



TC06866

Appeal number: TC/2017/005541

*EXCISE DUTY – civil evasion penalty – tobacco – whether dishonesty – yes
– whether allowances correct - yes*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GALYL KASSIM ALI MOHAMMED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR TERRY BAYLISS**

Sitting in public in Birmingham on 29 May 2018

**The appellant appeared in person, assisted by his daughter Miss Mohammed
Mr Evans, Counsel, instructed by the General Counsel and Solicitor to Her
Majesty's Revenue and Customs for the Respondents**

DECISION

Introduction

1. This is an appeal against the decision of the Respondents (HMRC) to issue an
5 Excise and Customs Civil Evasion Penalty in the amount of £2057.00 under s8(1)
Finance Act 1994 and s25(1) Finance Act 2003.

Background

2. The appellant (Mr Mohammed) travelled from Yemen to the UK via Istanbul on
2 June 2015. On arrival at Birmingham Airport he entered the green channel where he
10 was stopped by Border Force and was found to have 6,800 cigarettes in his baggage.
The statutory allowance is 200. The cigarettes were seized accordingly.

3. On 22 July 2016, HMRC issued a Notice of Assessment to Mr Mohammed in
respect of an excise and customs civil evasion penalty. Following a review by HMRC,
a review conclusion letter was issued on 29 September 2016 which concluded that the
15 penalties had been legally imposed but varied the amount of the penalty to £2,057.00
to reflect the correct recommended retail price for the cigarettes.

4. The penalty was appealed to this Tribunal on 14 July 2017. The appellant's
appeal was notified to the Tribunal late but, as HMRC made no submissions to
suggest that they disputed that late appeal, we decided to allow the appeal to proceed.

20 Relevant law

5. s8(1) of Finance Act 1994 (as preserved by Article 6 of SI 2009/571 for these
purposes) provides for a penalty to be imposed in relation to excise duty as follows:

(1) Subject to the following provisions of this section, in any case
where—

25 (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),

30 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.

6. s25(1) Finance Act 2003 provides for a penalty to be imposed in relation to
customs duty as follows:

(1) In any case where—

35 (a) a person engages in any conduct for the purpose 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.

7. s29(1)(a) Finance Act 2003 provides rights of appeal against that penalty:

(1) Where a person is liable to a penalty under section 25 ...—

5 (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.

10 (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—

15 (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 of any relevant tax or duty,

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

Appellant's case

8. Mr Mohammed's grounds of appeal were as follows:

25 (1) Mr Mohammed was travelling back from Yemen which was in a state of civil war and it was known that terrorists were targeting British citizens for capture. In the course of trying to get back to the UK, his luggage was unpacked and packed by relatives several times;

30 (2) Mr Mohammed was unwell at the time he travelled and his luggage was packed for the final time by relatives in Yemen. They packed the cigarettes into the luggage and Mr Mohammed was unaware of the quantity of cigarettes that had been packed as he had planned to leave the majority of the cigarettes with his family;

35 (3) An amount of "oud" was also seized and was mis-described as "wood"; Mr Mohammed has previously brought back oud without it having been seized. Mr Mohammed believed that this should not have been seized or, in the alternative, that it should be restored to him.

(4) No correspondence was received from HMRC until a year after the seizure, and he believed that no further action was to be taken after the goods had been seized;

(5) He was not told that he had 30 days to contest the seizure;

40 (6) He cannot speak English and Border Force made no effort to ensure that he understood what was being said to him during the seizure;

(7) As he also cannot read or write English, he was unable to read the letters sent to him by HMRC and no effort was made by HMRC to ensure that he was able to understand the contents of those letters;

5 (8) He did not want to burden his family with the problem and so instructed a solicitor recommended by a friend, but that solicitor did not take the case seriously and did not take any action to assist Mr Mohammed;

(9) Mr Mohammed has a number of illnesses and is registered disabled and is on disability living allowance. As such, he cannot afford to pay the fines.

9. During the hearing, Mr Mohammed also made the following points:

10 (1) He had had to escape from Yemen due to the civil war. He travelled from the Saudi border to Jeddah and then on to Medina. As he was very ill at the time, friends in Jeddah had purchased luggage, clothes and other items at his request and had packed the items in the luggage and tied it up securely.

15 (2) He then travelled on to the UK via Ankara; when he left, he was asked by his friends to call so that they could explain everything.

(3) At the airport, he could not understand the officer who stopped him as his hearing aid was not working. He gave the officer the keys to the luggage, and was shocked when the cigarettes were discovered as no-one had told him that this many cigarettes were in the suitcase.

20 (4) He had been told at the airport by his friends, when leaving, that there were presents in the suitcase but believe that these were clothes and perfume and was not told any detail.

(5) Mr Mohammed believed that they had only put in two sleeves (400 cigarettes) in the luggage.

25 (6) Mr Mohammed did not understand what was happening and simply signed the papers given to him. He was expecting to be given the opportunity to pay the duty and receive the goods back, as he had understood from his friends that this is what would happen. He asked whether he could take one sleeve of cigarettes, but the Border Force officer said that he could not. Mr Mohammed considered that the Border Force officer was very rude in reply.

30 (7) When his friends from Jeddah called him, they explained that they had wanted to send gifts to friends in the UK.

35 (8) Mr Mohammed considers that he is not to blame and does not accept what has happened; he undertook to abide by the law when he obtained British citizenship.

(9) The stress of the proceedings have impacted his health further, and he is simply asking for fairness. HMRC refuse to reduce the penalties at all.

10. In cross-examination, Mr Mohammed made the following points:

40 (1) He used to smoke regularly but has cut down to approximately one pack per week. He sometimes buys cigarettes in the UK and is not sure whether cigarettes are cheaper in Saudi as he has not bought cigarettes in Saudi. He

usually buys a box on the airplane and that lasts him for months. He does not want problems and would not bring in this many cigarettes.

5 (2) He did not ask relatives to buy cigarettes in Jeddah; they had provided the cigarettes as a gift but did not say who for, although they have friends in the UK and had said that they would call to say who they wanted the cigarettes distributed to. He has never brought in gifts before, and his friends would not talk to him after he asked them why they had “done this to me”.

10 (3) He did not carry the luggage at all, as it was packed for him and carried to the airport for him, so he was not aware of the weight. The bags were transferred at Ankara and he did not see them there.

(4) The Border Force officer did not ask him any questions, he just said “open your bag”. He did not ask Mr Mohammed his name.

(5) Although generally speaking through the interpreter, at this point in the hearing Mr Mohammed stated in English that “He never asked me”.

15 (6) Neither Mr Mohammed nor his wife, who was travelling with him, speak English. Mr Mohammed told the Border Force officer that he did not speak English.

20 (7) Mr Mohammed denied that the Border Force officer had given him more than one paper and stated, again in English that “he gave me one, only how many cigarettes” and when asked whether he had received the warning letter (BOR162) said that he had not received it and stated in English “one paper”.

HMRC’s case

25 11. Officer Coley gave evidence for HMRC and stated that, as set out in his notes which were exhibited to his witness statement, in interview on 2 June 2015 at Birmingham Airport:

(1) He asked Mr Mohammed his name and where he had arrived from; Mr Mohammed gave his name and replied that he had come from Yemen;

30 (2) Mr Mohammed confirmed that the bags with him belonged to him, and he had packed them himself. When asked whether he knew what inside them, Mr Mohammed answered “yes”. When asked whether everything inside the bags was his, Mr Mohammed answered “yes”. When asked specifically whether he had any cigarettes, Mr Mohammed answered “no”.

35 (3) When the bags were searched, 6,800 Rothmans cigarettes and 1.34kg of wood were found. The wood was seized as prohibited under DEFRA regulations and the cigarettes were seized as in excess of allowances.

40 (4) Mr Mohammed was informed of the seizure and issued with forms BOR156 (seizure information notice) and BOR162 (warning letter). He was also given Notice 1 (travelling to the UK) and Notice 12a (what you can do if things are seized by Border Force). He signed the warning letter and the seizure information notice. Copies of these signed letters were in the hearing bundle.

12. Officer Coley also explained:

(1) He did not consider that Mr Mohammed was fluent in English at the time of interview but believed that he understood enough to answer questions, giving his name and address and signing the papers when requested. Mr Mohammed's wife was present but did not contribute to the conversation.

(2) The wood seized was oud and agarwood, both are controlled and cannot be imported without permission under DEFRA regulations although, at seizure, the specific type of wood was not identified. Perfumes based on these products could be imported, and possibly incense sticks, but not the raw wood.

(3) He had written his notes of the interview 22 minutes after the interview ended.

13. HMRC explained that the burden of proof was on HMRC to show that s8(1)(a) and (b) had been satisfied; thereafter the burden of proof was on the appellant to show that his grounds of appeal had been established. The standard of proof is the civil standard, the balance of probabilities.

14. HMRC submitted that, when considering whether conduct is dishonest, the tribunal is required to

“first ascertain the actual state of the individual’s knowledge or belief as to the facts ... once his actual state of mind as to knowledge or belief as to facts is established, the question of whether the conduct was honest or dishonest is then determined by applying the (objective) standards of ordinary decent people. There is no requirement tht the defendant must appreciate that what he has done is, by those standards, dishonest” (*Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67).

15. HMRC submitted that:

(1) Mr Mohammed was carrying 33 times the permitted allowance of 200 cigarettes for travellers entering the UK from outside the EU when he entered the green channel, indicating that he had nothing to declare.

(2) It was Mr Mohammed’s responsibility to ensure that he knew the customs allowances, and there was considerable signage at the airport with details of the allowances;

(3) When questioned, Mr Mohammed said that he had packed his bags himself and that the contents of the bags belonged to him. He was clearly able to communicate with the Border Force Officers. At no point did he state that he could not understand or speak English. Mr Mohammed did not say that he had any health problems during the interview.

(4) Mr Mohammed was issued with Form BOR162, advising him that HMRC may consider further action with regard to the evasion of customs and excise duty. He was also given documentation explaining what he needed to do to contest the seizure.

(5) The legislation does not permit any reduction in the penalty due to a lack of funds with which to pay the penalty. The penalty has been imposed in accordance with the law, and the amount of co-operation and disclosure is reflected in the penalty. Mr Mohammed did not respond to HMRC's requests for disclosure and co-operation. HMRC wrote to him twice before issuing the Notice of Assessment and received no reply. It was only after the Notice of Assessment was issued that Mr Mohammed replied, via a solicitor, to request a review of the decision. HMRC submitted also that the penalties could not be reduced on medical grounds, as the legislation did not permit such a reduction.

16. HMRC submitted that the penalties had been correctly imposed and should be upheld.

17. HMRC submitted with regard to the imported wood (oud and agarwood) that the seizure of this could only be challenged at the Magistrates Court. It was liable to forfeiture as it was mixed, packed and found with the cigarettes. This Tribunal had no jurisdiction with regard to that seizure as no penalties had been charged in relation to the wood.

Discussion

18. We consider that this Tribunal has no jurisdiction with regard to the imported wood and so can make no decision with regard to Mr Mohammed's request for the wood to be restored to him.

19. We agreed with HMRC's submissions as to the burden of proof.

20. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. The airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. None of the countries through which Mr Mohammed travelled on this occasion is an EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable only when importing from EU countries.

21. Mr Mohammed did not challenge the legality of seizure of the goods within the statutory time limit. Where there is no challenge to the seizure within 30 days to the Magistrates court), the law provides that the goods are deemed to be condemned as forfeited. That is a final decision and the Tribunal has no jurisdiction to consider the issue any further.

22. We note Mr Mohammed's explanation that he was not given the papers which HMRC say that he did, that he was given only one paper although he does not explain which paper he was given. Having considered the evidence, we find that Mr Mohammed was given the papers. We have seen copies of the two letters (BOR162 and BOR156) and the Notices are indicated on BOR156 to have been issued as well signed by Mr Mohammed.

23. We must make it clear that we did not consider that Mr Mohammed was deliberately trying to mislead the Tribunal but that, balancing his recollection of events against the evidence before us, we preferred the documentary evidence.

24. The key issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is as set out above by HMRC.

5 25. We find that Mr Mohammed's evidence is inconsistent on a number of points:

10 (1) In correspondence with HMRC (a letter dated July 8, 2017 sent by his daughter on Mr Mohammed's behalf), he states that he was "unaware of the quantity of cigarettes [his friends] packed as he was planning on leaving the majority with them". In contrast, Mr Mohammed's evidence in the hearing was that he knew nothing at all of the cigarettes, other than that he thought his friends had packed two sleeves of cigarettes, and he had not asked his friends to buy any cigarettes, nor had he bought any cigarettes in Jeddah. Mr Mohammed also stated in the hearing that his friends said they would call to tell him how to distribute the cigarettes.

15 (2) Mr Mohammed stated that he does not read, write or speak English. We considered the evidence put forward in the hearing and concluded that Mr Mohammed does have a functional understanding of English: it was clear from his own evidence that he understands English well enough to have been able to ask the Border Force officer whether he could take one sleeve of the cigarettes and to know that the BF officer asked him to open his bag. During the hearing, although he primarily spoke via an interpreter, he replied to some of the questions in English without waiting for the interpreter.

20 (3) We also noted that although Mr Mohammed said that his hearing aid was not working during the interview at the airport, his evidence as to the interview made it clear that he had heard what was being said to him, as he knew he was asked to open his bag and he heard the reply to his request to be allowed to keep one sleeve of cigarettes.

25 26. As already noted, we do not consider that Mr Mohammed was deliberately trying to mislead the Tribunal but we consider that his recollection of events cannot be relied upon in preference to other evidence.

30 27. When considering the question of honesty, we note that Mr Mohammed's evidence was that he believed he had two sleeves of cigarettes in his luggage. This is 400 cigarettes, twice the permitted allowance. When asked whether he had any cigarettes in his luggage, he said no. Mr Mohammed did not say that he did not understand or know the permitted allowances for cigarettes.

35 28. We find, therefore, that Mr Mohammed knew he had more cigarettes than was permitted by law. Considering the first part of the test in *Ivey v Genting*, we find that Mr Mohammed's actual knowledge or belief was that he was carrying more cigarettes than the allowances permitted as he knew that he was carrying at least twice the amount of the allowance.

40 29. We find that this is objectively dishonest, considering the second part of the test in *Ivey v Genting* as "ordinary decent people" would find that importing more than cigarettes than the customs allowances permits and then attempting to avoid declaring

this by going through the green channel and denying having any cigarettes is dishonest.

30. We therefore find that HMRC have satisfied the burden of proof upon them to show that the penalties were properly imposed.

5 31. Mr Mohammed has submitted that the penalties were not fairly calculated as they have given no reduction for early disclosure and co-operation. He argued that, as he did not read, write or speak English he was unable to engage with HMRC and, when he did take professional advice, he was let down by his advisers. In addition, he cannot afford to pay the penalties.

10 32. We do not consider that any further reduction is appropriate. Mr Mohammed made no disclosure to HMRC, as he denied having cigarettes in his luggage when he knew that he had at least twice the permitted allowance. The letter of July 8, 2017 sent to HMRC makes it clear that Mr Mohammed understood the contents of the letters sent to him as he “did not want to burden his family” with the problems. Whilst we
15 have some sympathy with Mr Mohammed’s not wanting to burden his family, he could have sought other sources of assistance but did not obtain any such assistance until the Notice of Assessment had been sent to him and the penalty had been determined. He did not obtain any assistance to substantively respond to HMRC’s previous letters to him.

20 33. We also have sympathy for the fact that Mr Mohammed has limited funds, but it is clear from s29(3)(a) of 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.

Decision

34. The appeal is therefore dismissed and the penalties upheld in full.

25 35. 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
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

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RELEASE DATE: 13 DECEMBER 2018