



[2021] UKFTT 0258 (TC)

TC08204

EXCISE DUTY – tobacco products seized – no challenge to seizure - appeal against Customs and Excise Civil Evasion Penalty (CEP19/0668) – whether dishonest behaviour – yes – Ivey v Genting applied – whether penalty correctly applied – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09217

BETWEEN

GABRIEL CHRISTOPHER

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE NATSAI MANYARARA
SONIA GABLE JP**

The hearing took place on 9 June 2021. With the consent of the parties, the hearing was held remotely by video using the Tribunal’s own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellant, Litigant in Person

Ms Hannah Bains, Litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant (Mr Gabriel Christopher) appeals against the decision by HMRC, dated 17 September 2019, to impose a Customs & Excise Civil Evasion Penalty CEP 19/0668, in the sum of £12,056.00. The Penalty was issued pursuant to s 8 (1) of the Finance Act 1994 and s 25 (1) of the Finance Act 2003, for the evasion of customs duty and excise duty. The revenue evaded amounted to £30,143.00.

2. The Penalty was imposed following the Appellant's arrival at London Heathrow Airport ('LHR') on 31 August 2018. The Appellant was found to have 67,600 Marlboro Gold KSF cigarettes in his luggage. This quantity significantly exceeded the personal allowance. HMRC contend that the Appellant engaged in a course of conduct through his actions, for the purposes of evading excise duty, and that the Appellant's conduct involved dishonesty.

BACKGROUND FACTS

3. On 31 August 2018, the Appellant arrived at Terminal 5, LHR, on a flight from Nigeria. Whilst on duty at the North Baggage Hall, UK Border Force Officer Campbell was approached by a member of British Airways staff in relation to a bag that was behind baggage belt 6. Officer Campbell saw one large brown soft sided suitcase. The suitcase was open and contained Marlboro Gold King Size Filter ('KSF') cigarettes. Officer Campbell therefore re-sealed the suitcase and asked Officer Kelly to place the bag on the baggage belt.

4. Officer Campbell later observed the Appellant who was standing away from the baggage belt with a trolley consisting of 3 suitcases: a large brown soft sided suitcase, a large navy soft sided suitcase and a small black soft sided suitcase. The Appellant then proceeded towards the South End of the exit channels, without the remaining bag, and Officer Campbell approached him and asked him some questions.

5. The Appellant confirmed that he had cigarettes in his suitcases. Officer Campbell then escorted the Appellant back to baggage belt 6 and the Appellant confirmed that the large brown soft sided suitcase that had earlier been brought to Officer Campbell's attention belonged to him. The Appellant was therefore asked to remove the suitcase from the baggage belt.

6. Following further questions, the Appellant's luggage was found to contain 67,600 cigarettes. Officer Campbell therefore cautioned the Appellant. Officer Campbell and Officer Kelly then escorted the Appellant to an interview room where he was further questioned. The Appellant was then issued with form BOR156 (Seizure Information Notice), form BOR162 (warning letter about seized goods) and Public Notices 1 and 12A. The Appellant opted not to contest the legality of the seizure and the goods were therefore deemed to be forfeit.

7. The matter was referred to HMRC and on 20 August 2019, HMRC wrote to the Appellant notifying him of the intention to investigate his conduct, with a view to establishing whether his conduct was dishonest. The Appellant was further notified that the investigation was with a view as to whether it was appropriate to issue a penalty. Enclosed with the letter was Public Notice 300, in respect of Customs Duty and Import VAT, and Public Notice 160, in respect of Excise Duty. The Appellant was invited to provide disclosure.

8. Following further exchanges of correspondence, on 17 September 2019, HMRC issued a penalty in the sum of £12,056.00. The Appellant requested a review on 8 October 2019. HMRC upheld the decision by a review conclusion dated 11 November 2019.

9. On 8 December 2019, the Appellant notified his appeal to the Tribunal.

Respondent's Case

10. HMRC's case, as set out in the Statement of Case, can be summarised as follows:

(1) The Appellant's cigarettes exceeded his personal allowance by 338 times. The Appellant was aware, at the time of the importation, that he could not bring in such an amount, without paying duty.

(2) The Appellant attempted to leave the baggage reclaim area without one of his suitcases and without speaking to a Customs Officer.

(3) The Appellant was issued with form BOR156 and form BOR162, both of which explained that seizure was without prejudice to any other action that HMRC may take, including issuing a penalty.

(4) As the Appellant dishonestly attempted to evade import VAT, excise and customs duties, a penalty is due under ss 8(1) and 8(4) of the Finance Act 1994 and s 25(1) of the Finance Act 2003.

Appellant's Grounds of Appeal

11. The Appellant's grounds for appealing against the penalties can be summarised as follows:

(1) He is appealing for a further 20% reduction of the Penalty and he regrets his actions.

(2) He is a smoker and he discovered that cigarettes in Nigeria were cheaper. He decided to purchase a large quantity. He intended to keep the cigarettes for personal use.

(3) He was still in the baggage reclaim area at the time that he was apprehended by the Border Force Officer. He therefore did not evade duty. He had a panic attack and made a statement under duress.

(4) He was honest and co-operated with HMRC. He has never been involved in criminal activity in the past and he regrets his actions.

(5) He opted to forfeit the goods as he did not have the money to pay the duty due. He does not have the money to pay the Penalty. He is currently struggling financially. He has debts and minor children.

APPEAL HEARING

12. Ms Bains opened HMRC's case, as set out in the Statement of Case. We then heard oral evidence from Officer Lee Crozier, Officer Campbell and the Appellant.

Evidence and Submissions

13. The first witness to be called was Officer Lee Crozier, who is a Compliance Officer with HMRC. In his oral evidence, Officer Lee Crozier said that he made the decision to issue the Penalty having considered the information provided by UK Border Force ('UKBF'). He added that he had observed discrepancies between the information that the Appellant had provided to Officer Campbell and that provided to HMRC, in relation to the goods. He continued by saying that he had considered the fact that the Appellant had attempted to exit the baggage reclaim area and that it was only when he was intercepted by Officer Campbell that he collected his remaining suitcase.

14. Officer Crozier added that contrary to the Appellant's assertions, there was no evidence that the Appellant was suffering from any health conditions during the investigations. He highlighted that the Appellant had travelled to Nigeria on five previous occasions.

15. Under cross-examination from the Appellant, Officer Crozier said that he reached the conclusion that the Appellant was not suffering from stress when he was intercepted by Officer Campbell because Officer Campbell's notes do not suggest that the Appellant ever referred to stress during the interview. He concluded by saying that he decided that the Appellant had been dishonest because the Appellant had not made any attempt to exit the baggage area via the Red Channel, where he could have declared the cigarettes.

16. We then heard from Officer Campbell. Officer Campbell is a Border Force Officer at LHR. In her oral evidence, Officer Campbell explained that she had intercepted the Appellant as he began to walk away from the baggage belt and towards the South Exit, where there is no Red Channel.

17. In response to questions from the Tribunal, for the purposes of clarification, Officer Campbell said that the Appellant did not, at any point, say that he was either unwell or under duress. She added that her notes would have reflected any difficulties that the Appellant was having at the time that she interviewed him. Officer Campbell further confirmed that she did not have any record of the Appellant requesting to go to the toilet. She clarified that she had

been approached by British Airways staff because the Appellant's bag had opened and it was clear that it contained cigarettes. In terms of the marker that she had placed on the Appellant's suitcase, Officer Campbell clarified that this was not an actual mark on the Appellant's suitcase but a colourful bag in front of the Appellant's suitcase, to identify the Appellant's suitcase as it went around the baggage belt. In her view, the Appellant may have become suspicious when he observed a member of Border Force near his suitcase and decided not to collect it until he was asked to return to the baggage belt.

18. Under cross-examination from the Appellant, Officer Campbell maintained that her notes did not reflect that the Appellant had asked to go to the toilet when he was apprehended. She accepted that the Appellant had confirmed that he had cigarettes in his luggage.

19. We then heard from the Appellant. In his oral evidence, the Appellant adopted his notice and grounds of appeal, as summarised above.

20. Under cross-examination by Ms Bains, the Appellant said that the purpose of his trip to Nigeria was to attend to a kidnapping that had affected his family and that is why he had told Officer Campbell that he had returned from a family holiday. He then said that he had not been aware of his personal allowance in respect of tobacco and added that Officer Campbell was the person who pointed out his personal allowance to him for the first time. He added that he did not have the money to pay the excess and therefore decided to forfeit the tobacco. In relation to being under stress, the Appellant did not agree that he was under stress because he had been intercepted. He explained that he had claimed that he was carrying the cigarettes for someone else because he had panicked and therefore made an incorrect statement.

21. The Appellant further said that he could not recall how much money he had spent on the cigarettes and he explained that he smokes ten or more cigarettes a day. He repeated that he was pleading for leniency as he had admitted his wrongdoing. He concluded by saying that he had never done anything wrong before and that he regrets what has happened.

22. In response to questions from the Tribunal for the purposes of clarification, the Appellant said that he has been a smoker for many years. He added that he has, in the past, purchased duty free cigarettes (usually one carton) but tends to travel with one bag. He then explained how he determines which route to go through when he arrives at passport control and said that he reads the signs. In relation to customs, he said that he believed that the Red Channel was for those who are carrying contraband, such as firearms, drugs, money, imports or trafficked persons. He concluded by saying that he had purchased his suitcases in Nigeria before returning to the United Kingdom.

23. Following completion of the oral evidence, we heard closing submissions.

24. In closing, Ms Bains submitted that the Appellant's dishonesty began before he encountered UKBF. She added that the Appellant admitted that he did not have any money to pay the excess duty, when intercepted by Officer Campbell. She further added that the

Appellant had initially said that the cigarettes belonged to someone else, before saying that he intended to sell the cigarettes. She concluded by saying that the Appellant was aware that the goods were in excess of the allowances and that there is no reason for justifying a further reduction over and above that already given.

25. The Appellant did not wish to say anything in reply, apart from repeating that he pleads for leniency and acknowledges his unintentional mistakes.

APPLICABLE LAW

Customs and Excise Management Act 1979

78 Customs and excise control of persons entering or leaving the United Kingdom.

(1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom; or

(b) being dutiable goods or taxable goods, he has obtained in the United Kingdom without payment of duty or tax, and in respect of which he is not entitled to exemption from duty and tax by provision made by regulations under section 19 of the Taxation (Cross-border Trade) Act 2018 relating to any relief conferred on persons entering the United Kingdom or any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

In this subsection “taxable goods” means goods on the importation of which value added tax is chargeable or goods obtained in the United Kingdom before 1st April 1973 which are chargeable goods within the meaning of the Purchase Tax Act 1963; and “tax” means value added tax or purchase tax.

...

(2) Any person entering or leaving the United Kingdom shall answer such questions as the proper officer may put to him with respect to his baggage and any thing contained therein or carried with him, and shall, if required by the proper officer, produce that baggage and any such thing for examination at such place as the Commissioners may direct.

...

(3) Any person failing to declare any thing or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or level 3 on the standard scale, whichever is the greater.

(4) Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture.

139 Provisions as to detention, seizure and condemnation of goods, etc.

(1) Any thing liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

(1A) A person mentioned in subsection (1) who reasonably suspects that any thing may be liable to forfeiture under the customs and excise Acts may detain that thing.

(1B) References in this section and Schedule 2A to a thing detained as liable to forfeiture under the customs and excise Acts include a thing detained under subsection (1A).

(2) Where any thing is seized or detained as liable to forfeiture under the customs and excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, deliver that thing to an officer.

...

(5) Subject to subsections (3) and (4) above and to Schedules 2A and 3 to this Act, any thing seized or detained under the customs and excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

...

(7) If any person, not being an officer, by whom any thing is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder, he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the customs and excise Acts.

The Travellers' Allowances Order 1994

1. *This Order may be cited as the Travellers Allowances Order 1994 and shall come into force on 1st April 1994.*

2.—(1) *Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage.*

(2) For the purposes of this article—

(a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

(b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;

(c) “third country”, in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991).

3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

Finance Act 1994

8(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 duty or 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.

Finance Act 2003

25 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.

(2) Subsection (1) is subject to the following provisions of this Part.

(3) Nothing in this section applies in relation to any customs duty of a preferential tariff country.

(4) Any reference in this section to a person's "evading" any relevant tax or duty includes a reference to his obtaining or securing, without his being entitled to it,—

(a) any repayment, rebate or drawback of any relevant tax or duty,

(b) any relief or exemption from, or any allowance against, any relevant tax or duty, or

(c) any deferral or other postponement of his liability to pay any relevant tax or duty or of the discharge by payment of any such liability, and also includes a reference to his evading the cancellation of any entitlement to, or the withdrawal of, any such repayment, rebate, drawback, relief, exemption or allowance.

(5) In relation to any such evasion of any relevant tax or duty as is mentioned in subsection (4), the reference in subsection (1) to the amount of the tax or duty evaded or sought to be evaded is a reference to the amount of—

(a) the repayment, rebate or drawback,

(b) the relief, exemption or allowance, or

(c) the payment which, or the liability to make which, is deferred or otherwise postponed, as the case may be.

(6) Where, by reason of conduct falling within subsection (1) in the case of any relevant tax or duty, a person—

(a) is convicted of an offence,

(b) is given, and has not had withdrawn, a demand notice in respect of a penalty to which he is liable under section 26, or

(c) is liable to a penalty imposed upon him under any other provision of the law relating to that relevant tax or duty, that conduct does not also give rise to liability to a penalty under this section in respect of that relevant tax or duty.

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.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or 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 any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

[Emphasis added]

26. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

27. This is an appeal by the Appellant against the imposition of a Civil Evasion Penalty ('the Penalty'). The Penalty was imposed in respect of the evasion of customs duty and excise duty. There is no dispute as to the fact that the Appellant arrived in the United Kingdom in possession of 67,600 Marlboro KSF cigarettes. There is further no dispute as to the fact that the tobacco was found in the Appellant's luggage.

Findings of Fact

28. On 31 August 2018, the Appellant arrived at Terminal 5, LHR, on a flight from Abuja, Nigeria.

29. At 21.05, UKBF Officer Campbell was approached by a British Airways worker who asked Officer Campbell to attend to an item of luggage that was behind baggage belt 6. The item of luggage was a large, brown, soft-sided suitcase. The suitcase was open, revealing its contents. Within the suitcase were Marlboro Gold KSF cigarettes. Officer Campbell proceeded to use a marker bag to enable her to identify the suitcase and she asked Officer Kelly to place the suitcase on the baggage belt. Officer Campbell and Officer Kelly then returned to the baggage reclaim hall to monitor the suitcase entering the reclaim hall.

30. Officer Campbell observed passengers around the baggage belt and she also observed the Appellant standing away from the baggage belt, with a trolley consisting of the following items of luggage:

- (1) One large brown soft-sided suitcase;
- (2) One large navy soft-sided suitcase; and
- (3) One small black soft-sided suitcase.

31. Officer Campbell approached the Appellant as he proceeded towards the South End of the exit channels. Once she had apprehended to Appellant, she proceeded to ask him a few questions. During the questioning, Officer Campbell asked the Appellant where he had arrived from and whether he was collecting any more bags. The Appellant responded and confirmed that he had arrived from Abuja and that he was collecting another bag. Officer Campbell then asked the Appellant what was in his suitcases and whether he had anything to declare. The Appellant said that he had cigarettes in all of his suitcases.

32. Officer Campbell then escorted the Appellant back to baggage belt 6 and she asked the Appellant to remove the large, brown, soft-sided suitcase that she had earlier marked. She then asked the Appellant further questions, during which the Appellant said that:

- (1) He lived in the United Kingdom but had been away for one week to see his family.
- (2) He had six boxes of cigarettes in his luggage.
- (3) All of his suitcases contained cigarettes.
- (4) He had packed his suitcases himself.
- (5) He wanted to declare his cigarettes in order to see how much duty he would need to pay.
- (6) He intended to sell the cigarettes to make some money.
- (7) He had brought the cigarettes in for a friend as he had financial difficulties.

33. We have had the benefit of seeing a copy of Officer Campbell's notebook.

34. All four of the Appellant's suitcases were emptied and were found to contain 67,600 cigarettes. Officer Campbell then cautioned the Appellant and asked him if he understood. The Appellant made no comment.

35. The Appellant was escorted to an interview room by Officer Campbell and Officer Kelly, where he was informed that the cigarettes were seized.

36. Form BOR156 and Form BOR162 were issued to the Appellant; both of which he signed:

37. Form BOR162 is set out in the following terms:

“WARNING

The goods listed on the attached schedule (as detailed on Form BOR156) have been seized under Section 139 of the Customs and Excise Management Act 1979. This is without prejudice to any further action that may be taken against you in connection with this matter. This may include, but is not limited to, Border Force sharing information with:

- *HM Revenue & Customs who may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty, and or*
- *Other agencies or organisations who may wish to take action (which may include prosecution) in relation to this seizure.”*

[Emphasis added both above and below]

38. The Appellant was also issued with Public Notice 1. Public Notice 1 provides, *inter alia*, that:

“Border Force

UK customs information

...

Red Channel or Red Point Phone
You must use the red channel or the red point phone if you: <ul style="list-style-type: none">• have goods or cash (pages 12 and 14) to declare;• have commercial goods, see ‘Notice 6 – Merchandise in baggage’ available from the Helpline (page 23) for more information;• <u>are not sure about what you need to declare.</u>

...

“If you bring in goods worth more than your allowance, you must pay duty and/or tax on the full value, not just the value above the allowance.”

39. The Appellant was also issued with Public Notice 12A, advising the him that he could contest the legality of the seizure within one month. The Appellant chose not to exercise his right to challenge the seizure. As such, the cigarettes were deemed to be liable to forfeiture. The matter was then referred to HMRC for consideration of further action.

40. On 12 August 2019, Officer Lee Crozier wrote to the Appellant, notifying him of HMRC’s intention to investigate his conduct to establish whether it was dishonest and whether it was appropriate to issue a penalty. Enclosed with the letter dated 12 August 2019 were Public Notice 300 and Public Notice 160. Public Notice 300 provides, *inter alia*, that:

“Notice 300: customs civil investigation suspected evasion

...

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- *a person engages in any conduct for the purpose of evading any relevant tax or duty*
- *his conduct involves dishonesty (whether or not such as to give rise to any criminal liability)*

The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

The penalty can be mitigated (reduced) to any amount, including nil. Our policy on how the penalty can be reduced is set out in section 3.

...

3. How can I reduce the penalty?

It is for you to decide whether or not to co-operate with our investigations, but if you do you should be truthful as making a statement to us you know to be false may render you liable for prosecution.

If you chose to co-operate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

You should tell us about anything you think is relevant when we are conducting the investigation. At the end of the investigation we will take into account the extent of your co-operation.

...

3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100% import duties evaded will normally be reduced as follows:

- *up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them.*
- *up to 40% - fully embracing and meeting responsibilities under the procedure by, for example, supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.*

In most cases, therefore, the maximum reduction obtainable will be 80% of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

41. The Appellant was therefore advised of the action that he could take to reduce any potential penalty.

42. On 28 August 2019, the Appellant telephoned HMRC to ask how he should respond. He was advised to respond in writing.

43. In the absence of any further communication from the Appellant, HMRC issued a reminder letter on 3 September 2019. The Appellant was advised to respond by 19 September 2019, failing which he may be liable to pay £30,143.00, or more.

44. On 11 September 2019, the Appellant wrote to HMRC as follows:

“...I wish to state that I am a smoker and during the course of my visits to Nigeria, I discovered that cigarette in Nigeria were cheaper than what I purchase them here in the UK. I decided to purchase a large quantity for my personal use and also to give out some to my friends as gifts. I was accosted on return by the officials and the whole cigarette was sized and I was advised and given a warning never to bring in such quantity again which I have strictly adhered to. The statements I made initially was done under duress because of panic attack. I do hereby reiterate that the information given above are true and honest to the best of my knowledge and integrity in co-operation to this enquiry.” [sic]

45. The Appellant also provided the dates that he had travelled internationally, between August 2017 and August 2019: seven times in total. He also confirmed that he was the only person involved, in relation to the cigarettes in his luggage.

46. On 17 September 2019, HMRC wrote to the Appellant and informed him of their view that his actions on 31 August 2018 were dishonest and that a Penalty was appropriate. The letter highlighted that the total revenue evaded was £30,143.00. The Appellant was given a reduction of 30% for disclosure (out of a maximum of 40%) and a reduction of 30% for co-operation (out of a maximum reduction of 40%). The Penalty imposed was as follows:

We have assessed the penalty for 31 August 2018	Duty liable to a penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty for period
Customs civil evasion penalty	£9,491.00	60%	40%	£3,796.00	
Excise civil evasion penalty	£20,652.00	60%	40%	£8,260.00	£12,056.00

47. The Appellant was instructed to make payment by 17 October 2019.

48. On 8 October 2019, the Appellant wrote to HMRC requesting a review. In his letter, the Appellant said this:

“...I acknowledge that I had excess of my required allowance as explained to me by officials. I was still within the baggage collection areas at the time I was accosted and have not gone past the declaration point to suggest that I evaded declaration of the seized goods. I was honest and cooperated with the officials. Since I had no money to pay the excess, I opted to forfeit the whole tobacco for seizure hence I have to obey the law...I informed you that I am a smoker and I was meant to keep some for my personal use, give out/sale some to my friends...

I do not have any savings, I have under aged children and my current earnings are not sufficient for me to be able to pay the amount of £12056 penalty...This penalty has increased my stress level and will completely worsen my financial condition is upheld by your office.” [sic]

49. The matter was referred for review and on 11 November 2019, the decision to issue the Penalty was upheld by Review Officer Reid.

50. On 8 December 2019, the Appellant appealed to this Tribunal.

Consideration

51. The issues under appeal are, firstly, whether the HMRC have established conduct involving dishonesty and, secondly, whether or not the Appellant has provided an innocent explanation to rebut HMRC’s case. The factual prerequisite is therefore that HMRC has the initial burden of proof.

52. The test we adopt in determining whether dishonesty is established is that set out in the Supreme Court decision in *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC, at [74].

53. There, the Supreme Court held that 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 was a matter of evidence, often in practice determinative, going to whether he had held the belief, but it was not an additional requirement that his belief must be reasonable. The question was whether it was genuinely held. When once his actual state of mind as to knowledge or belief as to the facts was established, the question whether his conduct had been honest or dishonest was to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.

There was no requirement that the person must appreciate that what he has done was, by those standards, dishonest.

54. Therefore, there is no requirement that HMRC prove dishonesty by establishing that a person knew that what he was doing was dishonest. However, it is necessary to consider whether the person's behaviour was dishonest according to normally accepted standards of behaviour, having regard to circumstances known to the person at the time and his personal attributes, experience and intelligence.

55. Having considered all of the evidence, cumulatively, we find the Appellant to be an untruthful witness whose account was replete with inconsistencies. We do not accept the Appellant's account as representing a truthful or accurate description of his intentions on arrival in the United Kingdom whilst in possession of tobacco exceeding the personal allowance. We find that there is considerable force in Ms Bains' submission that the Appellant's arguments essentially amount to a plea-in-mitigation.

56. Firstly, we found the Appellant's inability to maintain a consistent account to be indicative of a lack of any truthfulness in his account. We find that if there were an innocent explanation for the Appellant's actions, then the Appellant would have maintained a consistent account. The Appellant initially told Officer Campbell that he was intending to declare the cigarettes, in order to find out how much duty he needed to pay. He further added that he had bought the cigarettes for a friend and intended to sell them, in order to make some money. When corresponding with HMRC, the Appellant departed from saying that he had bought the cigarettes for a friend, by saying that he was a smoker and that the cigarettes were for personal use and intended to be given to friends as gifts.

57. The Appellant also departed from his initial claim that he had intended to establish the duty that he needed to pay by saying that he did not, in fact, have any money to pay the duty due. It is therefore unclear how the Appellant why the Appellant would have wanted to find out how much duty he needed to pay if he would not have been able to pay the duty, due to impecuniosity.

58. Secondly, whilst the Appellant claims to have been under duress on arrival in the United Kingdom, we find that there is no evidence before us to show that the Appellant told Officer Campbell that he was experiencing any difficulties that would affect his ability to take part in an interview under caution. Indeed, the Appellant not only responded to all of Officer Campbell's questions, he was also able to personally collect the bag that remained on baggage belt 6.

59. We have had the benefit of seeing a copy of Officer Campbell's notebook, which includes a contemporaneous note of her questions to the Appellant and the answers that the Appellant gave to her questions. We further had the benefit of hearing Officer Campbell giving evidence before us. We are satisfied that we can place reliance on Officer Campbell's note of her conversation with the Appellant and we find her evidence to be reliable. We find that any

psychological difficulties or duress that the Appellant may have been experiencing would have been recorded in the notebook, if the Appellant had brought any difficulties to her attention. The Appellant does not suggest that Officer Campbell was aggressive towards him and it is therefore not the case that he felt too afraid to tell her of any difficulties that he would have submitting to an interview. We therefore do not accept that the Appellant was under any duress. Furthermore, by his own admission, the Appellant was the only person involved in bringing the tobacco into the United Kingdom and the Appellant was not therefore a willing lieutenant who was acting under the control and direction of another person.

60. Even if we were to accept that the Appellant was experiencing difficulties when he was apprehended and interviewed by Officer Campbell, we find that such difficulties would have solely been because he had been intercepted by Border Force in circumstances where he knew he had tobacco well in excess of his personal allowance in his possession.

61. Thirdly, we find that the Appellant was apprehended whilst he was walking towards the South End of the exit channels, where there is no Red Channel to declare goods. Whilst the Appellant initially told Officer Campbell that he had wanted to declare the cigarettes in order to see how much duty he would need to pay; we find that this statement by the Appellant does not sit well with the Appellant's actions in heading towards the South End of the exit channels. We find that if the Appellant had wanted to declare the cigarettes, then it would have been necessary for him to either approach UKBF officers, who were clearly visible, or approach the Red Channel. The Appellant claimed that he believed that the Red Channel was only for those carrying contraband, such as firearms, drugs, money, imports and trafficked persons. We therefore find that this does not therefore sit well with his claim that he wanted to declare the cigarettes. We further find that if the Appellant was not sure if he needed to declare his cigarettes, he could have still approached UKBF via the Red Channel.

62. Fourthly, we find that the Appellant was well aware of the need to declare the cigarettes. The Appellant was able to describe how he determined which lane to go through when he arrived at passport control. He explained that he does this by reading the signs. We find that the Appellant therefore has the ability to check for any signage that would inform the direction that he needs to take on arrival at the airport, right through to exiting the baggage reclaim area. The Appellant was aware that he had a significant number of cigarettes in his possession and we do not accept that he believed that he could simply leave the airport without speaking to anyone, other than the officials at passport control.

63. Fifthly, we find that the Appellant is an experienced traveller who is aware of the protocols in relation to duty free products. This is because we have had the benefit of seeing the answers to the questions that the Appellant was asked by Officer Crozier during HMRC's investigations. The Appellant's answers show that he has made numerous trips to Nigeria in the past few years. Moreover, by his own evidence, the Appellant confirms that he is a smoker who has purchased duty free cigarettes in the past. We find that it is not credible that the Appellant would not therefore have been aware of what the personal allowances were.

64. We find that the Appellant has failed to provide an innocent explanation for the circumstances that have arisen. We therefore find that dishonesty has been established in this appeal.

65. In his correspondence with HMRC, the Appellant claimed that he had co-operated with UKBF. We find that this clearly was not the case, as shown above. The Appellant seeks a reduction of the Penalty. We find that the Appellant was advised of the actions that he could take in order to reduce any penalty. He did not however engage with HMRC until a reminder letter was sent and he became aware of the amount that he would have to pay if he continued to fail to co-operate. The reminder letter prompted a response from the Appellant.

66. The Appellant has been given a 60% reduction in the Penalty. Section 29 of the Finance Act 2003 permits the Tribunal to reduce a penalty to such an amount (including nil) as it thinks proper. The Tribunal can also cancel the whole or part of any reduction of a penalty previously made by HMRC. There is no statutory definition of mitigating circumstances, but there is some statutory guidance to be found at s 29(3) of the Finance Act 2003, which provides that the following matters cannot be taken into account when considering a mitigation appeal:

- (1) The insufficiency of funds available to any person for paying any VAT due or for paying the amount of the penalty;
- (2) 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 VAT; and
- (3) The fact that the person liable to the penalty or any person acting on his behalf has acted in good faith.

67. The Appellant has raised the issue of his finances in relation to the Penalty. This is one of the matters that cannot be taken into account by the Tribunal when considering mitigation. Having considered all of the evidence, and having regard to the applicable law, we find that the Penalty has properly been imposed and we therefore uphold the Penalty and dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. 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.

**NATSAI MANYARARA
TRIBUNAL JUDGE**

RELEASE DATE: 12 JULY 2021