



TC07493

Appeal number: TC/2018/05838

EXCISE DUTY – penalties – section 8 Finance Act 1994 and section 25 Finance Act 2003 – importing cigarettes without payment of duty – dishonestly seeking to evade duty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAWN ELAINE GAUNT

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR MOHAMMED FAROOQ**

Sitting in public in Manchester on 22 November 2019

Ms Gaunt appeared in person

Mr Rupert Davies of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

1. On 1 April 2017 the Appellant, Ms Gaunt was stopped at Manchester Airport having arrived on a flight from Tehran via Istanbul. She was found to be carrying a substantial quantity of Bahman cigarettes in her luggage (“the Goods”). The Goods were seized on the basis that Ms Gaunt had exceeded the duty-free allowance of 200 cigarettes imported from a third country, she had entered the green channel indicating that she had no excise goods to declare and duty had not been paid. Ms Gaunt did not challenge the lawfulness of the seizure.

2. Following correspondence, on 30 April 2018 a civil evasion penalty assessment was issued to Ms Gaunt in the sum of £1,132 (“the Penalty”). This comprised £886 for evasion of excise duty and £246 for evasion of customs duty. The Penalty was issued on the basis that Ms Gaunt had engaged in conduct involving dishonesty for the purpose of evading duty.

3. HMRC say that the total amount of duty which would have been payable on the Goods was £3,774. The maximum penalty was 100% of the total duty sought to be evaded but after a reduction of 70% to reflect disclosure and co-operation in HMRC’s enquiries the Penalty was assessed at 30% of the total duty.

4. In this appeal Ms Gaunt challenges the Penalty. Her case is that she was not dishonestly seeking to evade duty. She says that she was unaware that there was any limit on the number of cigarettes she could bring back from Iran for her own personal use.

5. 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 that limit are imported and no duty is paid then the goods can be seized. There is also provision for excise duty and customs duty to be assessed and for a penalty to be assessed.

6. *Section 8 Finance Act 1994* makes provision for HMRC to assess a penalty in relation to evasion of excise duty 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.

(5) Neither of the following matters shall be a matter which the 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 with any other cases, been no or no significant loss of duty.”

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

8. The test for dishonesty is that set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. It is an objective test by reference to the standards of ordinary decent people. The test was described by the Court as follows:

“74 ...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 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 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.”

9. This appeal is made pursuant to *s16 Finance Act 1994* and *s33 Finance Act 2003*. We have full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty to any amount we think proper if we think there are grounds to do so, but not on the grounds of inability to pay.

10. The burden of proof is on HMRC to establish that Ms Gaunt engaged in conduct for the purpose of evading duty and that her conduct involved dishonesty. Otherwise the burden of proof is on Ms Gaunt.

11. We had a witness statement and heard oral evidence from Mr Chris Medhurst who is the HMRC officer who enquired into the circumstances of the importation and who issued the Penalty to Ms Gaunt. Ms Gaunt gave oral evidence, having previously set out her case in correspondence and in her grounds of appeal.

12. The principal issue on the appeal is essentially one of fact. We must make findings as to Ms Gaunt’s knowledge. In particular, whether she was aware that she was required to declare and pay duty on the Goods. In the light of our findings as to Ms Gaunt’s knowledge, we must then consider whether her conduct was dishonest by reference to the standards of ordinary decent people.

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

14. We are satisfied from the evidence before us that Ms Gaunt has been a smoker for approximately 5 years. She smokes one packet of Marlboro cigarettes a day and she was aware that there is tax on cigarettes purchased in this country. We are satisfied that at all material times she was aware that is why cigarettes can be much more expensive in the UK than when purchased abroad.

15. Ms Gaunt is a reasonably frequent traveller. She generally travels abroad once a year, either to see family in Iran or to visit her sister who lives in Spain. Ms Gaunt initially stated in her oral evidence that she had not previously purchased cigarettes abroad. This was consistent with what she had told HMRC in a letter dated 2 March 2018. Later in her evidence she accepted that “maybe” she had bought one sleeve of 200 Marlboro cigarettes back from Spain. She recalled that they had cost €70 per sleeve in Spain which was approximately half the UK retail price. It seems likely to us and we find that Ms Gaunt had previously imported cigarettes into the UK following her trips, at least on trips to Spain. As a traveller to Spain and a moderately heavy smoker it is not credible that she would not have bought cigarettes whilst abroad. That is why Ms Gaunt changed her evidence as to previous purchases.

16. In March 2017 Ms Gaunt was visiting Iran for a family wedding. We were told that whilst there she tried a local brand of cigarettes called Bahman. This was at the suggestion of her sister in law who thought she was smoking too many Marlboro cigarettes. Ms Gaunt said that she found these to be much stronger and that a packet of Bahman cigarettes would last her a week. She therefore bought a substantial quantity of Bahman cigarettes for herself and her 3 sons. The cigarettes were packed into one of Ms Gaunt’s suitcases and they were not concealed in any way.

17. It is not clear how Ms Gaunt would have known whilst she was in Iran that her sons would smoke Bahman cigarettes. It does not seem credible to us that she would bring back so many cigarettes for her sons when there was no guarantee that they would smoke them.

18. There was an issue as to how many cigarettes Ms Gaunt had imported. HMRC say that it was 11,000, but Ms Gaunt says that she thought it was less than that. A seizure information notice given to Ms Gaunt on 1 April 2017 and signed by her shows that it was 11,000 cigarettes that were seized and we find that is the amount Ms Gaunt was importing. Ms Gaunt could not recall how much they had cost to purchase, but suggested that it might have been £100.

19. Ms Gaunt told us that she did not see any signage at Manchester Airport setting out the duty free limits on cigarettes being imported from countries outside the EU and had no reason to check whether there were any restrictions. It may be that Ms Gaunt did not look at the signage, but we do not consider this means she was unaware of the restrictions on bringing cigarettes into the UK without payment of duty.

20. Ms Gaunt’s case is essentially as follows:

(1) She was not aware that excise duty may be payable on cigarettes when entering the UK or that there was any limit on cigarettes that could be imported for personal use without payment of duty.

(2) She had no intention of evading duty and had not acted dishonestly.

21. HMRC contend that we can be satisfied on the evidence that Ms Gaunt was dishonestly intending to evade excise duty and customs duty. Mr Davies placed reliance on the notebook of the border officer who stopped Ms Gaunt at Manchester Airport. The notebook states “[initial questions] asked including [prohibitions and restrictions] and understood”. We were invited to infer from this that the officer asked whether Ms Gaunt understood the restrictions in place on cigarettes and that she confirmed she did. There was no evidence before us from the officer and the brief notebook entry does not establish that Ms Gaunt understood that she could only import 200 cigarettes from countries outside the EU without payment of duty. There is however further evidence which sheds light on Ms Gaunt’s knowledge of the restriction. There is Ms Gaunt’s evidence as to previous purchases, which changed as outlined above. There is also her evidence, which we do not accept for the reasons given above, that some of the cigarettes were for her sons.

22. Over the last 5 years Ms Gaunt has been a moderately heavy smoker and an experienced traveller who has previously purchased cigarettes abroad. In the light of all the evidence we are satisfied that Ms Gaunt would not simply assume she could bring back as many cigarettes as she wanted for personal use without payment of duty. We do not accept her evidence that she was unaware of the existence of limits on the number of cigarettes that could be brought back duty free from a country outside the EU. She may not have known that the limit was 200 cigarettes from countries outside the EU, but we are satisfied that she was aware that there was a limit.

23. In our view a reasonable and honest person importing that quantity of cigarettes would have checked whether they were entitled to import the cigarettes without payment of duty. He or she would do so by consulting signage at the airport or making enquiries before entering the green ‘nothing to declare’ channel. The fact Ms Gaunt was a heavy smoker, a regular traveller and with the knowledge she had about tax on cigarettes and the fact cigarettes were much cheaper in Spain and Iran, we find it is likely that Ms Gaunt did know that there were restrictions on the number of cigarettes she could bring back to the UK without payment of duty.

24. Ms Gaunt complained that it was not until a year after she was stopped at Manchester Airport that HMRC contacted her in relation to the possibility of a penalty. She believed that a warning letter given to her at the time of seizure was the end of the matter. We can understand that Ms Gaunt was upset to be contacted in this way after that period of time. However, we are satisfied that HMRC were in time to assess the Penalty.

25. Ms Gaunt also mentioned in her correspondence with HMRC that she was on medication at the time she was travelling. However, this was not something she relied on as having affected her decision to import the Goods.

26. In the light of all the evidence we are satisfied on the balance of probabilities that prior to entering the green channel Ms Gaunt was aware that there were restrictions on the quantity of cigarettes purchased duty-free in Iran that could be brought into the UK

without payment of duty. We are satisfied that Ms Gaunt was aware that she was required to declare and pay duty on the Goods, and that by going through the green channel she was evading duty on the Goods. That conduct clearly involved dishonesty by reference to the standards of ordinary decent people and HMRC were entitled to assess the Penalty.

27. The penalty is based on the amount of duty sought to be evaded. We have considered the calculation of the excise duty and customs duty on the Goods. The calculation of excise duty is partly by reference to the recommended retail price in the UK of cigarettes of the description of cigarettes being imported (see *section 5 Tobacco Products Duty Act 1979*). Ms Gaunt's evidence, which we accept is that Bahman cigarettes are not sold in shops in the UK. For the reasons given in *Bazrriiz v HM Revenue & Customs* [2016] UKFTT 307 (TC) we are satisfied that HMRC were entitled to take the lowest recommended retail price at which cigarettes of any description are sold in the UK.

28. The total amount of duty payable on the cigarettes calculated on this basis was £3,774, comprising £2,954 excise duty and £820 customs duty. We note that a figure of £2,640.91 was written in manuscript on the seizure information notice, presumably by the border officer who seized the goods. We do not know on what basis the border officer calculated that figure but we are satisfied that the calculation performed by Mr Medhurst when issuing the penalty is accurate.

29. We are satisfied therefore that Ms Gaunt sought to evade duty of £3,774.

30. Ms Gaunt has challenged her liability to the Penalty but not the amount of the Penalty as such. She has to some extent co-operated with HMRC in their enquiries but has continued to maintain that she was not seeking to evade duty. In all the circumstances we consider that the reduction of 70% in the penalty given by HMRC was appropriate. Indeed, on one view it may be considered generous. Ms Gaunt told us that she could not afford to pay the penalty. However, the statutory provisions make clear that we cannot take that fact into account when considering the amount of the penalty.

31. For all the reasons given above we confirm the Penalty and 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 04 DECEMBER 2019