



**TC07023**

**Appeal number: TC/2018/01163**

*EXCISE DUTY – Cigarettes brought to UK from Poland – Seized at UK airport – Subsequent assessment to excise duty and penalties – jurisdiction of Tribunal – "consumption" and "proportionality" issues – hardship – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MAYA MICHALSKA**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE ALEKSANDER  
SHEILA CHEESMAN**

**Sitting in public at Taylor House, London EC1 on 5 December 2018**

**Charles Graham for the Appellant**

**Giselle McGowan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. This is an appeal against a review decision upholding assessment for tobacco products duty of £2204 and penalties of £462 in respect of 8000 cigarettes seized from the Appellant at Stansted Airport.

2. Witness statements were submitted by Border Force Officer Richard Lye and HMRC Officer Sean Reed, and they gave evidence before us. In addition, a bundle of documents was produced. An interpreter attended the hearing to translate between Polish (Ms Michalska's mother tongue) and English. Ms Michalska declined to give evidence.

### **Background facts**

3. Based on the evidence before us, we find the following facts.

4. Ms Michalska was intercepted at Stansted Airport by the Border Force, and 8000 Marlborough Gold cigarettes were seized from her luggage. She was interviewed by Officer Lye at the time, and she said that the cigarettes were for her uncle, that her mum had paid for the cigarettes, that she did not know if her uncle would reimburse her mum for the cigarettes, but they would sort it out themselves, and that her mum would not spend this amount of money. The cigarettes were seized because Officer Lye believed that they were imported for a commercial purpose, and excise duty had not been paid.

5. On 11 November 2016, Ms Michalska wrote to the Border Force to challenge the seizure. However, the challenge was withdrawn in December 2016. Accordingly, the cigarettes were duly condemned as illegal imports.

6. On 25 August 2017, HMRC wrote to Ms Michalska explaining that their view was that she was liable to pay tobacco products duty and a penalty in respect of the illegal import of the cigarettes. Ms Michalska was invited to provide relevant information by 24 September 2017.

7. Ms Michalska wrote to HMRC on 22 September giving the following information:

- (1) The cigarettes were for her own use, and should be returned;
- (2) She was not aware of any wrongdoing, and the amount of the penalty should be reduced to take account of this;
- (3) When she was interviewed at Stansted, she felt intimidated, and she was exhausted and tired;
- (4) The procedure was ambiguous and unclear;
- (5) She believed that she was allowed to pack as much tobacco in her luggage as she wanted;
- (6) Any wrongdoing by her was not deliberate;
- (7) She brought the cigarettes into the UK because she smoked and was smoking more due to stressful work and personal circumstances. She had misled

the Border Force Officer due to her ill-being at the time and because she did not want her family to know that she smoked and thought they would become aware of the outcome; and

5 (8) She felt pressured into signing Officer Lye's notebook, which she could hardly read or understand and felt intimidated by the interview and was misinformed that there was a limit of 800 cigarettes.

8. This letter was only received by HMRC on 26 September, and was only seen by the Officer Reed (who was responsible for this case) on 9 October 2017.

10 9. On 29 September 2017, Officer Reed issued an assessment for tobacco products duty of £2204 pursuant to s 12(1A) Finance Act 1994 and a notice of penalty of £462 pursuant to paragraph 4, schedule 41 Finance Act 2008.

15 10. The penalty was calculated at 21% of the lost duty on the basis that Ms Michalska had made a prompted disclosure of the illegal import, with her not admitting the wrongdoing, but HMRC requiring no further information to be able to assess the duty payable.

20 11. On 7 October 2017, Ms Michalska wrote to Officer Reed, referring to her 22 September letter, and asking him to take account of the information contained in it. She also requested a review. Officer Reed replied on 10 October stating that he had only received her original letter on 9 October, and therefore had not been able to address it in his previous correspondence. However, in any event, the information contained in did not change his view of the case, and he would therefore not amend the assessment and penalty.

25 12. On 14 October, Ms Michalska wrote to Officer Reed requesting that the excise duty be waived, as she had no use for the tobacco, and was not even able to pay one-fifth of the amount, and requesting 60 days to pay the penalty.

30 13. HMRC undertook a review of the assessment and penalty, and on 29 November 2017, Officer Elliot (the officer conducting the review) wrote to Ms Michalska upholding the assessment and penalty. On 9 January 2018, Ms Michalska wrote to HMRC requesting a reconsideration of the decision, and on 29 January 2018, Officer Reed replied that a second review was not available, and that she must appeal to this Tribunal if she disagreed with the decision.

14. Notice of Appeal was filed on 10 February 2018. With the consent of HMRC, the Tribunal gave consent for the late filing of the appeal. HMRC certified that the giving of security or payment of the duty was not required on the grounds of hardship.

### 35 **The Law**

15. Section 2, Tobacco Products Duty Act 1979 ("TPDA") and Article 1(1)(c) of EU Council Directive 2008/118/EC ("the Excise Directive") provide for the payment of an excise duty, tobacco products duty, on cigarettes imported into the UK.

40 16. At the relevant time, the duty was 16.5% of the lowest recommended retail price of the cigarettes plus £196.42 per thousand cigarettes (see Schedule 1, TPDA as in force at the relevant time).

17. Regulation 13, Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("EGR 2010") provides that the excise duty point for excise goods already released for consumption in another Member State is the time when the goods are first held for a commercial purpose in the UK in order to be delivered or used in the UK.
- 5 These regulations go on to provide that the person holding the goods intended for delivery is liable to pay the duty, and the duty must be paid at or before the excise duty point (regulation 20, EGR 2010).
18. Where goods are imported into the UK (having previously been released for consumption in another EU Member State), regulation 69, EGR 2010 requires payment to HMRC of any excise duty on or before the excise duty point, and requires the importer to consent to any check enabling HMRC to satisfy themselves that the duty has been paid.
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19. If there has been a contravention of EGR 2010 in relation to goods that are liable to duty that has not been paid, those goods are liable to forfeiture pursuant to regulation 88, EGR 2010.
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20. Further, where excise duty is not been paid or secured prior to the time that goods are held for a commercial purpose, they are liable to forfeiture pursuant to s49 Customs and Excise Management Act 1979 ("CEMA"), and, pursuant to s139 CEMA, anything liable to forfeiture may be seized.
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21. Paragraph 3, Schedule 3, CEMA sets out the provisions governing any challenge to the legality of a seizure. Notice must be given within a month of a notice of seizure being served. If notice is not given (or is given ,but subsequently withdrawn) the goods are deemed to have been duly condemned as forfeited by virtue of paragraph 5, Schedule 3 CEMA .
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22. Where it appears to HMRC that any person is a person from whom any amount has become due in respect of excise duty and that amount can be ascertained by HMRC, s12(1A) Finance Act 1994 gives HMRC power to assess the amount of any duty due from that person and notify that amount to that person or his representative.
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23. Paragraph 4, schedule 41, FA 2004 provides for a penalty is payable where, after the excise duty point for any goods which are chargeable with a duty of excise, a person acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and at the time when the person acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.
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24. The penalty payable is calculated in accordance with paragraphs 6B, 10, 12 and 13 of schedule 41, FA 2008. Paragraph 6B provides that the standard percentage of penalty in cases other than deliberate acts or failures by the taxpayer is 30 percent of the potential lost excise duty. Paragraph 12 provides for reductions on penalties where the person discloses a relevant act or failure by telling HMRC about it, giving HMRC reasonable help quantifying the tax unpaid, allowing HMRC access to records to check how much tax is unpaid and providing HMRC with additional information. Paragraph 40 13 provides that, where the standard percentage is 30 percent, HMRC must reduce the standard percentage to one that reflects the quality of disclosure made by the taxpayer but that the minimum percentage for prompted disclosure is 20 percent.

## Issues in the appeal

25. Ms Michalska's grounds of appeal are as follows:

5 (1) When withdrawing her challenge to the legality of the seizure, she had not conceded that the seizure was lawful, and did not expect to be assessed to tax by HMRC some nine months later and receive a penalty.

(2) Article 37 of Council Directive 2008/118/EC ("the Excise Directive") provides that excise duties (such as tobacco products duty) shall not be charged in the event of the total destruction or irretrievable loss of the goods.

10 (3) As the cigarettes have already been seized and not returned, it is disproportionate to both forfeit the goods and levy duty upon them.

(4) She does not have the funds to pay the assessment and penalty.

26. Ms Michalska does not dispute the calculation of the amount of the duty, or that the assessment and notice of penalty was properly served upon her.

15 27. This Tribunal does not have jurisdiction to adjudicate upon the legality of the seizure of the cigarettes by the Border Force. The only forum in which Ms Michalska can challenge the legality of the seizure is before the magistrates (for example, on the grounds that she imported the cigarettes for her own use). Because Ms Michalska withdrew her challenge to the seizure, the cigarettes are deemed to have been duly  
20 condemned as forfeit as illegally imported goods (see paragraph 5, Schedule 5, Customs and Excise Management Act 1979 ("CEMA")). This deeming effect of a withdrawal of a challenge was considered by the Court of Appeal in the case of *HMRC v Jones* [2011] EWCA Civ 824 at [71] and by the Upper Tribunal in *Race v HMRC* [2014] UKUT 0331 (TCC) at [30]-[34] and [42]. These decisions of higher courts are binding upon us.

25 28. The result is that it is not open to Ms Michalska to argue before us that the cigarettes were imported for her own use. That could only be done before the magistrates. She is now bound by the deeming effect of her withdrawal of her challenge. In consequence of that withdrawal, we are required to treat the import of the cigarettes as an illegal importation otherwise than for her own use.

30 29. The application of Article 37 of the Excise Directive was briefly considered by the Upper Tribunal in the case of *HMRC v Jacobson* [2018] UKUT 189 (TCC). The Upper Tribunal held that Article 37 does not apply where goods are seized on entry after the duty point, and condemned or destroyed thereafter. For technical reasons, the Upper Tribunal's decision is *obiter dicta*, and not binding upon us – however it is highly  
35 persuasive, and we consider that we should follow it. Accordingly, we find that the cigarettes were not totally destroyed or irretrievably lost during their transport.

30. Proportionality is a general principle of EU law, and as excise duties (such as tobacco products duty) are derived from EU law, proportionality applies to this duty. For a tax raising measure to be disproportionate, it is necessary to show that the  
40 statutory provisions are devoid of reasonable foundation (see for example the judgment of Stanley Burnton J (as he then was) in *R (Federation of Tour Operator) v HM Treasury* [2008] STC 547 at [134], which was expressly approved by Waller LJ on

appeal at [2008] STC 2524 at [21]). We agree with the decision by this Tribunal in *Staniszewski v HMRC* [2016] UKFTT 128 (TC), that s12 Finance Act 1994 is proportionate, as it clearly does not extend beyond its objective of a revenue raising mechanism and cannot, on any basis, be said to be devoid of reasonable foundation.

5 We therefore find that its provisions are proportionate. As regards the proportionality of penalties, we also agree with the decision of this Tribunal in *Staniszewski* that the “reasonable excuse” exception in paragraph 20, Schedule 41, Finance Act 2008, and the possibility of a reduction or stay in the penalty by reason of special circumstances under paragraph 14, has the effect of rendering the penalties as proportionate too.

10 31. The fact that Ms Michalska does not have the resources to pay the duty assessment or the penalty is not in itself a ground of appeal. This is consistent with paragraphs 14(2) and 20(2), Schedule 41, Finance Act 2008 which provided that special circumstances or reasonable excuses enabling a reduction (or elimination) of a penalty do not include a person's inability to pay (unless attributable to events outside the  
15 person's control). There was no evidence before us suggesting that Ms Michalska's inability to pay the duty was in consequence of events outside her control.

20 32. Finally, we have reviewed the penalty calculation undertaken by Officer Reed. We find that Ms Michalska made an unprompted disclosure of her wrongdoing. Accordingly, under Schedule 41 Finance Act 2008 the standard penalty is 30% of the lost duty. This can be reduced by up to 10% to reflect the quality of any disclosure made by Ms Michalska. Officer Reed reduced the penalty by 9% to 21%. His evidence was that he did not reduce the penalty by the maximum of 10% was because Ms Michalska did not admit her wrongdoing. We find that a reduction of 9% appropriately reflects the quality of the Ms Michalska's disclosure, and we are not minded to reduce the penalty  
25 any further.

33. There is no evidence before us of special circumstances or a reasonable excuse that would justify a reduction of or elimination of the penalty pursuant to paragraphs 14(2) and 20(2), Schedule 41 Finance Act 2008.

### **Conclusion**

30 34. For the reasons given above, we dismiss this appeal.

35 35. 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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**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

**RELEASE DATE: 04 MARCH 2019**

Cases cited in submissions but not referred to in this decision:

*Dansk Transport og Logistik v Skatteministeriet* (Case C-230/08)

*Hill v HMRC* [2017] UKFTT 18 (TC)

*Adewale v HMRC* [2017] UKFTT 103 (TC)

5 *Hale v HMRC* [2017] UKFTT 230 (TC)

*R oao Lumsdon v Legal Services Board* [2016] 1 AllER 391

*Fleming v HMRC* [2017] UKFTT 849 (TC)

*Ruzickis v HMRC* [2017] UKFTT 81 (TC)