



**TC04873**

**Appeal number: TC/2014/05345**

*EXCISE DUTY - Civil Evasion Penalty-admissibility of hearsay evidence - dishonestly engaged in conduct for the purpose of evading duty - appellant liable to penalty – yes – cooperation – no - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GARY RUSSELL**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT  
MEMBER: LESLIE BROWN**

**Sitting in public at Kings Court, Earl Grey Way, North Shields on Monday  
25 January 2016**

**Mr Gary Russell appeared in person**

**Anthony Senior of Counsel, instructed by the General Counsel and Solicitor to  
HM Revenue and Customs, for the Respondents**

## DECISION

### **Introduction and preliminary matters**

5 1. This appeal is against the respondents' ("HMRC") decision to assess the appellant for Excise and Customs Civil Evasion Penalty in the sum of £2,756 comprising £2,187 for evasion of excise duty and £569 for evasion of customs duty. The original Notice of Assessment was sent to the appellant by Officer Dawson of HMRC in a letter dated 28 April 2014. At that stage the total penalty was £2,757 being £2,626 for  
10 evasion of excise duty and £131 for evasion of customs duty. On 14 July 2014 the appellant requested a review and on 7 August 2014, Officer Marshall issued a letter confirming that following review the penalty in the revised amount of £2,756 was upheld.

15 2. The appellant lodged a Notice of Appeal dated 22 September 2014. That appeal is therefore late, however, HMRC offered no objection to the late appeal. We therefore had due regard to Rules 2 and 5 of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and decided that the appeal should be admitted late.

20 3. We also noted that HMRC had sought a variation of the timings in Directions 6 and 7 of the Directions issued by the Tribunal on 6 July 2015 since the Bundles had been delivered to both the Tribunal and the appellant earlier than the specified dates. We formally confirm that the specified deadlines are waived in terms of the Rules and there is deemed to have been full compliance with the Directions by HMRC.

25 4. Mr Russell was not represented and, by his own admission, he was not comfortable with paperwork and formal matters. He had no previous experience of Tribunal procedure and therefore with the consent of Mr Senior we extended considerable latitude to him in terms of the procedure. As an example, Mr Russell had asked very few questions of Officer Bell so Officer Bell was recalled as various issues had arisen in the course of Mr Russell's own evidence.

30 5. We explained to Mr Russell the limitations on the Tribunal's jurisdiction such that the Tribunal could not, and would not, look at HMRC's conduct in regard to various issues such as why two travellers had been interviewed together or why HMRC had not corresponded with him about CCTV evidence. We also pointed out the distinction between HMCTS and HMRC (and their total independence from each  
35 other) since it became evident that Mr Russell had not appreciated the distinction.

6. Lastly, Mr Russell had not complied with Directions 2 and 5 of the Directions issued by the Tribunal in that no witness statement or Skeleton Argument had been lodged. We again had due regard to the Rules and waived those requirements.

### **Background**

40 7. On 31 July 2013 the appellant was stopped at Durham Tees Valley Airport having arrived on a flight from Abu Dhabi via Amsterdam. Two police officers

detained him and those officers requested that a Border Force Officer attend the two passengers from the KLM flight who had been stopped.

5 8. Officer Bell was the only trained officer on duty. Accordingly, a colleague passed that message to him and once he had cleared the flight where he was working at the passport desk he went to the green channel where Mr Russell was standing with the police officers and his luggage (together with the other passenger and his luggage).

9. A search of the appellant's bag had revealed 9,600 Superking cigarettes and 450 grammes of Golden Virginia tobacco. The Officer recorded the formal questions asked at the time and the answers and they read as follows:-

10 "Where have you travelled from?

**Abu Dhabi**

Do you understand the Customs channel?

**Yeah – been stopped before**

Are you aware of your customs allowances outside EU?

15 **Yeah**

There are certain items that are prohibited/restricted to be brought into the UK, such as firearms, explosives, indecent/obscene material and certain food items?

**Yeah – aware?**

20 10. Officer Bell explained to the passengers that he would complete his notebook and offered them the opportunity to wait to confirm his notes. That offer was declined as Mr Russell had his daughter waiting to give him a lift. However, Mr Russell confirmed to the Tribunal that those answers were correct.

11. The cigarettes and tobacco were seized and Officer Bell issued the appellant with a warning letter and public notices.

25 12. Mr Russell has never challenged the lawfulness of the seizure.

### **The grounds of appeal**

13. Prior to the hearing Mr Russell had argued that:-

- 30 (a) It is admitted that the amount of cigarettes imported was over the permissible limits.
- (b) The goods were for personal use.
- (c) He denied dishonesty.
- (d) His primary argument was that he was stopped by the police before entering the green channel at the airport and therefore was not given the option to declare or pay the duty.

(e) He had repeatedly requested sight of the CCTV evidence, and

(f) He argued that the appeal had not been properly considered.

14. At the hearing he argued that:

5 (a) there was no direct evidence as to where he had been stopped since Officer Bell had not seen him when he was stopped. The Police Officers had not been cited to give evidence.

(b) If a passenger offers to pay the “tax” then there is nothing illegal.

(c) He had co-operated because he had given his name and address and therefore the £1 reduction was “ridiculous”.

10 (d) He had made an estimate of the likely duty and had money and a credit card with him so he could have paid the “tax”.

(e) He was never asked if he was capable of answering questions. He was intoxicated after heavy drinking over a period of some 30 hours.

### **HMRC**

15 15. HMRC contend that we can be satisfied on the evidence that Mr Russell was dishonestly intending to evade excise duty and customs duty.

16. It was confirmed that there was no CCTV in either the red or green channel and that any CCTV in the airport, if it existed, was not available to HMRC.

### **The issues**

20 17. The principal issue in the appeal is essentially one of fact as to whether or not there was dishonesty. In this case the cigarettes and tobacco were seized. No assessments to excise duty or customs duty were issued. We are solely concerned with the penalties.

### **The legal framework**

25 18. Section 8 Finance Act 1994 makes provision for HMRC to assess a penalty in relation to evasion of excise duty as follows:

*“(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),*

30 *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.”

5 19. The provisions for penalties in relation to evasion of customs duty are materially identical and contained in sections 25 and 29 Finance Act 2003.

20. The present appeal is made pursuant to section 16 Finance Act 1994. We have full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty if we think it proper to do so, but not on the  
10 grounds of inability to pay.

21. Section 16(6) Finance Act 1994 provides that the burden of proof is on HMRC to establish that Mr Russell has engaged in conduct for the purpose of evading and that his conduct involved dishonesty. Otherwise the burden of proof is on Mr Russell.

22. Mr Russell argued that since the evidence as to where he was stopped was hearsay  
15 evidence it should be excluded as it would be in a criminal court. This is not a criminal court.

23. Although penalties are to be treated as essentially criminal in nature (because of what is loosely described as the Human Rights European Convention) the standard of proof is to the simple civil standard which is on the balance of probabilities, or as we  
20 explained to Mr Russell, what is more likely than not to have happened. The authority for that, to which we were not referred, is *Khawaja v HMRC*<sup>1</sup>.

24. We had due regard to Rule 15(2)(a) of the Rules which reads:

“The Tribunal may-

25 (a) Admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom;...”.

We are very aware that dishonesty is a serious allegation and although the standard of proof does not vary, hearsay evidence is self evidently less persuasive than primary evidence.

25. We decided to admit the evidence of Officer Bell in regard to what he was told by  
30 the police officers and, as can be seen, we weighed it in the balance in the context of all of the other evidence.

### **What is meant by acting “dishonestly”**

26. HMRC relied on the guidance given by the Court of Appeal in *R V Ghosh*<sup>2</sup> where a two-step test for showing dishonesty was set out:-

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<sup>1</sup> 2008 STC 2880

<sup>2</sup> 1982 1 Queens Bench, 1053, CA

5 “In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest ... If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.

10 For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in what they do, because they know that ordinary people would consider these actions to be dishonest.”

15 27. Dishonest should be given its ordinary English meaning, namely “not honestly, trustworthy or sincere”. In the case of *Barlow Clowes International Limited (In Liquidation) & Another v EuroTrust International Limited and Another*<sup>3</sup> 2005 UK PC37 it was held that the test laid down in the earlier case of *Royal Brunei Airlines SDN BHD v Tan*<sup>4</sup> was the correct test and that is summarised as follows:-

20 “... 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. The Court of Appeal held this to be a correct state of the law and their Lordships agree.”

### **The evidence**

25 28. Officer Bell’s evidence was heard first and again last. There was no challenge to Officer Dawson’s evidence.

29. Mr Russell gave evidence at some length.

30. On the basis of the evidence before us and on the balance of probabilities we make the following findings of fact.

### **30 Findings of Fact**

31. Mr Russell has travelled widely over many years and was, and is, well aware of the amount of tobacco products which can be brought into the UK from outwith the EU.

35 32. At the relevant time he was engaged in a six month contract in Abu Dhabi as a scaffolding advisor and inspector. He returned to the UK approximately every 10 weeks.

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<sup>3</sup> 1982 1 Queens Bench, 1053, CA

<sup>4</sup> 1995 2 AC 378

33. Prior to arriving in the UK Mr Russell had ingested a large amount of alcohol (he estimated that he was ten times over the driving limit). That was his usual practice whenever he returned to the UK.
- 5 34. Mr Russell's luggage comprised a large holdall which contained the cigarettes and tobacco and very few personal items. He never carried much clothing or personal items when travelling to and from work.
35. Mr Russell had purchased the cigarettes and tobacco in Abu Dhabi where he had been working.
- 10 36. He had in his holdall 9,600 cigarettes and 450 grammes of tobacco when he entered the UK and he had bought them because they were much cheaper in Abu Dhabi, albeit he could not remember the cost. He was well aware that one reason for the difference in price was the "tax". The quantity of tobacco products was not disputed to be "49 times" the duty free allowance.
- 15 37. The holdall was unpacked in the green channel at the request of the police officers and the tobacco products identified.
38. The police officers told Officer Bell that they had stopped Mr Russell in the green channel. Mr Russell did not make any assertion to Officer Bell that he had not been stopped in the green channel.
39. He engaged in "banter" with the police officers and Officer Bell.
- 20 40. He had been stopped previously at Customs with cigarettes and had decided that he would not pay the "tax" on that occasion as "It was not worth the trouble". He could not remember when that had occurred.
41. On this occasion he did offer to pay the "tax" and did so to both Officer Bell and the police officers. Both had indicated to him that he could not do so because he was  
25 in the green channel.
42. There is no CCTV in the red or green channel.
43. Before he left the green channel Officer Bell told him that the goods would be seized.
- 30 44. Mr Russell signed BOR 162. That carried an explicit paragraph highlighted in bold as **WARNING**. In summary, that said that the goods had been seized, that HMRC might take action including assessments and penalties, and that other agencies might prosecute him etc. He also signed form BOR 156 and both forms were neatly and clearly signed within the designated boxes.
45. The matter was then referred to HMRC for consideration of further action.
- 35 46. On 11 February 2014 Officer Dawson wrote to the appellant informing him of the ongoing investigation and inviting disclosure. A reminder letter was issued on

21 February 2014 and on 19 March 2014 the Officer received a letter from the appellant dated 12 March stating that he had not received the original letter and stating that on receipt of that letter he would take legal advice.

5 47. The duplicate letter was issued on 20 March 2014 giving a further 30 days for a response but there was no response. On 28 April 2014 the decision letter with the Notice of Assessment was issued.

48. The letters were all sent to the address that Mr Russell had given to Officer Bell and which he himself used on his correspondence. The only evidence in regard to an email address was that he had given it to HMCTS not HMRC.

10 49. A letter from Mr Russell dated 5 May 2014 and received by HMRC on 15 May 2014 stated:

(i) He had not entered the green channel at the airport and he requested a copy of the CCTV.

15 (ii) He had never been asked to attend a meeting with HMRC so therefore had not made disclosure.

(iii) He had given information as fast as he could.

(iv) He had answered truthfully and honestly.

(v) He had given the facts.

(vi) He believed that an 80% reduction in the penalty should apply.

20 50. On 20 May 2014, Officer Dawson replied stating that

(i) The information in the hands of HMRC was to the effect that the police had stopped the appellant in the green channel and he had been questioned by a UK Border Force Officer in the green channel.

(ii) When stopped he had 49 times the allowances for excise goods.

25 (iii) Officer Dawson had offered the option for a meeting but had received no offer of meeting nor of disclosure.

(iv) Mr Russell had not replied to the points raised in the original letter of 11 February.

(v) The only communication had been the most recent letter.

30 51. On 3 June 2014 the appellant wrote to Officer Dawson stating that he was content that there should be disposal of the cigarettes but that if there were to be penalties then the CCTV footage should be reviewed and produced at a meeting together with witness statements from the officers in question.

35 52. On 24 June 2014 Officer Dawson replied stating that the appellant had previously been offered the chance to arrange a meeting and he had been advised of the options and at the time of the seizure and he had been given two notices which he had signed.



53. On 31 July 2014 Officer Dawson had amended the penalties to the correct figures of £569 for the Customs Civil Evasion Penalty and £2,187 for the Excise Civil Evasion Penalty. The total penalty was therefore reduced by £1 from £2757 to £2756.

### Discussion

5 54. HMRC argued that Mr Russell's evidence was contradictory and implausible. He certainly did frequently contradict himself. However, there was one aspect on which he was very clear and consistent in his oral evidence and that was that he had offered to pay the tax at the time. (That point had not been made previously). One of the few questions that he initially posed to Officer Bell was to ask him if he had offered to let  
10 Mr Russell pay the tax. The answer was no and we understood that response since they were in the green channel and therefore it was too late.

15 55. Ultimately, when recalled, Officer Bell confirmed that when he had been introducing himself to the two passengers there had indeed been "banter" and Mr Russell had offered to pay the tax and the Officer had said that it was too late, as indeed it was.

56. We also accepted the Officer's very clear evidence on three other aspects, namely that

(a) The police officers told him when he arrived in the green channel that they had detained Mr Russell in the green channel.

20 (b) Mr Russell had not alleged to him that he had not been stopped in the green channel, and

(c) He had paid little attention to the offer to pay tax because most people stopped in the green channel with undeclared goods offered to pay the tax when stopped.

25 57. If we had accepted Mr Russell's account that the police officers had detained him in the baggage hall, that they had taken him into the green channel and that he always intended to pay the tax, then obviously there could be no possible penalty because there would have been no dishonesty.

30 58. However, we had to decide whether or not Mr Russell was a credible witness. Sadly, for him we found that it was very unlikely indeed that the officers would have stopped him before he went into the green channel and that for a number of reasons.

59. Firstly, if that had been the case we would have expected him to have immediately protested to Officer Bell and made that point, particularly whilst the police officers were still present. By his own admission, he did not. Officer Bell was also very clear that he did not.

35 60. We were wholly unpersuaded by his various explanations. One of his suggestions was that he did not say anything because he had had a lot to drink and because it was "easy to rile me" and he just "wanted out". He may well have wanted out but since both he and Officer Bell described the encounter, other than the formal questions,

which are accurately recorded, as “banter”, it seems that whether he had drunk a great deal or not, he handled the interview at the time perfectly competently. He had signed the forms in the boxes (and they were exhibited to him and he did not argue that they were not signed by him) and consented to the seizure. In regard to the alcohol, he pointed out to him that we were well aware of the incidence of workers returning from “dry” countries, after contracts, drinking very large amounts but coping. He confirmed that he drank in the same way every time he returned.

61. We asked why he had never previously mentioned intoxication and he said that he did not know why that had been the case. We accept that he had drunk a large quantity over a long period, as is common in that industry. As he said, however, his conflicting argument was that he had known what he was doing and that he had good recall of what he had said. On balance we accept and prefer the Officer’s view that there was “banter” but that Mr Russell had understood the process.

62. Secondly, in regard to alcohol and also the green channel, his argument was that he had only answered the questions that he was asked and since he was not asked about alcohol or where he was stopped he had not offered any information. That was his choice. It does not explain why alcohol only arose as a possible issue in the course of the hearing.

63. Possibly because of alcohol or perhaps not, he gave us a number of conflicting accounts as to what actually happened at the airport. We tried very hard to ascertain what he recalled and we do accept that it is more than two years ago. However, his account varied between saying that the police officers did not say anything about the tax but that their attitude had made him think that he could not pay it to correcting that when it was read back to him. We find that he probably did offer to the police officers that he would pay the “tax” even although his letter of 14 July asking for a review was argued on the basis that he was not given the option to pay the tax. He certainly made that offer to Officer Bell.

64. We do not accept that he was stopped in the baggage reclaim area and taken to the green channel. His explanation was that the police were probably only looking for contraband...but then they found the tobacco. Any item would only become contraband once the carrier was in the green channel. If the police had taken him into the green channel, then the obvious response would have been to protest and demand to go to the red channel. In any event if the police had done so then they would effectively have been “framing” him. No complaint was ever lodged with the police.

65. Further, there is another far more compelling argument that his account is not accurate. His evidence was to the effect that he had been happy to pay the “tax” because even after payment thereof in the UK the cigarettes would still have been cheaper than buying them in the UK and he estimated that at approximately £2 per pack. That would mean that by not being permitted to go into the red channel he had lost not only the cigarettes but a further £960 being the differential in price. That does not sit well with him being prepared to accept the seizure of the cigarettes if HMRC imposed no penalty. He should have been outraged and taken immediate action. He did not. We do not believe him.

66. Lastly, in that context we simply do not accept his assertion that Officer Bell sent him on his way saying that he would hear nothing more about the matter having consented to the seizure. The Warning letter that he signed for Officer Bell makes it absolutely explicit that further action might well follow.

5 67. We had a similar problem with conflicting evidence in regard to receipt of mail  
and his dealings with HMRC. In summary he told us that his lifestyle was  
disorganised, that he had poor recall of dates and times and that he did not like  
dealing with officialdom and official papers. Initially, his evidence was that he did not  
10 get the original letter because he had a girlfriend who persistently tampered with his  
mail. We then pointed out to him that his letter of 5 May 2014 said that he lived alone.  
(That letter is not accurate in any event since it says that he only got the letter at the  
end of May which is impossible.)

15 68. He went on to say that he could not recall when he got the letter about the  
investigation. Latterly, he said that he had replied to letters “as best I can” and “when my  
head was right” he would deal with mail. In response to our questions he said that he  
had no mental health issues, he just had a complicated life with work and  
relationships.

20 69. We certainly do not think that he could be described as having engaged in any  
meaningful dialogue with HMRC at any stage before the decision in regard to  
penalties had been taken and the appeal rights arose. He did correspond thereafter,  
albeit there is some confusion from his perspective as to the differential between  
HMCTS and HMRC but his then requests for meetings were too little and too late.  
The decision had been taken. In any event those requests were predicated on a wish to  
25 see any CCTV and review statements from the police. He, himself, has still never  
answered the questions posed to him in the HMRC correspondence.

### **Decision**

30 70. In the light of our findings of fact we are satisfied that Mr Russell imported the  
cigarettes and tobacco in his luggage knowing that duty was payable. We are satisfied  
that he went through the green channel with a view to evading duty. He did so  
dishonestly, knowing that it was wrong.

71. Much of the evidence upon which we have based our findings of fact was only  
provided by Mr Russell at the hearing, notwithstanding that HMRC had repeatedly  
requested information in correspondence. Considering all of the circumstances we are  
not satisfied that the penalty should be reduced.

35 72. For the reasons given above we confirm the penalty in the total amended  
amount of £2,756 and dismiss the appeal.

40 73. 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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**ANNE SCOTT  
TRIBUNAL JUDGE**

**RELEASE DATE: 9 FEBRUARY 2016**

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