty remains (see §112 above in relation to *DTL*), because successful evasion would not have extinguished the debt and so in seizure cases there must have been an attempt to evade.”

Decision

31. It follows that we must dismiss the appeal.

32. 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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**RICHARD CHAPMAN
TRIBUNAL JUDGE**

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RELEASE DATE: 07 DECEMBER 2017