



TC05497

Appeal number: TC/2016/01726

EXCISE DUTY – CUSTOMS DUTY - Joint Customs Civil Evasion Penalty and Excise Civil Evasion Penalty - Importing 12,000 cigarettes without payment of duty - Whether dishonestly seeking to evade duty? - Yes - Whether reduction applied by HMRC to penalty should be altered? - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR BAHA UDDIN AHMED

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR JOHN ADRAIN FCA**

**Sitting in public at Alexandra House, 14-22 The Parsonage, Manchester M3 2JA
on 11th October 2016**

Mr Baha Ahmed appeared in person

**Ms Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor of
HM Revenue & Customs, for the Respondents**

DECISION

Background

- 5 1. Mr Ahmed lives in Oldham. In the summer of 2014 he went on holiday to Bangladesh. On 13 September 2014 he was stopped by a UK Border Force Officer after entering the Green 'Nothing to Declare' channel at Terminal 1 of Manchester Airport having arrived in the UK on a flight from Abu Dhabi.
- 10 2. He was found to be carrying 12,000 King Size Filter 'Benson and Hedges' cigarettes, in 60 sleeves: 'the Goods'.
- 15 3. Travellers arriving in the UK from countries outside the European Union such as Abu Dhabi are relieved from excise duty and VAT only on a personal allowance of up to 200 cigarettes, so long as those are not being imported for a commercial purpose: *Travellers' Allowance Order 1994 SI 1994/995*. Therefore, Mr Ahmed had 60 times the permitted personal allowance for cigarettes.
- 20 4. As the Goods had not been declared and were over the personal allowance, they were seized as liable to forfeiture under section 139 of the *Customs and Excise Management Act 1979* ("CEMA"). The Appellant was issued with two leaflets - Public Notice 1 (*'Travelling to the UK: What you **can** bring in, What you **can't** bring in, What you **must** declare'*) and Public Notice 12A (*'What you can do if things are seized by HM Revenue and Customs'*) - and two forms (both of which he signed): a Seizure Information Notice (Form BOR156) and a Warning Letter about Seized Goods (Form BOR162).
- 25 5. Mr Ahmed did not challenge the lawfulness of the seizure in the Magistrates' Court. The seizure was therefore deemed to be lawful, pursuant to Paragraph 5 Schedule 3 CEMA. As part of that, the cigarettes were deemed to be for commercial use.
- 30 6. On 21 October 2015, HMRC issued a joint customs and excise civil evasion penalty against him in the sum of £3,579.
- 35 7. On 17 or 18 November 2015 (the letter bears both dates) Mr Ahmed wrote to HMRC, for the first time. He denied dishonesty. He stated that he unaware of the legal amount of cigarettes he could bring back, and said that he was *'merely bringing back the cigarettes as pre-ordered gifts for my friends'*.
- 40 8. On 18 December 2015 (but in a letter still bearing the date 21 October 2015) HMRC re-issued the penalty, but in the revised, lesser, sum of £2,863. The customs civil evasion penalty was £620 and the excise civil evasion penalty was £2,243. A reduction of 20% had been applied to take account of Mr Ahmed's letter of 20 November 2015. Half of this (10%) was for 'disclosure', and the remainder for 'co-operation.'
9. On 14 January 2016 Mr Ahmed requested a review. The decision of 18 December 2015 was upheld on 22 February 2016.

This Appeal

10. The main point which Mr Ahmed takes in his Grounds of Appeal, dated 21 March 2016, is that the letter of 21 October 2015 was the first letter which he had received from HMRC. He argues that, had he received earlier letters, he would have responded sooner. He argues that he should still be treated as having provided HMRC with early co-operation, and therefore should secure a more substantial discount.

11. As to the substance of the penalty, Mr Ahmed says that he was not a frequent flyer and *'therefore I am honestly not aware of the amount per person allowed and I was misinformed regarding the amount per person. I would also like to highlight that we were three adult family members travelling together therefore I believe that the amount was a balanced amount'*. He admitted that he had made *'an honest mistake'*. Mr Ahmed expressed his apologies, and he renewed these before the Tribunal for having done what he described to us as *'a silly thing without getting advice'*.

12. His Notice of Appeal was supported by a Statutory Declaration (made pursuant to the *Statutory Declarations Act 1835*) in which Mr Ahmed declared that he did not act dishonestly, he had not received any letters or paperwork from HMRC before 21 October 2015, and he was *'unaware of procedure when entering through a green channel, it was not explained to me at any time during my travel'*. There is no challenge to the way in which the penalties had been calculated.

13. The issues in this appeal are essentially factual ones. They involve Mr Ahmed's knowledge of customs requirements and his state of mind when he returned to the UK, and in particular whether he was dishonest. If he is found liable to a penalty, we must go on to consider whether the letter of 21 October 2015 was indeed the first letter which he had received from HMRC.

14. HMRC bears the burden of showing that Mr Ahmed was dishonest. The standard of proof imposed on HMRC in this regard is the civil standard - that is, the balance of probabilities.

15. HMRC contends that we can conclude on the evidence that Mr Ahmed dishonestly intended to evade excise duty. In support of this, in its Amended Statement of Case, it argues that: (i) the amount of Goods was 60 times in excess of the personal allowance; (ii) there are notices in the airport regarding customs limits, and that Mr Ahmed would have seen them; (iii) when initially stopped, Mr Ahmed confirmed that he was aware of customs allowance for tobacco; and (iv) his denial of the fact that duty was payable on cigarettes is not credible.

The Law

16. Section 8(1) of the *Finance Act 1994* provides that HMRC may impose a penalty for the evasion of excise duty as follows:

"Penalty for evasion of excise duty.

(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.

17. Section 25(1) of the *Finance Act 2003* provides that HMRC may impose a penalty for the evasion of customs duty and VAT as follows:

"Penalty for evasion.

(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. (...)

18. The test for dishonesty in the civil context is primarily objective. We must scrutinise Mr Ahmed's behaviour, and ask whether it was dishonest according to normally accepted standards of behaviour.

19. We had witness statements from Officer McAssey (an immigration and customs official) and Officer Dodd (a post-detection audit officer). Both officers attended and gave oral evidence.

20. We heard oral evidence from Mr Ahmed and took account of his Grounds of Appeal, Statutory Declaration, and letters in the bundle.

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

Whether Mr Ahmed was dishonest?

22. We reject Mr Ahmed's case and his evidence that he 'did not recall' and was 'unaware' of any signs. It is simply not credible. At the time, there were prominent signs at Manchester Airport, in the baggage hall, and on the carousels, and before the green channel, informing passengers of their personal allowances. We find that he was aware of the signs.

23. We reject Mr Ahmed's evidence that he was 'unaware of any green or red channel'. We find that he was so aware. There are three channels at Terminal 1. There is a blue channel for arrivals from the EU. There is a green channel for non-EU arrivals, which is clearly and prominently marked as 'nothing to declare'. There was
5 also a red point, with a red telephone, for passengers who wish to make a customs declaration or an inquiry. Mr Ahmed did not use the red phone.

24. Mr Ahmed was born in 1979. He told us that he had been to Bangladesh twice in the last 20 years - that is, since 1996. Mr Ahmed was 17 in 1996. Hence, and even if not in strict terms a 'frequent' traveller, he has nonetheless travelled internationally,
10 and to the UK from outside the EU, before, at least once, as an adult, when customs limits were in force, and there existed red and green channels at airports. This simply reinforces the inherent implausibility of his alleged ignorance, which we reject.

25. We note that, in the course of his cross-examination of Officer McAssey, Mr Ahmed suggested, for the first time, that he 'did not recall' being stopped in the green
15 channel. If this was an attempt to raise doubt as to where he was apprehended and questioned, then we reject it as a belated and opportunistic attempt to mislead the Tribunal. Moreover, it is inconsistent with his own earlier account, including in his letter of 14 January 2016. We find that Mr Ahmed was stopped in the green channel.

26. He had 4 bags with him, on a trolley, all of which contained cigarettes, in sealed
20 packets in sleeves of 200. In total, there were several cubic feet of cigarettes.

27. Mr Ahmed challenged whether he had been asked certain questions since there was an apparent inconsistency given that these questions were set out, in full, in the Officer's witness statement, but were not set out in full in her notebook. We find that Officer McAssey asked the usual questions in relation to 'Prohibitions' (things you are
25 not allowed to bring into the country at all) and 'Restrictions' (things you can bring into the country, but only in limited amounts) including questions as to whether Mr Ahmed was aware of the customs limits. In her notebook, she simply noted these using the abbreviation 'P & R'. We accept Officer McAssey's evidence that she could say conclusively that she had asked those questions. We accept her evidence that, as
30 she put it, she knows them 'as a mantra' and asks them of every passenger stopped. She was able to recite them, from memory, to us.

28. We are also satisfied that Mr Ahmed told the officer that all the bags were his. We reject Mr Ahmed's suggestion that he told the officer that some of the cigarettes were for other travellers in his party - namely, his mother and his wife. Indeed, on his
35 own account in his November 2015 letter, and as elaborated before us, it was simply never the case that any of the cigarettes were for his mother and his wife. His case in this particular regard is therefore hopelessly inconsistent, and we find it to be untrue.

29. We are satisfied that Officer McAssey asked Mr Ahmed whether anybody had asked him to bring anything into the country for them. We are satisfied that Mr
40 Ahmed said 'No'. That answer is inconsistent with Mr Ahmed's position as set out in his letter that the cigarettes were 'pre-ordered gifts' for 'friends'.

30. We are satisfied that Officer McAssey asked Mr Ahmed whether he was aware of customs limits, and he confirmed that he was.

31. We are not satisfied that Mr Ahmed is telling the truth about who paid for the cigarettes, and his intended use of them. Mr Ahmed's evidence on this point was
5 entirely unsatisfactory:

(1) His first account, at the airport, was that he was not carrying anything for anyone else;

(2) It was not until November 2015 - a year after the seizure - that he asserted, for the first time, that the cigarettes were 'pre-ordered gifts' for 'friends',
10 although he did not name any of these 'friends' or give any further details;

(3) Before us, and when pressed (fairly) by Ms Vicary in cross-examination, he said that the cigarettes had been purchased by his brother-in-law's brother in Bangladesh, a Milon Chowdhury. We reject his explanation as to why this had not been mentioned sooner, which was that he did not think it was 'relevant'. It was plainly relevant in circumstances where Mr Ahmed had said at the airport
15 that the cigarettes were his, and then had said they had been bought for others.

32. We are extremely sceptical as to the truth of Mr Ahmed's account. Mr Ahmed was not able to advance any explanation (let alone any plausible explanation) as to why his relative Mr Chowdhury in Bangladesh would be making gifts of thousands of
20 cigarettes, bought with Mr Chowdhury's own money, to Mr Ahmed's 'friends' in England, especially when, on Mr Ahmed's account, he had never met Mr Chowdhury until his latest trip to Bangladesh. Mr Ahmed subsequently added that he had given Mr Chowdhury 10,000 Bangladeshi Taka (about £100) but still could not tell us what the overall purchase price had been.

25 33. Mr Ahmed then changed his account, and said that the cigarettes were bought for him personally. But if, as he told us, he smokes 10-12 a day, then he was bringing back almost 3 years' supply. We reject this explanation.

34. He then said, for the first time, that some of the cigarettes were for his 'family', and that '4 or 5 relatives would get a few sleeves'. But that does not make sense either.
30 He had 60 sleeves with him which, on any view, is more than 5 times 'a few'. His answer to that was that he 'could have got the maths wrong' and that he did not know how many cigarettes were in a sleeve. That changed shortly afterwards when he named one of these relatives, Mr Wali Khan, who had wanted '2000 cigarettes - 10 sleeves'. Put under pressure, he named four friends for whom cigarettes had allegedly
35 been bought, but was not able to tell us who had wanted how many. All this was information which had never previously been put forward.

35. The manifest inconsistencies in Mr Ahmed's account, the way in which it has changed over the course of time, and the way in which, even in its final version, it makes little sense, lead us to the firm view that he was not telling the truth to HMRC
40 and he was not telling the truth to us either. We refuse to accept his evidence as to the circumstances in which the cigarettes were both bought and imported. We find that his evidence was evasive and dishonest.

36. In the light of our findings of fact, we are satisfied that the act undertaken (entering the green channel with an amount of cigarettes well above the personal allowance) was objectively dishonest by the standards of any ordinary, reasonable person. In our view, the ordinary, reasonable, honest person, if importing such a large amount of cigarettes, would have checked the position from an authoritative source: if not before travelling, then, at the latest, before entering the green channel.

37. In the light of our findings of fact, we are also satisfied that Mr Ahmed did what he did dishonestly, in the subjective sense that he himself knew it was wrong according to those standards.

38. We therefore conclude that because Mr Ahmed acted dishonestly and deliberately took action to evade duty and tax, HMRC was entitled under s 8(1) of the *Finance Act 1994* and s 25(1) of the *Finance Act 2003* to issue the Appellant with penalties.

Whether Mr Ahmed received post before 21 October 2015

39. Mr Ahmed's subsidiary argument was that, even if the penalty had been lawfully imposed, he should nonetheless have been given a greater discount than 20%. His case on this was that he had not received any correspondence from HMRC until 21 October 2015.

40. The burden in relation to this issue lies on Mr Ahmed to establish, on the balance of probabilities, that post had not reached him; and not on HMRC to establish that post had reached him.

41. Mr Ahmed's evidence before us as to his true residential address at the time of the seizure was not straightforward and was somewhat confusing. At the airport, he gave one address - 269 Middleton Road. He told us that this was in fact his mother's house, but he sometimes stayed there. At the time, Mr Ahmed owned another house of his own, 9 Cedar Crescent. 9 Cedar Crescent was a residential property which Mr Ahmed used as his business address, in connection with his online electronic sales business, and where he also lived with his wife and children. It is the address which his accountants used for his profit and loss account for the year ended 5 April 2015 - that is, the period during which the seizure was made.

42. It was far from clear to us, even having heard Mr Ahmed give evidence on the point, as to why he had given the officer his mother's address and not 9 Cedar Crescent.

43. However, we are satisfied that *correctly-addressed* post sent to either 9 Cedar Crescent or 269 Middleton Road would reach him promptly. Mr Ahmed admitted that he was picking up post at both addresses.

44. HMRC came to send post to 9 Cedar Crescent, although this was not the address which Mr Ahmed gave at the airport, since Officer Dodd had located 9 Cedar Crescent as an alternative address for Mr Ahmed from HMRC's own internal systems.

45. We find that HMRC sent two letters - on 3 September 2015 and 17 September 2015 - and that each letter had been sent to both addresses.

46. None of the letters had been returned as undelivered to HMRC.

47. However, HMRC had made a mistake with the postcode of 269 Middleton Road. The postcode which HMRC used was not the postcode given by Mr Ahmed at the airport. HMRC had mistakenly carried across the postcode for 9 Cedar Close to 269 Middleton Road.

48. But, even taking this factor into account, we are satisfied that the letter dated 3 September 2015 to 9 Cedar Close was correctly addressed (it is in the bundle, at page 321) and that it was received by Mr Ahmed at the time.

49. That letter enclosed Public Notice 300, which states that a reduction in penalty (of up to 40%) may be given for 'an early and truthful admission' and a further reduction in penalty (of up to a further 40%) for 'co-operation', being attendance at interviews, the prompt provision of information, answering all the questions truthfully, giving relevant information to establish true liability, and co-operation until the end of the investigation.

50. Even though he received that letter, and Public Notice 300, and even though he had been given detailed guidance as to how to secure a reduction in any penalty (no penalty at all having been imposed at that point, and HMRC stating that it had not yet decided whether there had been dishonest conduct) Mr Ahmed did not respond to it in any way.

51. We are also satisfied that the next letter, dated 17 September 2015, to 9 Cedar Close was correctly addressed (it is in the bundle, at page 327) and that it was received by Mr Ahmed at the time. That letter was a chasing letter, and requested a response by 4 October 2015. Mr Ahmed did not respond to it in any way. That letter gave fair warning as to what could happen if Mr Ahmed did not co-operate: if HMRC did not hear from Mr Ahmed by 4 October 2015, it would take it that his intention was not to help HMRC in its check; a decision would be made regarding a penalty; and the penalty could be up to £3,579.

52. The letter of 21 October 2015 imposed the penalty. Even then, it was almost a whole month before Mr Ahmed responded.

53. His letter denied dishonesty, stated ignorance of the legal limits, and said that he was *'merely bringing back the cigarettes as pre ordered gifts for my friends'*. That letter does not set out any further detail. It does not identify the 'friends'. It does not set out the process by which the cigarettes had come to be 'pre-ordered'. It does not say what is meant by 'gifts' (since gifts are normally things given for free, and not paid for by the recipient).

54. In short, that letter did not really engage with the questions which had been asked by HMRC, and which, as we have already found, Mr Ahmed had received and ignored.

55. He offered to provide statements from the 'friends' referred to, and said that he was happy to provide their details, but he did not provide any details (until under the pressure of cross-examination at the hearing) and he never provided any statements.

56. His letter, looked at closely, raises more questions than it answers.

5 57. The reduction of 20% applied simply on account of this single letter, received only after the penalty had been imposed, and obviously in response to it, when two earlier letters, in succession, correctly addressed, had gone unacknowledged and unanswered, arguably answers to Ms Vicary's characterisation of 'generous in the extreme'.

10 58. Whilst we have jurisdiction to cancel the whole or any part of reduction already applied by HMRC, we were not formally asked to do so and we decline to do so. Moreover, we see absolutely no reason why we should increase the reduction, as Mr Ahmed requests. Letters were sent to Mr Ahmed, giving fair warning, and they were ignored. It was only the issue of the penalty which eventually prompted a response,
15 but even this was sluggish and uninformative.

59. We note that Mr Ahmed was relieved from liability for paying the penalties pending the hearing of his appeal on the basis of hardship. But hardship is not a valid ground of appeal, and, when deciding the appeal, we are not allowed to take into account any insufficiency of funds available to pay: *Finance Act 1994* s 8(5)(a) and
20 *Finance Act 2003* s 29(2) and (3)(a).

Decision

60. We therefore dismiss the Appeal.

61. This document contains full findings of fact and reasons for the decision. Any
25 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)"
30 which accompanies and forms part of this decision notice.

**Dr CHRISTOPHER McNALL
TRIBUNAL JUDGE**

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RELEASE DATE: 17 NOVEMBER 2016