



TC07156

Appeal number: TC/2017/04339

EXCISE DUTY – civil evasion penalty – cigarettes in excess of allowance – whether dishonest – yes – whether further reduction in penalty merited – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MATTHEW MAHER

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR MOHAMMED FAROOQ**

Sitting in public at Leicester on 26 November 2018

The Appellant appeared in person

Mr Millington, counsel, for the Respondents

DECISION

Introduction

1. This is an appeal against a excise and customs civil evasion penalty in the amount of £1,149.00 issued by HMRC on 14 March 2017.

Background

2. The appellant (Mr Maher) arrived at Birmingham Airport on 17 February 2016, returning from Tenerife in the Canary Islands. He was stopped and questioned on entering the Green Channel. His luggage was searched and 5,600 Mayfair King Size filter cigarettes were found and seized.

3. Following correspondence, Mr Maher was issued with the penalty on 14 March 2017. Mr Maher asked for a review of the decision to issue the penalty. The review concluded on 12 April 2017 and upheld the decision to issue the penalty.

4. On 20 May 2017, Mr Maher appealed the decision to the Tribunal. The appeal was made a few days outside the 30 day time limit for appealing the decision and Mr Maher requested permission to bring a late appeal. HMRC did not object to the appeal being made late and the Tribunal granted permission for the appeal to be made late.

Appellant's case

5. Mr Maher's grounds of appeal were that he considered it was very unfair that he should be so heavily fined: he had responded immediately to HMRC's correspondence, which had included the statement that penalties could be reduced if he made a prompt disclosure. However, his first letter to HMRC, with the requested signed enclosures, had been lost in the post and because of this he had been given a harsher penalty. Once he realised that the first letter had not been received, he had immediately sent another letter by recorded delivery. This letter did not include any copies of the enclosures sent with the first letter, nor a copy of that letter, as he had not kept copies. However, Mr Maher's evidence was that he had explained everything again in the second letter.

6. Mr Maher stated that he had also sent a Notice of Claim to challenge the seizure within the 30 day time limit when he had received the first letter but that he had not had any response to that Notice. He was not now challenging the legality of the seizure.

7. Mr Maher had researched the position online and found that someone else in a similar position had been given a 65% reduction in contrast to the 30% reduction given to him, with the only difference being that the other person's first letter had been received.

8. During the hearing, Mr Maher stated that he did not agree with the Border Force officer's record of the interview when he was stopped; he disagreed with the typed record and said that he could not read the officer's handwritten notes. He said he thought that things had been changed when the notes were typed up.

9. Mr Maher's evidence was that he remembered being stopped but didn't remember the whole scenario. He stated that he had told the officer that, contrary to the officer's notes, he did not know what his duty free allowance was from Tenerife and that, if he had known, he would either not have brought back so many cigarettes or would have told Customs that he had done so.

10. Mr Maher accepted that there were obviously restrictions on the import of cigarettes but that he had not known what they were; he had never looked into it and it never occurred to him to ask what the limits were. He had never brought this quantity of cigarettes into the UK before. He had arrived at the airport at 1am with his son (who was nine years old at the time) and a friend and hadn't looked at the signs in the baggage area. He just wanted to get his bags and go home, and had followed other passengers into the Green Channel.

11. Mr Maher did not disagree that, on being told that the allowance was 200 cigarettes and being asked whether he had any cigarettes, he had replied "a few". However, his view was it was a long time ago and that might be an error and that the officer's notes should not be relied upon as Mr Maher considered that the handwritten notes were not readable.

12. The officer's notes included details of a comment made by Mr Maher's son during the interview, stating that the boy made reference to Mr Maher selling cigarettes. Mr Maher agreed that his son had spoken at that point but that the comment had been incorrectly recorded and his son had been referring to Mr Maher smoking the cigarettes. Mr Maher stated that he remembered his son's words.

13. Mr Maher stated that he could not remember whether or not his reply to his son's comment had been "No, they're for me" and considered that he could have said anything.

14. Mr Maher explained that had not attempted to smuggle cigarettes into the UK and had no intention of evading tax. He had simply made a mistake. He had assumed that, as he had paid tax on the cigarettes when he purchased them in Tenerife, that there would be no tax payable on import to the UK. He was a heavy smoker, smoking 40 cigarettes per day, and the cigarettes were for personal use.

HMRC's case

15. Officer Coley, of Border Force, provided a witness statement and gave oral evidence. His notes of his interview with Mr Maher were also produced. In summary, his evidence was:

(1) Mr Maher was stopped in the Green Channel at Terminal 1, Birmingham Airport, at approximately 1am on 17 February 2016. Mr Maher stated that he had arrived from Tenerife..

(2) Officer Coley asked whether Mr Maher was aware of his duty free allowances from Tenerife, and Mr Maher replied “yes”. When asked what he thought the allowances were, Mr Maher replied “you tell me”.

(3) Officer Coley explained that the allowance was 200 cigarettes per adult and asked whether Mr Maher had any cigarettes. Mr Maher replied “a few”.

(4) Once the luggage had been searched and the cigarettes found, Officer Crowley asked Mr Maher whether the cigarettes were for Mr Maher’s use. Mr Maher replied yes, but his son then said “don’t you sell them, Dad?” Mr Maher replied “No, they’re for me”. This unusual exchange meant that Officer Coley had a clear recollection of the interview. He did not agree with Mr Maher’s statement that his son had said “don’t you smoke them, Dad?”

(5) On seizure of the goods, Officer Coley issued a BOR156 seizure information notice, which Mr Maher signed, a BOR162 warnings letter about seized goods, also signed by Mr Maher, and Notice 12a explaining what a person can do if goods are seized by Border Force.

(6) Officer Coley wrote up the notes of the interview at 01:26, having seized the goods at 01:13.

16. Officer Crozier, of HMRC, also provided a witness statement and gave evidence as follows:

(1) On 31 January 2017 he issued a letter to Mr Maher, enquiring into his customs duty, import VAT and export duty affairs for the period 17 February 2015 to 31 January 2017. Included with the letter were a fact sheet and two public notices. Mr Maher was asked to sign, date and return a copy of the letter to Officer Crozier within 30 days. Mr Maher was also asked to provide details in response to a number of questions, and to provide any supporting documentation to those responses.

(2) A reminder letter was issued on 14 February 2017, as a nudge, advising that a response had not been received and advising that a response was now expected by 2 March 2017. Officer Crozier stated that the nudge letter was standard procedure, even though the deadline for reply had not yet passed.

(3) On 23 February 2017, a letter was received from Mr Maher. Officer Crozier considered that this letter did not answer all of the questions in the letter of 31 January 2017. In conjunction with the information provided by Border Force, including Mr Maher’s responses to questions in the interview, Officer Crozier concluded that there had been a dishonest act and recommended a 15% reduction for disclosure of information (out of a maximum of 40%) and a further 15% reduction for co-operation (out of a maximum of 40%).

(4) Officer Crozier stated that, even if the first letter had been received, on the basis of the information provided by Mr Maher as to the contents of that letter,

no further reduction would have been given. Officer Crozier considered that no penalty arose simply from the failure to receive the first letter.

(5) The excise duty, customs duty and import VAT on the cigarettes was calculated on the basis of the lowest known UK price for the relevant cigarettes at the time of seizure.

17. HMRC submitted that the relevant test of dishonesty is that contained in *Ivey v Genting Casinos (UK) t/a Crockfords* [2017] UKSC 67 at §74:

“... the fact finding tribunal must first ascertain (subjectively) 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 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 done is, by those standards, dishonest”.

18. HMRC submitted that the number of cigarettes seized was substantial: 5,600 cigarettes is 28 times the personal allowance and equates to 28 boxes. HMRC submitted that the quantity, and Mr Maher’s son’s comments as to the goods being for sale during the interview, meant that Mr Maher’s assertion that the cigarettes were for personal use lacked credibility. Although there is no “personal use” aspect to allowances in relation to goods imported from Tenerife, HMRC submitted that this evidence was important as to the credibility of Mr Maher’s submissions more generally.

19. HMRC also submitted that it was clear from the evidence that Mr Maher was aware of the limits which he had exceeded and that he was evasive in his answers. His actions were, it was submitted, dishonest behaviour by the normally accepted standards of ordinary decent people (in line with *Ivey v Genting*).

20. Accordingly, HMRC submitted that the overall discount of 30% was reasonable given that Mr Maher had not provided answers to all of the questions asked by HMRC, and his answers in the interview with Border Force had also been evasive.

Discussion

Dishonesty

21. In order for a person to be liable to a civil evasion penalty the conduct which led to the evasion of duty must involve dishonesty (s8(1) Finance Act 1994, in relation to excise duty; s25(1) Finance Act 2003 in relation to customs duty and VAT).

22. We considered that Officer Coley was a credible witness; the Tribunal did not have any difficulty reading the handwritten notes of the interview produced in evidence

and considered that these were accurately reproduced in the typed version also produced in evidence.

23. We also considered that Mr Maher's evidence that he did not really remember the scenario meant that it was not appropriate to prefer his view of what had been said where this differed from Officer Cowley's notes.

24. Considering the two part test in *Ivey v Genting*, we need first to consider what Mr Maher knew or believed in relation to the import of the cigarettes.

25. Mr Maher's own evidence was that it was obvious that there were restrictions on how much could be brought into the country. He said he had never checked to see what the restrictions were, although he told Officer Crowley in the interview that he knew what the limits were.

26. Mr Maher also said that he believed that no UK duty was payable because he had bought the cigarettes in a shop in Tenerife. We consider that, if Mr Maher had believed that at the time of import, then he would have said so at the interview; there was no effort in that interview to explain that he thought that UK duty might not apply, nor did Mr Maher suggest in evidence that he had tried to explain this to Officer Coley. The point was first raised in Mr Maher's letter to HMRC.

27. Accordingly, we find that Mr Maher knew when entering the Green Channel that there were restrictions on the number of cigarettes which could be imported into the UK, although that he had not checked exactly what those restrictions were. We find that Mr Maher did not believe that UK duty would not be payable because he had purchased the cigarettes in a shop in Tenerife.

28. We note the evidence as to the question from Mr Maher's son but have not paid any particular attention to it: we prefer Officer Cowley's evidence as to the exact words of the question but consider that the question could equally have been inappropriate mischief on the part of a bored and/or tired nine year old. In the light of the other evidence set out above, we did not consider that it was necessary to try to determine whether it had been intended seriously.

29. Turning to the second part of the test, Mr Maher's conduct in relation to the import of cigarettes can be summarised as follows: he carried a substantial number of cigarettes, considerably in excess of the permitted allowance, into the Green Channel without having checked what the allowance was, although he knew that restrictions applied. He did not believe that the cigarettes would be duty free in the UK because he had purchased them in a shop in Tenerife. When questioned by a Border Force officer we find that his response of "a few" when asked whether he had any cigarettes, having been informed that the allowance was 200 cigarettes, was evasive and also clearly inaccurate. He had 5,600 cigarettes. That is considerably more than "a few".

30. We find that applying the standards of ordinary honest people, Mr Maher's conduct in relation to the import of the cigarettes was dishonest.

31. We find, therefore, that Mr Maher's conduct in relation to the import of the cigarettes was dishonest such that he is liable to a civil evasion penalty under s8(1) Finance Act 1994 in respect of excise duty and under s25(1) Finance Act 2003 in respect of customs duty and VAT.

Amount of the reduction

32. Under s8(4) Finance Act 1994 (in relation to excise duty) and s29(1) Finance Act 2003 (in relation to customs duty and VAT), HMRC or, on appeal, the Tribunal may reduce a penalty to an amount as they think proper.

33. Mr Maher argues that the penalty should be reduced by 65%, rather than 30%, because he is aware that other people in a similar situation have had a 65% penalty reduction.

34. It is well-established that this Tribunal does not have a free-standing jurisdiction to consider whether HMRC acts fairly between taxpayers.

35. We considered the evidence of Officer Crozier as to why he gave the reduction he did and considered the circumstances of the case. The questions raised in HMRC's letter were not fully answered (for example, no details of international travel were given and Mr Maher did not confirm the number of cigarettes imported) and we find that Mr Maher was evasive in the interview with Border Force.

36. Accordingly, we do not consider that there is any reason to change the reductions of 15% (out of 40%) for disclosure (early and truthful admission of the extent of the arrears and why they arose) and 15% (out for 40%) for meeting responsibilities and co-operating with HMRC.

Decision

37. The appeal is dismissed and the penalty upheld in full.

38. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 23 MAY 2019