



Neutral Citation: [2023] UKFTT 698 (TC)

Case Number: TC 08890

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2022/11883

CUSTOMS and EXCISE – civil evasion penalty – appellant entered green channel at Leeds airport carrying excessive excise goods – whether conduct involved dishonesty – yes – penalty mitigation – should reduction of 70% be increased to 80% - no – appeal dismissed

Heard on: 21 July 2023

Judgment date: 7 August 2023

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MISS SUSAN STOTT**

Between

MICHAEL STANDING

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant did not attend and was not represented

For the Respondents: Ms Esther Hickey, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. On 14 January 2020 the appellant (or “**Mr Standing**”) arrived at Leeds Bradford airport having travelled from Fuerteventura, and having collected his luggage, exited customs control through the green channel. He was stopped by a Border Force Officer and an examination of his luggage revealed that he was carrying 10,580 cigarettes which amount is considerably greater than his personal allowance.
2. On 22 July 2021 HMRC issued him with a civil evasion penalty (“**the penalty**”) in the sum of £1,144. This decision deals with the appellant’s appeal against that penalty.
3. For the reasons given below we have decided to dismiss his appeal.
4. The appellant did not attend the hearing nor was he represented. The appellant had been notified of the hearing on 22 June 2023. On 12 July 2023 he made an application for a postponement on the basis that he was on holiday until 1 August 2023. That application was rejected on 18 July 2023. The tribunal also telephoned the appellant on the morning of the hearing and was told that he had made an application to postpone the hearing. It was our view that the balance of prejudice weighed in favour of proceeding with the hearing in the appellant’s absence. There would be considerable financial and operational prejudice to HMRC if the hearing was to be postponed. A Border Force Officer had to be taken off operational duties to attend. If the appellant considered that his appeal was important, he should have made himself available to attend. There seemed little that the appellant would be able to add in oral testimony that he had not already said in correspondence.
5. Rule 33 of the First-tier Tribunal (Tax Chamber) Rules allows us to proceed in the absence of the appellant if we are satisfied that he has been notified of the hearing (or that reasonable steps have been taken to notify him) and that we consider that it is in the interests of justice to proceed with the hearing.
6. We were satisfied that both criteria had been met and proceeded with the appeal in the appellant’s absence.

THE LAW

7. The legislation set out below is cited only so far as relevant to the issues in this appeal.

Excise duty

8. Chapter II of Part I of the Finance Act (“FA”) 1994 is headed “Appeals and Penalties.” Section 8 comes under subheading “civil penalties” and so far as relevant to this decision reads as follows:

“Penalty for evasion of excise duty

9. Subject to the following provisions of this section, in any case where—

- (1) Any person engages in any conduct for the purpose of evading any duty of excise, and 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.

- (2)
- (3)
- (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.
- (5) Neither of the following matters shall be a matter which the 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”.

9. FA 1994 s 16(6) provides that the burden of proving dishonesty rests with HMRC.

Customs duty and import VAT

10. FA 2003 s 25(1) provides that where a person has engaged “in any conduct for the purpose of evading” customs duty and/or import VAT and that conduct involves dishonesty, that person is liable to penalties up to the value of the duty or VAT evaded. FA 2003 s 33(7)(b) provides that the burden of proving dishonesty lies with HMRC. Similar provisions to those set out in section 8(4) and (5) FA 1994 apply to appeals against penalties for evading customs duty and/or import VAT.

Mitigation

11. HMRC’s policy regarding reductions to civil evasion penalties is as follows:

- (1) Up to 40% of the penalty may be reduced for an early and truthful explanation as to why the arrears arose and the true extent of them (“**disclosure**”).
- (2) Up to 40% of the penalty may be reduced for fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification irregularities, attending meetings and answering questions truthfully and honestly (“**cooperation**”).

The test for dishonesty

12. A civil evasion penalty can only be levied if a person has behaved dishonestly. The legal test for dishonesty was clarified by the Supreme Court in *Ivey v Genting* [2017] UKSC 67 (“**Genting**”) and is as follows:

“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 is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest”.

13. The standard of proof is the civil standard, being the balance of probabilities.

THE EVIDENCE AND FINDINGS OF FACT

14. We were provided with a bundle of documents which also included the authorities and the relevant legislation. Border Force Officer Hammond and HMRC Officer Sultman gave evidence on behalf of HMRC. From this evidence we find the following:

- (1) At approximately 19.25 on 14 January 2020 the appellant, along with another passenger, was intercepted going through the green channel at Leeds Bradford International Airport. He had travelled there from Fuerteventura.

- (2) The pair were carrying three suitcases which were x-rayed and that x-ray detected 10,580 Lambert and Butler cigarettes. The appellant admitted that they belonged to him. The cigarettes were seized. He was issued with the Border Force documents BOR156 and BOR162.

- (3) On 6 May 2021 HMRC wrote to the appellant advising him that they were enquiring into his duty and tax affairs and advised that cooperation with the enquiry could reduce any penalties. He was also issued with relevant fact sheets.

- (4) A reminder letter was then issued to the appellant who responded by way of a telephone call on 4 June 2021. It appeared that the appellant had not received the original letter which was resent to him.

- (5) The appellant responded to that in a letter dated 3 July 2021. In that letter he states that: Nobody else was involved in the smuggling attempt; there were no other times and dates when tobacco or alcohol had been smuggled or an attempt to smuggle had been made; he had travelled to Cyprus in October 2019 and Tenerife in December 2018; he was to be paid £100 for carrying the cigarettes; he had been in a bar the evening before he was due to fly back to the UK and agreed to carry the cigarettes for Geordie John from Newcastle; he was told that he was doing nothing wrong and that he was allowed a personal allowance; he knew that this was a wrong decision which had never happened before and would never happen again; he doesn't smoke.

- (6) Officer Sultman reviewed this information and decided to issue the appellant with a civil evasion penalty based on dishonesty. In her view it was not credible that the appellant did not realise that 10,580 cigarettes would not have been within his personal allowance; nor is it credible that he did not consider that he was doing anything wrong being paid to carry goods into the UK; an honest person would have checked what his personal allowance was and would not have taken the word of Geordie John; he had not told the Border Force Officer at the time of seizure that the cigarettes did not belong to him.

- (7) Accordingly on 22 July 2021 Officer Sultman issued a notice of assessment for the

penalty of £1,144. She calculated the total duty evaded as £3,818. The maximum penalty was 100% of this. She gave a reduction of 70% calculated as 35% for disclosure and 35% for cooperation. She did not give him the maximum 80% reduction since he did not provide the information concerning ownership of the cigarettes to the Border Force Officer. Nor did he tell the Officer that he was being paid to bring the cigarettes into this country. She simply did not believe that he thought that that number of cigarettes was within his personal allowance. It was clear to her that the appellant knew that he was doing something wrong. Had he been frank to start with, she would have given him the full 40% reduction for each category.

(8) Her evidence too was that she had not realised that the cigarettes were Lambert and Butler. She had calculated the duty based on the lowest tariff for cigarettes whereas had she realised that they were Lambert and Butler cigarettes, the tariff would have been higher and accordingly the duty would have been higher and so too the penalty.

(9) On 28 August 2021 the appellant requested a review of the penalty and on 13 January 2022 HMRC issued their review conclusion letter upholding the penalty.

(10) The appellant appealed against the penalty on 28 March 2022.

(11) There are three channels at Leeds Bradford airport. The blue channel which should be used when travelling from an EU country with no banned or restricted goods; the green channel if travelling from a country outside the EU with goods which are not greater than the personal allowance or are not banned or restricted; and the red channel in any other circumstances or if the traveller is not sure about what he or she needs to declare.

(12) All ports of entry display customer information, both at the baggage reclaim and the customs declaration areas detailing which countries are within the EU and advising the allowances for tobacco products for countries within and without the EU. The personal allowance for personal use tax paid cigarettes imported from an EU country is unlimited. It is limited to 200 personal use cigarettes from a non-EU country.

DISCUSSION

15. The legislation is clear that it is for HMRC to establish conduct involving dishonesty on the part of the appellant and the standard of proof is the balance of probabilities. HMRC accept this.

16. We find as a fact that the penalty assessment is a valid in time penalty assessment. The appellant does not dispute the basis of calculation of the penalty. He disputes the mitigation percentage which should be applied.

17. In his notice of appeal, the appellant states his grounds of appeal as being: That he could not have done any more and should receive the full 80% reduction; he did not know that the allowance from the Canary Islands was different to mainland Spain and that if he had known this he would not have brought the tobacco back; he does not smoke; he has never done this before and will never do it again; he was not being dishonest and was unaware of the difference in allowances.

18. Ms Hickey submitted that:

(1) The appellant told the Border Force Officer that the cigarettes were his but later told HMRC that they were being brought in for Geordie John (who was paying him to bring the

cigarettes into this country) and that he did not smoke. He therefore gave a dishonest answer to the Officer.

(2) The dishonest act was entering the green channel knowing that the cigarettes were not for his own personal use. He was dishonest since he knew that they were not for personal use, he was being paid to import them for someone else but did not declare them.

(3) If he had genuinely thought that Fuerteventura was within the EU (as he claims in his grounds of appeal), he would have gone through the blue channel. The fact that he went through the green channel suggests that he did know that Fuerteventura was not in the EU for duty purposes. But the green channel can only be used by a traveller who is bringing in goods within their personal allowance namely 200 cigarettes. And it simply cannot be the case that this appellant thought that 10,580 cigarettes were within that allowance. Taking the word of a total stranger that it was within his allowance is not the behaviour of an honest individual. The appellant should have checked the government website.

(4) Indeed, at all ports of entry there is customer information displayed before entry into the relevant channels and it is more than likely that the appellant knew of the personal allowance yet still made a dishonest attempt to bring in more than that allowance. Even if he did not know the precise allowance, the magnitude of the excess is such that he must have known that the cigarettes were not within his personal allowance. Given that he did not smoke, they could not have been used for personal use.

19. In considering whether the appellant has acted dishonestly, we must apply the test set out in *Genting*, the first element of which is that we must ascertain subjectively the actual state of the appellant's knowledge or belief as to the facts. We must ascertain whether that belief is genuinely held based on the evidence. We must then go on to decide whether the conduct was honest or dishonest by applying the objective standards of ordinary decent people.

20. It is our view, for many of the reasons given by Officer Hickey, that the appellant's subjective knowledge of the relevant facts was that he knew that he was seeking to import cigarettes in an amount far greater than his personal allowance and that in coming through the green channel, and failing to declare the cigarettes, he was deliberately and consciously intending to smuggle those cigarettes into this country without paying the relevant duty on them.

21. By his own admission he doesn't smoke, yet he told the Border Force Officer that the cigarettes belonged to him. They could not therefore be for personal use, and information regarding the number of cigarettes that can be imported not for personal use was evident from the information exhibited at the point of importation.

22. He was being paid to import the cigarettes. He did not tell the Border Force Officer this at the time of importation. He went through the green "nothing to declare" channel. It is not credible to us (in the same way that it is not credible to the HMRC Officers in this case) that the appellant thought that the huge number of cigarettes which he imported was within his personal allowance. It is our view that the appellant knew that he was not entitled to import that number of cigarettes on a duty-free basis.

23. If the appellant thought that he was arriving from an EU country, he would have gone through the blue channel. The fact that he didn't suggests that he knew that the Canary Islands were not within the EU. By going through the green channel, he tacitly admitted this. But it is clear when going through the green channel that cigarettes can only be imported duty free if

they are within the personal allowance. And it is inconceivable to us that the appellant thought that 10,580 cigarettes were within that allowance. Reliance on Geordie John's ostensible advice that they were within that allowance without objectively checking is not the behaviour of an honest individual given the magnitude of the goods.

24. But even if the appellant had gone through the blue channel, which would have been consistent with his submission that he thought that the Canary Islands were within the EU (and that had he realised they were not he would not have imported the cigarettes) it is our view that he would have subjectively known that he should have been paying duty on them. This is because the personal allowance for duty free importation of cigarettes from an EU country is only unlimited where the cigarettes are for personal use. And it is the appellant's evidence that he does not smoke. We place little reliance on his assertion that he would not have attempted to import the cigarettes if he had known that there was a difference in the personal allowance from the Canary Islands compared with an EU country.

25. We must then test this subjective understanding of the facts against the objective standards of ordinary honest individuals, to see whether the appellant's conduct was honest or dishonest. Tested against those standards, we have no hesitation in concluding that the conduct was objectively dishonest. Knowing, as we have concluded, that he was bringing in an amount of cigarettes far in excess of his personal allowance (irrespective of whether the Canary Islands are within or without the EU) in circumstances where, as again we have found, he is more likely than not to have known that duty should have been paid on them, it is our view that this is objectively dishonest behaviour.

26. Nor do we have any hesitation in rejecting the appellant's claim that he should be given the maximum 80% reduction for cooperation and disclosure. Frankly we think HMRC have been generous in allowing him a discount of 70%. The appellant lied to the Border Force Officer at the point of import. He did not make full disclosure at that point, and he cooperated only to the extent that he provided an alternative version of events, when prompted, to HMRC.

DECISION

27. We dismiss this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 7 August 2023