



[2022] UKFTT 00029 (TC)

TC 08381/V

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04713

*CUSTOMS DUTY – EXCISE DUTY – civil evasion penalties – passenger in airside transit –
whether appellant dishonest – no – appeal upheld*

BETWEEN

STUART WOOD

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

The hearing took place on 30 July 2021. The hearing was held via the Tribunal video hearing platform, with the appellant attending Manchester Employment Tribunal to use the video facilities there. A face to face hearing was not held because of restrictions arising from the COVID-19 pandemic. I was referred to a hearing bundle of 98 pages, an authorities bundle of 393 pages and the skeleton arguments of the parties.

The Appellant appeared in person.

Mr Metzger, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision by the Respondents (“HMRC”) on 22nd March 2019 to issue the Appellant (“Mr Wood”) with a Customs Civil Evasion Penalty of £667 and an Excise Civil Evasion Penalty of £1,857, in the total sum of £2,524, in relation to the importation of 13,600 cigarettes and 0.5 kg of hand rolling tobacco (“HRT”) seized on 31 January 2018 whilst Mr Wood was transiting airside through Heathrow Airport.

Background

2. On 31 January 2018 Mr Wood arrived at Terminal 3 at Heathrow Airport and transferred to Terminal 5 at the same airport. Mr Wood, and his hold luggage, were checked through to his final destination of Manchester Airport such that the luggage was to be automatically transferred to his onward flight to Manchester rather than collected at Heathrow and re-checked onto the new flight. As Mr Wood was in transit to Manchester airport, he did not need to leave the ‘airside’ parts of Heathrow or pass through the green/red customs channels at Heathrow.

3. Mr Wood was returning to the UK from the Philippines and was carrying 3,600 cigarettes and 500g of hand rolling tobacco as hand luggage, in clear plastic bags. He had purchased this in the duty-free area of Hong Kong airport, another transit point in his journey from the Philippines to Manchester.

4. On arrival at the security checkpoint in the transit area in Terminal 5, Mr Wood placed the bags on the scanner at the checkpoint. He was stopped by the security officer because of the quantity of cigarettes and Border Force officers were called. They arrived approximately thirty minutes later.

5. Mr Wood was asked some preliminary questions. In his replies, Mr Wood stated that he believed that he had to declare excise goods at Manchester. He was advised that hand luggage excise goods had to be declared at the Heathrow transfer point by telephone. Mr Wood replied that he was not aware of this requirement. Mr Wood was then taken to an interview room. His hold luggage was also retrieved and taken to the interview room.

6. Mr Wood was asked what was in his luggage; he replied that one bag had cigarettes and the other had his clothing. His luggage contained a further 10,200 cigarettes. Mr Wood confirmed that he had had cigarettes seized by Border Force on one occasion previously, about four or five years earlier. Mr Wood was cautioned and notes of the interview were written up by Officer Depala. Mr Wood refused to sign the notes. He was advised that the goods would be seized and provided with relevant notices and a warning letter about the seized goods. He was advised that HMRC may take action against him.

7. Mr Wood did not contest the seizure. Mr Wood also did not dispute the evidence as to the number of cigarettes which he was carrying.

8. On 28 January 2019 HMRC advised Mr Wood that they were considering imposing penalties for dishonest evasion of customs duty, import VAT and excise duty, and requested information.

9. On 25 February 2019, Mr Wood wrote to HMRC disputing that his behaviour was dishonest. The letter included information about his international travel, which included seven trips outside the UK in 2017 and 2018.

10. On 22 March 2019, HMRC issued a penalty of £2,524 after a total reduction of 55% in mitigation for disclosure and cooperation. The decision letter included reference to Mr Wood having been stopped in the incorrect customs channel at Heathrow.

11. On 20 April 2019 Mr Wood asked for a review of the decision to impose the penalty, noting that he had not passed through any customs area at Heathrow and that, as far as he was aware, he was still within the tax-free zone at Heathrow when he was stopped.

12. On 12 June 2019, an independent review upheld the decision. The review acknowledged that the decision had incorrectly stated that Mr Wood had been stopped in a customs green channel but concluded that he had not followed correct procedure when he arrived at the security point. The letter stated that he should have declared the cigarettes in his hand luggage by using the “red” telephone at the security point’.

13. On 11 July 2019, Mr Wood appealed to this tribunal.

Relevant law

14. ss78 and 139 Customs and Excise Management Act 1978 provide that a person entering the UK may be required to answer questions concerning their baggage and to produce items for examination. In circumstances where items chargeable with duty or tax are found concealed, these are liable to forfeiture, and as such may be seized or detained.

15. s8 Finance Act 1994, and ss25,29 Finance Act 2003, provide that a person who engages in conduct for the purpose of evading any relevant tax or duty, and the conduct involved dishonesty, shall be liable to a penalty of the amount of duty evaded or sought to be evaded, subject to any reductions that HMRC or the Tribunal may make as they think proper.

16. s16(6) Finance Act 1994, and s33(7) Finance Act 2003, provide that the burden of proof is on HMRC to show that the person acted dishonestly. The standard of proof is the ordinary civil standard of the balance of probabilities (per *Khawaja* [2008] EWHC 1687 (Ch)).

HMRC’s case

17. HMRC noted that Mr Wood was a frequent traveller and has previously had cigarettes seized as being in excess of permitted allowances, so he would then have been informed of relevant requirements. They contended that it was likely that Mr Wood had dishonestly attempted to evade tax and duties on this occasion for a number of reasons.

18. Officer Depala provided a witness statement and gave oral evidence at the hearing for HMRC.

Failure to declare goods in hand luggage

19. HMRC submitted that Mr Wood did not declare the excise goods that he was carrying in his hand luggage before he was stopped.

20. HMRC submitted that there was a clearly signed “red” telephone point at Heathrow which Mr Wood should have used to contact Border Force to declare the cigarettes in his hand luggage and that his failure to do so was a dishonest attempt to evade duties.

Failed to declare goods in hold luggage when asked to do so

21. HMRC contended that, when first questioned by Border Force at the security point, Mr Wood was asked whether he had any excise goods in his hold luggage and replied that he had only clothing in his luggage. Later, in the interview room, Mr Wood stated that one of his bags was full of cigarettes. Officer Depala considered that he had not been mistaken as to Mr Wood’s response when first questioned as to the contents of his bags at the security point.

22. HMRC contended that Mr Wood had changed his answer only because he realised in the interview room that his bags would be searched, and that his initial answer was a dishonest attempt to evade excise duties.

Other submissions

23. HMRC contended that, in correspondence, Mr Wood subsequently attempted to mislead HMRC as to the amount of cigarettes which he had brought in as he stated in a letter that the total was around 9000 cigarettes.

24. HMRC further contended that passengers have a responsibility to make themselves aware of the place and procedure for declaring excise goods on import, and there is signage at regular intervals in place to inform them of the relevant requirements.

Mr Wood's case

25. Mr Wood's case is, in summary, that he knew that he was bringing in cigarettes and tobacco in excess of the allowance and intended to declare all of the goods and pay the relevant duty and VAT. Some of the goods were in his hand luggage, purchased at an earlier transit point in Hong Kong, and some were in his hold luggage. He believed that the correct place to declare the goods was his final destination, Manchester Airport. Although Mr Wood flew regularly, he did not usually take UK connecting flights through Heathrow as he usually flew directly back to Manchester and so was not familiar with the customs processes when in airside transit at UK airports.

26. He had therefore not realised that the tobacco and cigarettes in his hand luggage should be declared when passing through airside transit at Heathrow, and had not seen any signs or other information which would have alerted him to this requirement. There were no customs officers present in the area; it had taken half an hour for the officers to arrive once security had called for them.

27. Mr Wood had placed the clear plastic bags containing the hand luggage cigarettes and tobacco in the security scanner and considered that he could not have done anything else at that point with regard to the cigarettes. He stated that he had not denied the presence of cigarettes in his hold luggage when questioned at the security point. He had been advised by the security guard, during the half hour wait for Border Force to arrive, that his bags would be retrieved and searched. There would therefore have been no point in saying that there were no cigarettes in the hold luggage. He had refused to sign Officer Depala's notes because he did not agree with their contents.

28. Mr Wood also made a number of submissions as to the conduct of the interview and possible reasons for Border Force having recorded the exchange as they did. We have not recorded these further as matters relating to HMRC conduct are outside the jurisdiction of this Tribunal and as such the submissions were not relevant to our decision as to whether or not HMRC have satisfied the burden of proof upon them as to whether Mr Wood dishonestly sought to evade duties.

Discussion

29. The dispute in this case is as to civil evasion penalties, which apply where there has been dishonest conduct by a person seeking to evade tax and duties. The question for the Tribunal to decide is whether Mr Wood dishonestly attempted to evade the duties owed on the cigarettes and tobacco in his luggage.

30. The relevant test of dishonesty to be considered was established in *Barlow Clowes* [2005] UKPC 37 (Lord Hoffmann, at pp 1479-1480), and confirmed by the Supreme Court in *Ivey v Genting Casinos* [2017] UKSC 67 at [62],[74]:

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

Goods in hand luggage

31. HMRC contended that Mr Wood dishonestly failed to declare the cigarettes and tobacco in his hand luggage before he was stopped at security at Heathrow airport. They stated that he should have declared the goods at a red telephone point which was present in the transit corridor.

32. HMRC's description of the relevant telephone point varied. It was submitted to be clearly present when entering the transit area, but Officer Depala's evidence was that it was on a wall on the left of the transit corridor in Terminal 5 through which passengers have to walk to get to a security checkpoint between flights. and that one would have to approach it reasonably closely to read the instructions on it, although the word "Customs" would be visible from further away. No photographs of the area were produced in evidence. Officer Depala stated that the telephone was "genuinely there for people who are looking for it".

33. In the review conclusion letter, which acknowledged that the penalty decision letter had incorrectly stated that Mr Wood had been stopped in a customs channel, the telephone point is referred to as a "red" telephone and states that the telephone is at the security point in the transit area.

34. Given the varying descriptions of the location of this telephone, and Officer Depala's evidence that indicates that a passenger has to be looking for the telephone for it to be clearly available, I consider that this means that the telephone is not as clearly sited and marked as HMRC submit and that it would not be immediately obvious to a person who was unaware of the discrepancy between declarations with regard to hand luggage versus hold luggage when transiting from an international flight to a domestic flight at a UK airport.

35. I note also that, contrary to HMRC's contentions in the hearing and their skeleton argument that signage as to the requirements was in place "at regular intervals", Officer Depala's evidence was only that there was a telephone with instructions that could not be read at distance.

36. Mr Wood's evidence was that he did not see any red telephone at Heathrow, although he also believed that the cigarettes needed to be declared at Manchester. He noted that the Heathrow website stated (as at the date of the hearing) that passengers clear customs at their final destination if, as in his case, their baggage was checked through to that final destination. There was no mention of the need to declare goods in hand luggage.

37. HMRC submitted that Notice 1 makes it clear that declarable goods in hand luggage must be declared when arriving at a UK airport even if in transit to another UK airport. Mr Wood agreed that the Notice states that hand luggage has to be declared but submitted that Notice 1 does not say how or where that declaration should be made. He had put the cigarettes through the scanner where they would be seen by the security officer and submitted that this should be regarded as having been a declaration of the cigarettes to the extent that this was needed.

38. I note that Notice 1 does state at page 14 that goods in hand luggage need to be declared when transferring to a UK domestic, but that there is no specific mention on that page as to how that should be done. In contrast, on page 9 of the Notice, discussing allowances when entering the UK, the reader is advised that they should speak to an officer "in the red channel or on the red point phone" if they are entering the UK with goods over the allowance limit. On page 4 of the notice, the red channel and red telephone point are again mentioned but this is also in a section marked "Going through Customs" and referring to exits at ports and airports.

39. Mr Wood had made no attempt to hide the cigarettes he was carrying as hand luggage, and it was not disputed that these were contained in a clear plastic bag such that it would have been obvious that he was carrying cigarettes which were well in excess of the allowances.

40. I therefore consider that Mr Wood did not intentionally fail to declare the cigarettes and tobacco in his hand luggage at Heathrow as he was not aware that they needed to be declared at Heathrow rather than his final destination, Manchester Airport.

41. On balance, I consider that it would not be clear to a person transferring between flights, who believed that the appropriate point to declare excise goods was at their final destination, that the telephone referred to by HMRC was something which they needed to check to see whether they needed to take any action.

42. Following the test in *Barlow Clowes and others*, the question is whether Mr Wood's mental state in this context would be regarded by the ordinary person as dishonest.

43. I note that this case is, in this context, markedly different to the position where a passenger who knows that they are carrying excise goods in excess of the allowances and fails to see a customs telephone point but then chooses to enter a green channel without attempting to locate customs assistance.

44. I consider that Mr Wood's belief that the place at which his excise goods needed to be declared was Manchester Airport, and his related failure to find and use a customs telephone in the transit corridor at Heathrow when carrying in a clear plastic bag goods which were clearly in excess of permitted allowances, would not be regarded as dishonest by an ordinary person.

Goods in checked luggage

45. Mr Wood stated that he did not deny that he had cigarettes in his checked-in luggage when questioned by Border Force at the security point. He contended that there would have been no point in him doing so when he had been told by the security officer, during the half hour that they were waiting for Border Force to arrive at the security point, that his luggage would be offloaded from the plane and checked. HMRC did not dispute his evidence as to this discussion with the security officer.

46. I note that Mr Wood refused to sign the notes of the interview. Mr Wood stated that he refused because they were inaccurate, and that he had been willing to miss his connecting flight rather than sign inaccurate notes. HMRC contended that he refused because he knew that the notes showed he had been dishonest. No reason for Mr Wood's refusal is recorded in the notes themselves.

47. On balance, I find that Mr Wood did not deny that he had cigarettes in his luggage when initially questioned by Border Force.

48. I consider that it is more likely there was some misunderstanding between Mr Wood and Border Force as to what was being asked and answered in the exchange at the security point. We note that Officer Knox, who counter-signed the notes, was not present when the exchange took place. Another Border Force officer, referred to in Officer Depala's notes as "Officer RF", was present at the security point but was not further identified and did not appear before the Tribunal. That officer did not countersign the notes and apparently was not present in the interview room.

49. In saying this, I should make it clear that I do not find that Officer Depala deliberately recorded the exchange incorrectly. I note that Officer Depala considers that he was not mistaken as to the exchange, but that does not mean that there was no misunderstanding between the participants in the exchange as to what was asked and/or what was answered.

50. It is also clear that the notes were written after the event and the internal timing on the notes indicates that they are not a complete verbatim report. For example, the notes state that the suitcases were passed to Officer Depala at 17:50. The next time statement is 17:55, when Mr Wood was cautioned. The intervening five minutes are recorded as containing only

confirmation by Mr Wood that the luggage was his and an exchange between Officer Depala and Mr Wood as to the contents of the luggage in the form of three short sentences. It seems unlikely that this exchange took five minutes.

Other submissions

51. Although HMRC contend that Mr Wood attempted to mislead HMRC as to the amount of cigarettes in his luggage, I note that this is in reference to a letter written by Mr Wood approximately a year after the seizure, in which he refers to the number of cigarettes as being “around 9000”.

52. Mr Wood’s explanation was that he had been travelling for around 25 hours at the time of the seizure and the letter was written much later, and that he simply did not recall the precise figures when writing the letter.

53. Given that HMRC had the specific details of the seizure and Mr Wood had, according to Officer Depala’s notes, been present when the tobacco was itemised I do not consider that this inaccuracy on Mr Wood’s part can credibly be considered to be an attempt to mislead HMRC. As such, I do not consider that it should be regarded as evidence of dishonesty.

54. I note HMRC’s submissions regarding the general responsibility on the travelling public to be aware of the customs requirements. I do not consider that Mr Wood’s mistake as to the place of declaration for excise goods in hand luggage amounts to dishonesty. Mr Wood did not dispute that he was bringing in cigarettes over the allowance threshold, including goods in his hand luggage in clear plastic bags in excess of that the allowance, and his evidence was that he expected to declare these and those in his hold luggage at the customs point in Manchester.

55. For these reasons, I find that Mr Wood did not dishonestly attempt to evade duty and VAT in respect of the tobacco seized by Border Force.

Conclusion

56. As I have found that Mr Wood did not dishonestly attempt to evade duty in respect of the goods seized, it follows that I find that he is not liable to the civil evasion penalties imposed by HMRC as these penalties apply only where there has been dishonest conduct.

57. The appeal is therefore upheld.

Right to apply for permission to appeal

58. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 20 JANUARY 2022