



TC07435

Appeal number: TC/2018/01291

EXCISE AND CUSTOMS DUTY - importation of tobacco products - appeal against penalties - s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 - whether dishonesty - yes - whether allowances given to reduce penalties correct - yes – whether amount of penalties correct – no – penalty amount amended – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHAUDHARY MOHAMMAD GHAZANAFAR Appellant

- and -

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

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

Sitting in public at Birmingham on 24 April 2019

The Appellant appeared in person

Ms Patel, presenting officer, for the Respondents

DECISION

Introduction

1. This is an appeal against:

(1) A Customs Civil Evasion penalty of £480 issued on 15 November 2017 under s25(1) Finance Act 2003; and

(2) An Excise Civil Evasion Penalty of £1,758.00 issued on 15 November 2017 under s8(1) Finance Act 1994.

Background

2. The following basic facts were not disputed:

(1) The appellant (Mr Ghazanafar) arrived at Birmingham airport on 3 January 2017 on a flight from Lahore. Having collected his luggage, he entered the 'green channel' where he was stopped and questioned by a Border Force officer.

(2) Mr Ghazanafar's luggage contained 7000 John Player Gold Leaf cigarettes (being 350 packets in 35 sleeves) and 4 kilograms of hand-rolling tobacco. Mr Ghazanafar explained that these were for himself, his family and his friends. The cigarettes and tobacco were seized by Border Force.

(3) Mr Ghazanafar did not challenge the seizure.

Appellant's case

3. Mr Ghazanafar explained that he had been to Pakistan to attend a wedding; his friends and family had asked him to bring back cigarettes and so he had bought these as a gift for his friends and family. He had not brought in the cigarettes with any intention to sell them.

4. He was not sure if he was allowed to bring in the cigarettes and tobacco and was not aware of the limits on the number of cigarettes and tobacco that could be imported into the UK. It did not occur to him to check how many he was allowed to bring in.

5. This was the first time that he had brought cigarettes and tobacco into the UK.

6. He cannot afford to pay the penalties.

HMRC's case

7. The Border Force officer who stopped Mr Ghazanafar in the 'green channel', Officer Tempest, gave evidence as follows:

(1) There is a "declare" desk at Birmingham airport before the 'green channel' and signs in the channels and at the desk with the relevant duty free limits.

(2) On questioning, Mr Ghazanafar stated that he did not know what the duty free allowances for cigarettes were. He was advised that he was allowed to bring in 200 cigarettes or 250 grams of tobacco.

(3) Mr Ghazanafar confirmed that he had cigarettes in his luggage. When asked how many, he replied “20 maybe 30”. He confirmed that he had packed the luggage himself and that everything in the bags belonged to him.

(4) In her search of the luggage, Officer Tempest found 7000 John Player Gold Leaf King Size Filter cigarettes and 4 kilograms of tobacco. She seized the goods as they were substantially in excess of the allowed amounts.

(5) Mr Ghazanafar confirmed that he worked at a petrol garage at a motorway junction but stated that he had not imported the tobacco to sell there.

8. The copies of the seizure documentation produced by HMRC contained the following details (inter alia):

(1) 7000 cigarettes: excise duty £1599.59

(2) 4 kilograms of HRT (hand rolling tobacco): excise duty £430.84

9. Officer Tempest confirmed that she had taken these figures from the HMRC system at the time of the seizure.

10. Officer Crozier of HMRC also gave evidence as to the enquiry process and the penalties and confirmed that he had taken into account the following information when assessing whether to give any penalty reductions:

(1) Mr Ghazanafar did not reply to the questions in HMRC’s initial letter and so did not provide a full disclosure and did not fully co-operate with the enquiry. Accordingly, a 15% reduction was given for disclosure and a further 15% given for co-operation, rather than the maximum reductions of 40% for each.

(2) A colleague, Officer Gibson, calculated the Excise Duty, Customs Duty and Import VAT on the seized goods as follows:

(a) 7000 cigarettes: total excise duty £1,720.00 (based on RRP of £5.99 per 20), customs duty £8.06 (based on price per 20 of £0.04)

(b) 4 kilograms of tobacco: excise duty £792.40 (based on rate per kg of £198.10), customs duty £117.44 (based on price per kg of £39.20)

(c) VAT on the total value including customs and excise duty: £561

(3) The aggregate of the duties and VAT on the cigarettes and tobacco was £3,198. The maximum penalty chargeable is the amount of duty evaded and so, with the reduction of 30% (15% plus 15%), the penalty issued to Mr Ghazanafar was £2,238.

(4) Officer Crozier confirmed that this information would have been based on the lowest known price for the goods on the date of seizure, with the information being provided to HMRC by the manufacturers. Officer Crozier could not explain why the excise duty in this calculation was different to that stated on the seizure notice.

11. HMRC accepted that the burden of proof was on them to show that the conduct leading to the seizure was dishonest, so that the penalties were due, and that the penalties were correctly calculated.

12. HMRC submitted that the test for dishonest behaviour was that established in *Ivey v Genting Casinos* ([2017] UKSC 67, at §74) so that, having established what the knowledge or belief of the individual as to their behaviour, the question is whether the conduct was honest or dishonest by the standards of “ordinary decent people”. There is no requirement that the individual must appreciate that his conduct is, by those standards, dishonest.

13. HMRC submitted that, under this test, Mr Ghazanafar’s behaviour would be regarded as dishonest. He entered the ‘green channel’, which is a declaration that he had nothing to declare, despite signage in the airport outlining the restrictions and so he should have been aware of the duty free allowances that apply to travellers from outside the European Union.

14. In addition, having been advised that the limit was 200 cigarettes or 250g of hand rolling tobacco, Mr Ghazanafar stated that he had “20 maybe 30”. HMRC considered that it was not clear whether he meant 20 or 30 cigarettes, or 20 or 30 packets of cigarettes. He was carrying 7000 cigarettes and 4 kilograms of hand rolling tobacco and was therefore carrying 35 times the duty free allowance of cigarettes and 16 times the allowed amount of tobacco. HMRC submitted that he had not given a true and honest response to Officer Tempest when asked about the number of cigarettes in his possession, and that this indicates that he was aware that he was attempting to bring more than the allowance into the country. Even if he was unaware of the specific limits, HMRC submitted that he had ‘closed his eyes’ to the need to check the permitted amounts. HMRC submitted that this was dishonest by the objective standards of ordinary decent people (considering the test in *Ivey*).

15. HMRC submitted that, as the behaviour was dishonest, the penalties were applicable and that these had been calculated on the basis of the best information available to the officer at the time. HMRC also submitted that the reductions of 15% for disclosure and 15% for co-operation were appropriate given that Mr Ghazanafar had not fully replied to the questions asked and had only given partial responses.

16. HMRC further submitted that the relevant legislation provides no scope for either the Tribunal or HMRC to reduce penalties on the basis of inability to pay, nor for the penalties to be reduced because it is the first such offence.

Relevant law

17. Finance Act 1994, Sections 8(1) and 8(4) state 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),

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. (...)

18. Finance Act 2003, Sections 25(1) and 29(1)(a) state as follows:

(1) in any case where

(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. (...)

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. (...)

Discussion

Dishonesty

19. 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).

20. Considering the two-part test in *Ivey*, we need first to consider what Mr Ghazanafar knew or believed in relation to the import of the cigarettes. His evidence in the hearing was that he was not sure if he was allowed to bring the cigarettes and tobacco, he had no idea that there were restrictions, and that it did not occur to him to check whether there were any restrictions.

21. We note that Mr Ghazanafar's evidence is both that he was not sure if he was allowed to bring in the goods and that he had no idea that there were restrictions. If he was unsure whether the import was permitted, it must be the case that he was aware that there at least might be restrictions but did not attempt to establish what these were even though he was bringing in a considerable quantity of cigarettes. In any case, we

consider that it is inherently unlikely that a person would not be aware that there were limits on the amount of cigarettes and tobacco that could be imported into the UK without payment of duty.

22. We also note that, when asked by the Border Force officer whether he had any cigarettes, his response was that he had “20 maybe 30”, having been told that the limit was 200 cigarettes. We consider that this answer was evasive and clearly inaccurate (even if intended to refer to packets or sleeves of packets of cigarettes).

23. On the balance of probabilities, we consider that Mr Ghazanafar’s state of mind was that he was aware that he was bringing in a quantity of cigarettes and tobacco in excess of the permitted limits even if he did not know exactly what those limits were and that, by going into the green channel, he did not intend to pay UK duty upon those goods.

24. Turning to the second part of the test: Mr Ghazanafar’s conduct in relation to the import of cigarettes and tobacco can be summarised as follows: he carried a substantial number of cigarettes and a large amount of tobacco, considerably in excess of the permitted allowance, into the Green Channel without having checked what the allowance was, although we consider that he knew that restrictions applied, and that he did not intend to pay duty on those goods.

25. We find that applying the standards of ordinary honest people, Mr Ghazanafar’s conduct in relation to the import of the cigarettes and tobacco was dishonest.

Amount of the reduction

26. 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.

27. Having considered the evidence, we do not consider that there is any reason to change the reduction to 15% (from a maximum of 40%) for disclosure and 15% (from a maximum of 40%) for co-operation.

Amount of the penalty

28. We note that the legislation does not permit the Tribunal to reduce the penalty on the grounds of inability to pay and we do not consider that any further reduction in the penalty, on the basis Mr Ghazanafar had not previously incurred any such penalties, would be appropriate.

29. The penalty assessment issued to Mr Ghazanafar contained the following information in the calculation of the penalty:

- (1) Customs duty liable to a penalty: £686
- (2) Excise duty liable to a penalty: £2,512

30. We note that the customs duty amount is the aggregate of customs duty plus VAT, from HMRC's calculation and the explanation given by Officer Crozier.

31. However, the excise duty stated in the seizure notice provided to Mr Ghazanafar at the time of the seizure and produced by HMRC to the Tribunal amounts to £2,030.43.

32. HMRC were unable to explain the difference, stating that the information would have been taken from HMRC's systems. In the absence of any explanation for the difference, we consider that the figure in the seizure documentation is more likely to be correct than that in the penalty assessment (having been completed on the date of the seizure, rather than some months later).

33. As noted above, the Tribunal is able to reduce either of the penalties to such an amount as we think proper. As we consider that the figure in the seizure documentation is more likely to be correct, we find that the Excise Civil Evasion Penalty should be reduced to £1,421 (being 70% of £2,030).

Conclusion

34. As Mr Ghazanafar dishonestly attempted to evade import VAT, Excise and Customs duties, penalties are due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

35. The penalty reduction of 30% has in our view been calculated correctly.

36. We consider that the Excise Civil Evasion Penalty should be reduced to £1,421 to reflect the excise duty amount shown in the seizure notice provided to Mr Ghazanafar at the time of the seizure.

37. The appeal is therefore dismissed and the Customs Civil Evasion penalty of £480 is upheld; the Excise Civil Evasion Penalty is upheld in the reduced amount of £1,421.

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: 30 OCTOBER 2019