



TC05109

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Appeal number: TC/2015/01770

***CUSTOMS AND EXCISE DUTIES – evasion –penalties-import of
cigarettes-whether conduct dishonest***

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

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SUNDAR ALI

Appellant

- and -

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

**TRIBUNAL: JUDGE MARILYN MCKEEVER
 MS JANE SHILLAKER**

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Sitting in public at Northampton on 11 April 2016

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The Appellant in person

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**Mr B Lloyd instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

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1. *Background*

2. This case concerns an appeal against HMRC's imposition of a customs civil evasion penalty of £564 and an excise civil evasion penalty of £2,308, a total of
10 £2,872. The penalties were assessed after the Appellant had entered the UK on two occasions in 2014 with cigarettes far in excess of the permitted duty free allowance.

3. The penalty was originally assessed, on 10 December 2014 at a total of £2,920. Following an internal review, it was realised that the duties had been incorrectly calculated and the correct penalties, set out in paragraph 1 were assessed on 6 May
15 2015.

4. Mr Ali appeals against both the imposition of the penalties and their amount.

5. Mr Ali spoke at the hearing via a Bengali interpreter and he was also accompanied by his daughter (who spoke good English and had corresponded with HMRC on his behalf). Although Mr Ali was clearly more comfortable communicating
20 through an interpreter, we were satisfied that Mr Ali had a reasonable command of English and could understand and respond to questions in English.

6. *The Law*

7. Section 8 Finance Act 1994 makes provision for HMRC to assess a penalty in relation to the evasion of excise duty as follows:

25 “(1) Subject to the following provisions of this section, 5 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),
30 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
35 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
40 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.”

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8. The provisions relating to the penalties for the evasion of customs duty are contained in section 25(1) Finance Act 2003 and they are materially the same.

9. Accordingly, a penalty may be assessed where:

- A person engages in conduct *for the purpose of* avoiding a duty; and
- That conduct involves dishonesty.

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10. Section 16(6) Finance Act 1994 provides that the burden of proof is on HMRC to establish that the Appellant has engaged in conduct for the purpose of evading duty and that his conduct involved dishonesty. Otherwise the burden of proof is on the Appellant.

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11. The penalties are, in the first instance calculated by reference to the duty evaded, but HMRC can reduce the penalties. In practice HMRC reduce a penalty by up to 40% for “disclosure” where they are told promptly about what was wrong and why and by up to 40% for “co-operation” which includes meeting HMRC when asked to do so, giving HMRC information, answering questions truthfully and honestly and providing the relevant facts. The penalties charged in this case included a reduction of 25% for disclosure and 30% for co-operation.

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12. *The evidence and the facts found on the basis of the evidence*

13. The Tribunal had before it a bundle of documents and correspondence and we also heard evidence from Mr Ali and from officers of the Border Force. Among the documents were copies of the notebooks in which the Border Force officers recorded their contemporaneous accounts of events when they stopped the Appellant as he was going through customs.

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14. On 4 March 2014, the Appellant arrived at Heathrow airport on a flight from Bangladesh via Doha. He was stopped by Mrs Rosalind Animashaun, an officer of the Border Force. Mrs Animashaun gave the following account of what happened.

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15. Upon being stopped, the Appellant confirmed that he had travelled from Bangladesh and that he was travelling with his wife. Mrs Animashaun asked the Appellant if he had anything to declare and he said he did not. She then asked him whether he had any cigarettes, alcohol or food items and again, the Appellant said he did not. The Appellant’s luggage included three large suitcases and two large cardboard boxes. Upon the officer saying she was going to x-ray the luggage to make sure they contained no revenue goods, the Appellant stated that he had some cigarettes, which were for his own use. On being asked how many cigarettes he had,

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he replied only “I am a smoker”. The officer informed Mr Ali that his allowance from outside the EU was 200 cigarettes.

16. The luggage was then searched. The cardboard boxes were found to contain 20,000 Derby brand cigarettes, wrapped in black nylon and taped. A further 600 Benson & Hedges cigarettes were found in one of the suitcases. The officer informed Mr Ali that he had exceeded his allowance. The Appellant then said that some of the cigarettes were for his son but that none of them belonged to his wife.

17. The cigarettes were seized. The seizure has not been challenged.

18. Mrs Animashaun gave Mr Ali Form BOR156 (which gives information about the goods seized) and Form BOR162 (which warns about further action which may be taken). She also warned Mr Ali that HMRC might charge a penalty. In addition, the Appellant was given Notice 12A (which sets out the courses of action which a person can take where Border Force has seized goods from them) and Notice 1 (which sets out what can and cannot be brought to the UK and clearly states the duty free allowances for goods including cigarettes).

19. There are signs in the baggage hall at Heathrow which state the duty free allowances for goods from outside the EU. There are signs in the centre of the baggage reclaim belt and further signs are located before the entrance to the “red and green channels”.

20. Mrs Animashaun confirmed that Mr Ali spoke reasonable English and that he understood what she had said to him and responded appropriately. She had recorded in her notebook that Mr Ali’s wife “did not speak any English and only nodded to some questions”. There was no note in relation to Mr Ali’s ability to speak English.

21. Mr Ali, in his evidence, challenged the officer’s statements. He asserted that when he was asked if he had any cigarettes, alcohol, or food he replied that he had cigarettes. He maintained that he said this at the outset, before the officer said she was going to x-ray the luggage.

22. He further said that he was unaware of his allowances and that the officer did not tell him of his cigarette allowance.

23. He also said that he was sure he did not mention that any cigarettes were for his son as his son did not smoke. His wife smoked and, at the hearing, he said one of the large boxes was for her

24. Mrs Animashaun was recalled. She was quite clear that the account she had given, as recorded in her notebook, was correct. In particular, she confirmed that Mr Ali had initially denied having any cigarettes, that she had informed him of his duty free allowance and that he had said that the cigarettes were for him and his son and specifically denied that any were for his wife.

25. Four months later, on 15 July 2014, Mr Ali was again intercepted in the green channel at Heathrow airport having arrived on a flight from Dhaka via Doha. Border

Force officer Mrs Nicole Trickett-Bell, who stopped Mr Ali on this occasion, gave the following account of events.

26. Mr Ali stated that he had two cartons of cigarettes in his Duty Free Bag and that he was unaware of his duty free allowance. Mrs Trickett-Bell explained that he could
5 bring 200 cigarettes into the country as a personal allowance. Mr Ali said the cigarettes were for himself and his friends who expected him to bring cigarettes as gifts.

27. Upon being asked by the officer, Mr Ali said that he had not had any cigarettes taken from him by Customs before.

10 28. Mr Ali subsequently admitted he had ten cartons of cigarettes.

29. The officer searched his baggage and discovered 400 Gold Leaf cigarettes in a duty free bag 140 loose Derby cigarettes in his hand luggage and 2,000 Derby cigarettes wrapped in black plastic in his suitcase. Mr Ali contended that they were wrapped in plastic "because of the rain".

15 30. The 2,540 cigarettes were seized and Mr Ali issued with Forms BOR156 and BOR162 together with Notice 12A (Notice 1 being unavailable). Again, Mr Ali did not challenge the seizure.

31. Mrs Trickett-Bell confirmed that she had no concerns about Mr Ali's understanding of English. He could, and did, hold a conversation as set out in her
20 notebook and recounted in her evidence. Had she had any such concerns, she would have asked a colleague who spoke the appropriate language to assist, or if no-one was available, she would have obtained an interpreter on the telephone or via a computer database.

32. In his evidence, Mr Ali denied that he had said he had two cartons of cigarettes.
25 He said that he had a "big box". He was not sure how many he had exactly. He also said that when he was stopped in March, the customs officer had not told him of his allowances, so that he was still unaware of his allowances in July. He accepted that it was his mistake and he should have known. He agreed that he had been told what his allowances were on the second occasion.

30 33. He also disputed the officer's statement that she had asked him if Customs had taken cigarettes from him before (to which he had answered "no"). He asserted that it had been written down wrongly. The officer had, in fact asked him if he had ever brought cigarettes to the UK before to which he had answered "yes".

34. Mrs Trickett-Bell was recalled in the light of Mr Ali's challenge to her evidence
35 and she confirmed her original statements. In particular, Mr Ali had said that he had two cartons of cigarettes (400 in total) and that she had then asked if he had had any cigarettes taken by customs before. She indicated that this was a standard question where a passenger has brought more than their allowance as it goes to whether they were aware of the allowance. It was only after this that Mr Ali admitted to having ten
40 cartons.

35. We have set out Mr Ali's specific challenges to the Border Force officers' evidence above. Mr Ali gave further evidence at the hearing and also made a number of statements in correspondence before the hearing, which we now consider.

5 36. Mr Ali informed us that he had lived in the UK since the age of 15. He goes to Bangladesh every year . He was a very heavy smoker and he normally brought back to the UK a whole year's supply of cigarettes.

10 37. In his letter to HMRC of 23 October (written by his daughter on his behalf), it was stated "...usually he purchases a couple of cartons of tobacco whenever he goes abroad because it's cheaper. This time he purchased approximately 11 cartons and didn't realise it was not permitted. He said the tobacco was for himself to smoke...". This seems to be referring to the second stop. In his letter to HMRC of 17 November 2014 Mr Ali stated that he has always smoked Bangladeshi brand tobacco and he usually brought some back to the UK to smoke himself. He said "I usually bring sufficient to last me whilst here which can only be a couple of cartons-however-
15 during the time of the tobacco conversation I wasn't planning any travelling for a little while. This is the reason I had many more cartons than normal". This letter (and others) were also written by Mr Ali's daughter on his behalf, but Mr Ali confirmed that he had signed them. They are inconsistent with Mr Ali's statement at the hearing that he had brought more cigarettes than normal on this occasion (it was not clear
20 whether this was March or July 2014) because prices had gone up in the UK.

38. Mr Ali said at the hearing and in his 17 November 2014 letter that he brings back to the UK enough cigarettes to last him between visits to Bangladesh and that he is a heavy smoker. Yet in both the above letters, he said that this amounts to a "couple of cartons". These statements are clearly inconsistent.

25 39. Mr Ali submitted that he had always been an honest, law abiding citizen and that he was unaware that what he had done was wrong or that he was breaking the law. He was unaware that there were any limits and thought he was allowed to bring in the quantities of cigarettes which he had. He apologised for his wrongdoing and asserted that this would not happen again.

30 40. Mr Ali confirmed that he had entered the green channel on each occasion. He also confirmed that he was aware that there was a red channel and that he knew he should use the red channel if he had something to declare to Customs. He said that went into the green channel because he had nothing to declare.

35 41. On the first occasion he was stopped, Mr Ali initially said that the cigarettes were for him. As noted above, Mrs Animashaun's evidence is that he then said that some of the cigarettes were for his son. At the hearing he asserted that his son did not smoke and that some were for his wife. He denied he ever mentioned his son.

40 42. In Mr Ali's letter of 14 May 2015 he expressly states that the cigarettes were solely for his own use. He also asserts he was unaware of the actual number of cigarettes he had.

43. Mr Ali further denied that he had been told of his allowances in March and asserted he was unaware of his allowances when he entered the green channel in July.

44. We found Mrs Animashaun's and Mrs Trickett-Bell's evidence to be clear and straightforward and we consider that they are truthful witnesses. For the reasons mentioned below, we accept their accounts of events at Heathrow on 4 March and 15 July 2014 respectively.

45. There were a number of inconsistencies in Mr Ali's evidence. He gave different accounts of certain matters at the airport, at the hearing and in his correspondence with HMRC. At different times he said the cigarettes were for his own use, that they were for him and his son and that they were for him and his wife.

46. He said that he visited Bangladesh every year and brought back cigarettes to last him until his next trip. However, although he said he was a heavy smoker, he asserted in correspondence this amounted to "a couple of cartons". He gave different reasons for bringing back more than usual. In correspondence he said it was because he was not intending to travel again for a while. At the hearing, he said it was because the price in the UK had gone up.

47. The Appellant challenged the evidence of both officers, which was based on their contemporaneous notes recorded in their notebooks. Mr Ali did not produce any contemporaneous evidence to support his version of events. Whilst it is perfectly possible for an officer to make an error in recording a conversation, we do not find it credible that two different officers, on two different occasions, should each have made multiple errors in their notes. We therefore prefer the officers' accounts. We accept that on the first stop in March, the Appellant denied that he had any cigarettes until the officer began to put his luggage in the x-ray machine and that he had on that occasion been informed that the duty free allowance was 200 cigarettes. We find that the Appellant was asked, in July, whether he had had cigarettes taken before and that he untruthfully replied that he had not.

48. The Appellant said he did not know that there was a limit on the number of cigarettes he was allowed to bring into the UK, that he was not told what the allowances were in March 2014 and that he did not know what the allowance was when he entered the UK in July 2014.

49. We do not find this credible for a number of reasons. Mr Ali has lived in the UK for over 50 years and has travelled to Bangladesh at least once a year for many years. He must have been aware that there were Customs restrictions. Indeed, he stated at the hearing that he was aware of the difference between the red and green channels. He knew that the red channel should be used if a person has something to declare but he went into the green channel as, he said, he had nothing to declare. This suggests that he did know that there were restrictions on what could be brought to the UK. There is clear signage at all UK airports, including Heathrow stating what the allowances are and the Appellant must have seen these on many occasions.

50. We have found that the Appellant was aware that limits existed and we do not find it credible that he believed that those limits exceeded 20,000 cigarettes on the first occasion.

51. We find that Mrs Animashaun did tell Mr Ali in March 2014 that his duty free allowance was 200 cigarettes and that he was given Notice 1 which set out the allowances in writing.

52. Accordingly, we find that Mr Ali did know that his cigarette allowance was only 200 cigarettes when he came back to the UK from another trip only four months later and that he was untruthful in stating that he did not know his allowances, and that he had not had cigarettes seized before.

53. We also note that on each occasion when excess cigarettes were discovered they were wrapped up in nylon or plastic and taped. On the second occasion, the Appellant stated that the cigarettes were wrapped in plastic “because of the rain”. We find that it was more likely that they were wrapped up on each occasion in an attempt at concealment.

54. In summary, we find, on the balance of probabilities that:

- The Appellant was aware that there were limits on the number of cigarettes that he could bring to the UK in March 2014 and he must have known that 20,000 cigarettes were far in excess of any limit;
- On the second occasion he was stopped in July 2014, he was fully aware that the duty free allowance was 200 cigarettes; and
- That the Appellant told a number of lies when questioned by the Border Force officers with a view to concealing the fact that he had cigarettes in excess of the duty free allowance.

55. *Discussion*

56. In order to impose a penalty, HMRC must show that the Appellant engaged in the relevant conduct “for the purpose of evading” the duty (section 8(1) Finance Act 1994). That is to say the conduct must have been deliberate and intended to evade the payment of the duty. Secondly, HMRC must demonstrate that the Appellant’s conduct involved dishonesty. In each case, HMRC’s burden of proof must be discharged on the balance of probabilities.

57. The test for dishonesty was considered in the case of *Bintu Binette Krubally N’Diaye* [2015] UKFTT 380 (TC). That case explained that the test in criminal cases was set out in *R v Ghosh* [1982] 1QB 1053. It is a two part test. “...a jury must first decide whether according to the standards of ordinary decent people what was done was dishonest...If it was dishonest...the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.” The first step is objective, the second subjective.

58. The Court of Appeal then clarified the test for dishonesty in civil cases in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492. Arden LJ adopted the approach of the Privy Council in *Barlow Clowes International Ltd. v Eurotrust International Ltd.* [2006] 1 WLR 1476. The Privy Council in that case held that “it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest [the second limb in *Ghosh*]. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour”.

59. Having discussed the *Barlow Clowes* case in *Abou-Ramah*, Arden LJ went on to say, “On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty...honesty has “a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.”

60. So the test we must apply is whether Mr Ali’s conduct was dishonest according to normally accepted standards of behaviour, taking into account what he actually knew about those elements of his conduct which made it dishonest.

61. The Appellant’s conduct was clearly dishonest according to normally accepted standards of behaviour.

62. In relation to the second part of the test, the question is whether the Appellant was aware that there were limits on the number of cigarettes he could bring into the UK, that he knew that the cigarettes he had brought in exceeded those limits and that he knew he should have declared them and paid duty.

63. For the reasons set out above, we have found that the Appellant did know these things.

64. Even if he was uncertain of the exact duty free allowance in March 2014, (and we are not convinced that that was the case) we have found that he must have been aware that 20,000 cigarettes was well in excess of the allowance. In this context, we note the comments of Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at page 389G that an honest person does not “deliberately close his eyes or ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless”. In other words, as Mr Ali knew that there were *some* restrictions, he cannot escape a charge of dishonesty by contending that he did not know the precise extent of those restrictions. The information on allowances was prominently available in the airport. He must have seen the notices on numerous occasions and if he had any doubts as to the allowances, he could have easily ascertained what they were. On the second seizure in July 2014, we have found that he was aware of the 200 cigarette limit.

65. Accordingly, we find that Mr Ali’s conduct was deliberately intended to evade the duties and that his conduct was dishonest.

66. *The amount of the penalty*

67. Mr Ali also appeals the amount of the penalty. He considers it to be an extortionate amount and states that, as a pensioner, he cannot afford it. He also states that he was advised that if he co-operated the penalty would be reduced, and he asserts that he gave full co-operation.

68. HMRC may reduce the penalty if the taxpayer gives an early and truthful explanation as to how the duty came to arise. There can be further reductions for co-operating fully with the enquiry procedure and providing full information and answering questions. HMRC wrote to the Appellant twice before they received any response and neither that nor subsequent correspondence provided a full explanation as to what had happened. HMRC's letter of 9 October 2014 contained a number of questions about the events, most of which had not been answered. Mr Ali did not return a copy of the letter confirming he had read the information supplied (as requested in the letter). He did not explain what had happened, how the trips were funded, how he was able to afford to buy 20,000 cigarettes, or even the quantities of cigarettes involved. Despite the limited co-operation, HMRC allowed a 25% reduction (out of a maximum of 40%) for disclosure and a 30% reduction (out of a maximum of 40% for co-operation).

69. The Appellant states that he is a pensioner and also helps to support his family in Bangladesh and he cannot afford to pay the penalty (though he has not explained how he can afford to travel to Bangladesh on a regular basis or how he can afford to purchase 20,000 cigarettes). In any event, section 8(5)(a) Finance Act 1994 prevents lack of funds from being a factor which HMRC or the Tribunal may take into account in determining the amount of any reduction in the amount of a penalty.

70. We consider that the reduction in the level of penalties already given by HMRC fairly reflects the level of co-operation given by the Appellant and we see no reason to reduce them further.

71. We note that Mr Ali alleged that the Border Force officers were rude to him and his wife, but we have heard no evidence to substantiate this.

72. *Decision*

73. For the reasons set out above, we find that the customs and excise civil evasion penalties assessed on the Appellant were properly so assessed and that it is not appropriate for the Tribunal to alter the amount of the penalties.

74. We therefore dismiss the appeal.

75. 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.

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MARILYN MCKEEVER

TRIBUNAL JUDGE

RELEASE DATE: 19 MAY 2016

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