



Neutral Citation: [2022] UKFTT 00310 (TC)

Case Number: TC08579

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote audio hearing

Appeal reference: TC/2020/03375

CUSTOMS DUTIES - EXCISE DUTIES – civil evasion penalties – appellant stopped in green channel at Heathrow with 6,200 cigarettes and 8 kg rolling tobacco – was this conduct for the purpose of evading duty and did it involve dishonesty? – held: yes – but: penalty reduction by dint of appellant’s co-operation and disclosure after the incident increased from 60% to 80% – appeal allowed in part

**Heard on: 25 July 2022
Judgment date: 27 July 2022**

Before

**JUDGE ZACHARY CITRON
MR MICHAEL BELL**

Between

WILLIAM RAYMOND RUSKE

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Rupert Davies, of counsel, instructed by HM Revenue and Customs’ Solicitor’s Office

FULL WRITTEN STATEMENT OF FINDINGS AND REASONS

INTRODUCTION

1. Mr Ruske appealed against a “joint” (i.e. both customs and excise) civil evasion penalty of £2,214. We gave our decision orally at the end of the hearing, allowing the appeal in part. As the parties agreed to a “short” decision notice (i.e. that it was unnecessary for the decision notice to include full or summary findings of fact and reasons for the decision), we issued a decision notice in the following terms:

“The Tribunal decided to reduce the total penalty imposed on the appellant from £2,214 to £1,107, as the requirements for the penalties were made out on the balance of probabilities but a reduction of 80% was appropriate in light of the Appellant’s conduct upon, and after, being stopped in the green channel at Heathrow on 18 November 2018.”

2. Mr Ruske subsequently applied for full written findings and reasons. This now follows.

THE HEARING

3. With the consent of the parties, the form of the hearing was A (audio) on BT MeetMe. A face to face hearing was not held because of public health concerns at the time of listing. The documents to which we were referred were a hearing bundle of 240 paginated pages and an authorities bundle of 183 paginated pages.

4. 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.

5. We heard oral evidence from Mr Ruske and from Officer Neil Roberts, the HMRC official responsible for raising the penalty.

6. Officer Sara Khan (the officer at the scene when the incident took place) did not attend the hearing. It follows that, where contested, we placed little weight on her evidence.

7. We summarise the evidence, so far as it was contested, and explain our findings of fact based on that evidence, in what follows.

THE PENALTY AND THE APPEAL

8. By letter dated 27 December 2019, HMRC issued a civil evasion penalty in the sum of £2,214, comprised of a customs evasion penalty in the sum of £704 and an excise evasion penalty in the sum of £1,510. In so doing, HMRC applied a 30% reduction for disclosure and a 30% reduction for co-operation.

9. Mr Ruske requested an internal review; this was done and HMRC upheld the penalty by letter of 24 August 2020. On 8 September 2020 Mr Ruske appealed to the tribunal.

LAW

10. Section 8 Finance Act 1994 states (so far as relevant here):

Penalty for evasion of excise duty

(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 any duty of 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.

- (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.
- (6) ...
- (7) ...
- (8) ...

11. Sections 25 and 29 Finance Act 2003 make provision in the same terms as above, relating to excise duty.

12. The Supreme Court in *Ivey v Genting Casinos Ltd t/a Crockfords* [2017] UKSC 67 said (at [62]) that the test of dishonesty was as explained by Lord Hoffmann in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, at pp 1479-1480, as follows:

“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.”

13. The Supreme Court gave this further guidance at [74]:

“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.”

14. The burden of proof in establishing 'conduct involving dishonesty' lies with HMRC as provided under s16(6) Finance Act 1994 in respect of excise duty and s33(7)(a) Finance Act 2003 in respect of customs duty. Otherwise, it is for the appellant to show that the grounds of which the appeal is brought have been established.

15. The standard of proof is the civil standard of the balance of probabilities.

FINDINGS OF FACT BASED ON UNCONTESTED EVIDENCE

16. We make the following findings of fact based on uncontested evidence.

17. Mr Ruske came through the green “nothing to declare” channel at Heathrow airport, on 18 November 2018, with 6,200 cigarettes and 8 kg of rolling tobacco. He had just come off a flight from Nairobi in Kenya, returning from visiting Uganda, where his wife’s family lived (there had been a family funeral). He had bought the cigarettes and tobacco at the airport in Nairobi.

18. 6,200 cigarettes and 8 kg of tobacco was considerably over the legal allowances (as set out in the Travellers’ Allowances Order 1994 (as amended)) of 200 cigarettes or 250g of rolling tobacco. The cigarettes and tobacco were seized under s139 Customs and Excise Management Act 1979 (CEMA) as being liable to forfeiture under s49 CEMA. The legality of seizure was not challenged in the magistrates’ court and so the seizure has been deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

19. At the time of the incident, Mr Ruske was in his late 70s and retired. Although not living with his wife at the time, they were on good terms, and were travelling together. Prior to retirement, Mr Ruske had worked as London black cab driver for many years. He had COPD and emphysema and had stopped smoking. The cigarettes and tobacco were for use by family members and friends.

20. Mr Ruske had visited Uganda fairly regularly over the years, approximately every 3-4 years.

21. About nine years earlier, on returning to the UK on a flight from Uganda, Mr Ruske had been stopped by customs officials in the green lane at the airport, found to be carrying tobacco over the legal limit, and had the tobacco confiscated. This is information Mr Ruske gave HMRC when corresponding with them about the 2018 incident.

22. Mr Ruske was generally open and cooperative in his dealings with HMRC after the incident. The principal reason that HMRC did not apply the “maximum” (80%) discount (per their policies) was that Mr Ruske did not “admit” that he had acted dishonestly. In addition, HMRC were of the view that Mr Ruske could have (but did not) provided a copy of his passport to support the information provided regarding his international travel.

EVIDENCE AS TO MR RUSKE’S RELEVANT STATE OF MIND WHEN ENTERING GREEN CHANNEL ON 18 NOVEMBER 2018 WITH 6,200 CIGARETTES AND 8 KG TOBACCO

23. Mr Ruske’s state of mind when entering the green channel on 18 November 2018 with 6,200 cigarettes and 8 kg tobacco is the key issue in this case. We will make findings of fact on it in the “Reasons” section below. In this section, we summarise the evidence put forward by Mr Ruske as relevant to this issue.

24. Mr Ruske said he had asked a shop assistant at an airport shop selling cigarettes and tobacco about restrictions on bringing tobacco into the UK, and been told that no limitations any longer existed. In his oral evidence, Mr Ruske this shop had been in the airport in Nairobi; in his letter to HMRC of 8 January 2020, Mr Ruske said that shop where he was told this was in Kampala.

25. Mr Ruske said (in his letter of 10 December 2019 to HMRC) that, on the previous occasion, nine years earlier, when he had been caught in the green channel with tobacco over the limit, he had also been misadvised by the duty free department selling the product.

26. In oral evidence, Mr Ruske challenged Officer Khan’s evidence that Officer Khan had interviewed him at airport. Mr Ruske said Officer Khan interviewed his wife; he was interviewed by a male officer. Mr Ruske said in oral evidence that he “voluntarily” “turned

around and came back” to where Officer Khan was speaking to Mr Ruske’s wife – following which, Mr Ruske’s cigarettes and tobacco were seized.

27. Mr Ruske’s oral evidence was that he thought “it had all changed” (as regards limits on tobacco brought in to the UK) since the incident nine years earlier, as he had heard of people going to continental Europe in vans and bringing back large amounts of tobacco products.

REASONS FOR THE DECISION

28. We were satisfied that HMRC made out a *prima facie* case that, by entering the green channel with 6,200 cigarettes and 8 kg of tobacco, Mr Ruske had engaged in conduct for the purpose of evading customs and excise duties, and that his conduct involved dishonesty. Their case was either that Mr Ruske was “subjectively” dishonest because he knew that this quantity of cigarettes and tobacco exceeded the legal limit or if, somewhat remarkably, he genuinely thought that this quantity of cigarettes and tobacco did not exceed any legal limit, his conduct was “objectively” dishonest i.e. dishonest by the standards of ordinary decent people.

29. In his grounds of appeal, Mr Ruske wrote: “Dishonest (NO). Misinformed/trusting/naïve (MAYBE).” In essence, his case was that he honestly believed that the cigarettes and tobacco did not attract duties.

30. In our view, it is improbable that Mr Ruske genuinely believed that bringing in 6,200 cigarettes and 8 kg of tobacco to the UK from Africa incurred no duties. He was a man of reasonable worldliness and competence, having driven a black cab in London for many years, and a seasoned traveller between Uganda and the UK. He had been caught bringing excess tobacco from Uganda through the green lane nine years earlier. It is very improbable that an informal conversation with a shop assistant at an airport tobacco shop – which we accept Mr Ruske had (although the fact that his evidence was inconsistent as to what country it took place in, is indicative of how informal the encounter was) – would have engendered in Mr Ruske a genuine belief that duties no longer applied on tobacco brought in to the UK from Africa.

31. We put little weight on Mr Ruske’s oral evidence that he “voluntarily” returned to the customs officers, who were interviewing his wife, and to his argument that this showed his genuine belief that no duties were due – we think it likely that Mr Ruske’s movements were induced by the knowledge that both he and his wife, as a couple travelling together, were, at that moment, under the close watch of customs officials, and he had no practical chance of “escaping” whilst his wife was being questioned. We find on the balance of probabilities that Mr Ruske did not “voluntarily” surrender himself to the scrutiny of customs officials – he had no practical choice, as he and his wife, as a couple, had been “caught”.

32. We thus find that Mr Ruske did not genuinely believe that the 6,200 cigarettes and 8 kg of tobacco were free of duty – and so, that his conduct, by choosing to go through the green lane, was both for the purpose of evading customs and excise duties, and involved dishonesty in the “subjective” sense.

33. For completeness, we make the finding that, even if we had found Mr Ruske’s conduct not to have been “dishonest” in the subjective sense (because, contrary to our findings, he had genuinely convinced himself that tobacco duties had been abolished), we would nonetheless have found it “dishonest” by the standards of ordinary decent people, since to convince oneself, in Mr Ruske’s circumstances, of something so improbable, was, by those standards, just dishonesty by another name.

34. However, once caught, Mr Ruske was in our view, taking into account his age and state of health, entirely open with HMRC. We do not agree with HMRC’s assessment that Mr Ruske was uncooperative because he did not give HMRC a copy of his passport - we find he would have been happy to do that. Given our findings above as to Mr Ruske’s relevant state of mind,

we obviously agree that Mr Ruske was wrong to resist the penalty on grounds of absence of “dishonesty”. However, we do not think this was in essence driven by a lack of openness or cooperation and, in any case, adopting HMRC’s scheme (of maximum 40% reduction for each of cooperation and disclosure) still leaves Mr Ruske with a 20% penalty, which we consider to be just and reasonable in all the circumstances.

OTHER MATTERS THAT CAME UP IN PROCEEDINGS

35. Mr Ruske provided information, in correspondence with HMRC and in his appeal, relating to his financial circumstances; however, we do not record this information in any detail, or adjudicate upon it, as the law does not allow it to be taken into account.

36. Mr Ruske also said, in correspondence with HMRC and in his appeal, that he had offered to pay the penalty by instalments. We do not make findings of fact on this as mechanics of payment (as opposed to the amount of the penalty) is not an area where the tribunal has jurisdiction.

37. Mr Ruske referred at the hearing to s16(3)(a)(ii) Finance Act 1994; however, this provision does not assist his case, as it describes a situation (not relevant on the facts here) where an appeal will not be entertained by the tribunal.

38. Mr Ruske was unhappy that Officer Khan did not attend the hearing; as explained at the hearing, this weakened Officer Khan’s evidence but did not weaken Mr Ruske’s evidence or his case.

39. Mr Ruske questioned HMRC’s treatment of his wife, who, he said, was also carrying tobacco but did not receive civil evasion penalties. This again is not a matter over which the tribunal had jurisdiction, as this was an appeal against Mr Ruske’s penalty.

CONCLUSION

40. Our conclusion is as stated in the decision notice, as quoted at [1] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

41. 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.

**ZACHARY CITRON
TRIBUNAL JUDGE**

Release date: 27 JULY 2022