



TC06917

Appeal number: TC/2017/04745

CUSTOMS DUTY – EXCISE DUTY - Civil Evasion Penalties - Seizure of 8,600 cigarettes and 4kg of shisha tobacco at Manchester Airport - Appellant initially apprehended outside airport buildings - Remarks on adversarial jurisdiction - Whether appellant's conduct dishonest? - Yes - Whether discounts already applied by HMRC to penalties should be adjusted? - No - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MRS SHARIFA GULAM IBRAHIM

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MRS MARY AINSWORTH**

**Sitting in public at Tribunals Service, Alexandra House, 14-22 The Parsonage,
Manchester on 13 December 2018**

The Appellant did not appear and was not represented

**Miss Heather Aspinall, Counsel, instructed by the General Counsel and Solicitor
to HM Revenue and Customs, for the Respondents**

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DECISION

1. This is our decision in relation to Mrs Ibrahim's appeal against:
 - (1) A customs civil evasion penalty in the sum of £250, imposed under section 25(1) of the *Finance Act 2003*; and
 - (2) An excise civil evasion penalty in the sum of £976, imposed under section 8(1) of the *Finance Act 1994*.
2. Together, these penalties amount to £1,226.
3. The penalty sum was originally £2,146 (24 February 2017) but was adjusted to £1,226 to take account of the Appellant's disclosure and co-operation. The penalties were upheld by internal departmental review on 25 May 2017.
4. At the hearing, there was no appearance by or on behalf of the Appellant. The Appellant had used an online Notice of Appeal, and had not provided a mobile phone number at which she could be contacted. So, it was not possible for the Tribunal to check with her, on the day, by phone, whether she intended to come to the hearing.
5. However, on 7 June 2018, one Adam Ibrahim had emailed the Tribunal in relation to this appeal and said, amongst other things: "*I therefore wish to request if someone could please look at this case again, taking into account that we were told no action would be taken, and to offer [to] reduce the penalty. I would like to withdraw the tribunal, as I have never attended a tribunal before and do not feel confident in attending.*"
6. That email was not copied by Mr Ibrahim to HMRC.
7. The Tribunal responded to it on 18 July 2018, saying, amongst other things: "*The Tribunal will now proceed to list the appeal. Should you still wish to withdraw the appeal then please email us further and we will of course action the withdrawal*".
8. On 18 July 2018, the Tribunal sent Mr Ibrahim's emails of 7 June 2018 and its response to HMRC, at its clearing house email address.
9. Nothing further was heard from the Appellant.
10. Unfortunately, HMRC did not appear to be aware of the above exchange of emails. It continued to prepare for the hearing as if it were to be fully contested, including a 21 page Skeleton Argument, and a 320 page hearing bundle.
11. It seems to us that the Tribunal was right to treat Mr Ibrahim's email of 7 June 2018 in the way that it did. The Tribunal's clerk carefully explained the consequences of withdrawing an appeal, and recognised that, although the word 'withdraw' was used, this was equivocal because the email also asked the Tribunal 'to look at the matter'. Had the appeal been withdrawn, then there would not have been anything for the Tribunal to look at.

12. On that footing, we were satisfied that the appeal had not been withdrawn and therefore remained effective.

13. Rule 33 of the Tribunal's Rules allows us to proceed with a hearing in the absence of an appellant if we are satisfied that they have been given notice of the hearing, and it is in the interests of justice to proceed.

14. We were satisfied that the Appellant had been given proper notice of the hearing. That notice was contained in a letter dated 27 September 2018 and emailed to the Appellant at the email address which she had given on her Notice of Appeal. The hearing was listed at 10am, and we waited until about 10.40am before beginning, to make sure that the Appellant was not simply running late in getting into the centre of Manchester, through the traffic, from Bolton.

15. We were also satisfied it was in the interests of justice to proceed. The alternative would have been to adjourn. That was not an attractive option in circumstances where the appeal was already 18 months old, the Appellant's intentions in regard to actively pursuing her appeal were unclear, and HMRC had attended the hearing, together with two witnesses. There was nothing to suggest that the Appellant would attend any adjourned hearing. An adjournment would not have served any useful purpose.

The Facts

16. We find the following facts:

- (1) On 3 February 2016, Mrs Ibrahim flew to Manchester T1 from Dubai with her son, Adam Gulam Ibrahim;
- (2) Mr Ibrahim was intercepted in the green channel by UKBF Officer Phil Robinson;
- (3) Mr Ibrahim said that he was travelling with the Appellant, who had already gone through;
- (4) He confirmed that the bags were his and he was aware of the contents;
- (5) He confirmed he was aware of his customs allowances, and volunteered the information that the allowance was 200 cigarettes;
- (6) He produced 200 cigarettes from a duty-free bag;
- (7) His other bags contained 4,200 'Speed Blue' king-size filter cigarettes and 4kg of shisha tobacco.

17. At this point, UKBF Officers Bushnell and Whatham left the customs channels and the terminal building to locate the Appellant. 15 minutes later they returned with the Appellant:

- (1) She had two suitcases with her;
- (2) Her cases contained 4,400 'Speed Blue' king-size filter cigarettes;

(3) She claimed responsibility for all the cigarettes and tobacco - i.e., she claimed responsibility not only for the cigarettes in her own luggage, but also for the cigarettes and tobacco in her son's luggage. She was able to plausibly do this because Officer Robinson had not asked her son whether the contents of his bags belonged to him.

18. The cigarettes and tobacco were seized. The Appellant was issued with a Seizure Information Notice (Form BOR156), a Warning Letter about Seized Goods (Form BOR162), a Notice 1, and a Notice 12A. She signed the BOR 156 and left the airport.

19. On 25 January 2017 - i.e., just under a year later - HMRC wrote to the Appellant in relation to customs duty and excise duty, informing her that it was enquiring into whether she was involved in smuggling or attempted smuggling of tobacco into the United Kingdom.

20. Ms Ibrahim responded on 6 February 2017. She said that she did not know what the limit was, and had bought the cigarettes for her sons.

21. The penalties were originally imposed under cover of a letter dated 27 February 2017.

22. Ms Ibrahim wrote again on 3 March 2017 saying she could not afford to pay, was told at the airport that no action would be taken 'but that I may be contacted by HMRC', she had purchased the tobacco goods for her son, who is a heavy smoker, she had no intention of not declaring the tobacco goods, but simply was not aware that she had to declare the cigarettes.

23. On 24 March 2017, HMRC revised the penalties, applying greater discounts, so as to bring them to £1,226.

24. Ms Ibrahim's case, in summary, is as follows.

- (1) Only VAT should be chargeable.
- (2) The duty rates are exaggerated and inflated.
- (3) An assurance was given at the airport that there would be no further action.
- (4) This was a genuine mistake.
- (5) She is in poor health.
- (6) The penalty is unjust, and she cannot afford to pay it.

Discussion

25. The first matter which caused us concern was the location of Ms Ibrahim's apprehension. Unlike her son, she was not in the green channel, nor even in the airport buildings, but was somewhere outside the buildings in the airport car park. Officers Bushnell and Whatham went and found her and brought her back to the airport building. As far as we are aware - there being no evidence from either of those officers - she returned to the airport buildings willingly. Given the circumstances and location, we were bound to ask whether this apprehension was lawful. Although the point had not been raised by the Appellant, we nonetheless considered it proper to have some regard to it. Unfortunately, neither Counsel nor any of the witnesses were able to take us to the source of the power whereby an Officer of UKBF is entitled to stop someone in the airport car park and to conduct them back into the airport buildings. The officer who gave evidence about the seizure - Officer Phil Robinson - was not the person who had gone outside to find Mrs Ibrahim.

26. Even recognising that our jurisdiction is adversarial, we nonetheless consider that the circumstances were so self-evidently unusual that it was not unreasonable to have anticipated that a Tribunal would ask. But, in the absence of any adversarial argument, or focussed submissions, we have proceeded on the footing that the stop was lawful, and that nothing about the stop had any effect on the lawfulness of the subsequent interview or seizure.

27. A further point raised concerned the applicable duty rates. We ourselves had some initial difficulty in fully understanding the excise duty and customs duty calculation which had been done. However, having heard evidence from Officer Brent Hands, an officer in the Customs and International Trade and Excise team, we are satisfied that the calculations appearing at pages 107 and 108 of the hearing bundle are correct.

28. The Appellant's argument that only VAT should be charged is wrong as a matter of law. It is not developed by the Appellant, but seems to flow from a simple mis-reading of the customs and excise duty calculations.

29. We are not satisfied that Mrs Ibrahim was told at the airport that she would not receive any penalties. We accept Officer Robinson's evidence that he did not say such a thing. Moreover, the Appellant was given, at the time, a Warning Letter about Seized Goods (Form BOR 162) which she signed, which includes, as part of a prominent 'Warning' that the seizure *'is without prejudice to any further action that may be taken against you in connection with this matter. This may include ... Border Force sharing information with: HM Revenue and Customs who may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty'*. That is what has happened here.

30. The delay of almost a year between the events at Manchester Airport and the notification of civil and excise penalties was perhaps unfortunate since it was capable of giving rise to an impression that nothing further would happen, when in reality the matter had not been closed.

31. A penalty for the evasion of excise duty under section 8 of the *Finance Act 1994* can only be imposed where a person engages in any conduct for the purpose of evading any duty of excise, and that conduct involves dishonesty (whether or not such as to give rise to any criminal liability).

32. A penalty for the evasion of customs duty under section 25 of the *Finance Act 2003* can only be imposed where a person engages in any conduct for the purpose of evading any relevant tax or duty, and that conduct involves dishonesty (whether or not such as to give rise to any criminal liability).

33. We are satisfied that the Appellant engaged in conduct within the proper meaning and effect of each penalty statute.

34. We are satisfied that the Appellant passed through the Green Channel. Officer Robinson saw her pass through before he stopped her son. There is no red channel in the arrivals hall at T1, but there is a red phone, which anyone with a customs question or matter to declare can use. We are satisfied that the Appellant did not use the red phone.

35. The relevant test for dishonesty was explained by Lord Hoffmann in *Barlow Clowes International Ltd* [2005] UKPC 37 [2006] 1 WLR 1476 at 1479-80, and approved in October 2017 by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67 at Paragraph 62:

"Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards."

36. HMRC bears the legal and evidential burden of proving that Ms Ibrahim was dishonest within this definition.

37. We are satisfied that HMRC has succeeded in proving that Ms Ibrahim was dishonest:

(1) She was a regular international traveller, having fairly recently travelled to the United Kingdom from countries outside the European Union including India, Pakistan, and Saudi Arabia. To be clear - there is no suggestion that those previous trips involved smuggling. But the submission is that, as a fairly frequent international traveller, she must have known that there are customs limits in operation at the United Kingdom border, and that those customs limits applied - amongst other things - to cigarettes and tobacco;

(2) Customs limits are displayed at various places in the arrivals hall and baggage reclaim at Manchester Airport, and indeed at other United Kingdom airports which handle international flights. Mrs Ibrahim would have seen these on this occasion, and on the previous occasions when she had travelled;

(3) Even if Mrs Ibrahim was unaware of the exact customs limit for cigarettes and tobacco, she would have nonetheless been aware that the limit was

significantly less than 8,600 and 4kg, and therefore would have been aware that she was carrying significantly more cigarettes and tobacco than the limits provided;

(4) She did not use the red phone;

(5) She went through the green channel without declaring any cigarettes or tobacco products at all. An ordinary honest person, with the above knowledge, would not have done this.

The penalties

38. The final matter which we consider is the reduction applied to the penalties. HMRC had applied substantial discounts, although not the maximum. We see no reason to increase or decrease those discounts.

39. Ability to pay is not a relevant factor when it comes to the amount of the penalty, nor is ill health. These are matters which can only be addressed by HMRC through the exercise of its 'Care and Management Powers'.

Outcome of the Appeal

40. Therefore, and for the above reasons, the appeal is dismissed.

41. This document contains full findings of fact and reasons for the decision.

42. Any application to set this decision aside under Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 must be made in writing to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

43. 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.

**DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE**

RELEASE DATE: 03 JANUARY 2019