



TC07797

Customs civil evasion penalty – excise evasion penalty – whether or not the appellant acted dishonestly – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/00815

BETWEEN

BRIAN MUIR

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MR LESLIE BROWN**

Sitting in public at Leeds Magistrates' Court Westgate, Leeds, LS1 3BY on 9 March 2020.

The Appellant appeared without representation.

Miss Kelly Bond, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

A summary decision was issued to the parties on 20 May 2020. A request for a full decision was subsequently received from the Appellant. This is our full decision in this appeal.

DECISION

INTRODUCTION

1. This is an appeal against a customs civil evasion penalty in the sum of £282 (reduced from £353) and an excise evasion penalty in the sum of £834 (reduced from £1,043) pursuant to section 8(1) of the Finance Act 1994 and section 25(1) of the Finance Act 2003.

FINDINGS OF FACT

2. We heard evidence from Officer Rahima Ali (the Officer who first interviewed Mr Muir) and Officer Brent Hands (the decision making Officer) on behalf of HMRC. We also heard evidence from Mr Muir. We make the following findings of fact based upon the evidence and also the documents made available to us at the hearing.

3. On 25 May 2017, Mr Muir and his son arrived at Terminal 1 of Manchester Airport, having travelled from Cuba.

4. Mr Muir was stopped by a Border Force Officer who Mr Muir felt had treated him abruptly and disrespectfully. He was asked to sit at the back of passport control for fifteen minutes. Officer Ali and a colleague then met Mr Muir. Mr Muir said in evidence that Officer Ali and her colleague treated him politely and respectfully.

5. Officer Ali and her colleague took Mr Muir to the carousel to collect his luggage and then took him to an interview room to be interviewed and for his bags to be searched. Officer Ali asked Mr Muir if he had anything to declare. Mr Muir replied, "about 1000 cigarettes that is all." There was some dispute as to whether this discussion took place before going through the green channel and, indeed, whether or not Mr Muir went through any channel at all. We find that the discussion took place before going through the green channel and that, after the discussion, he went through the green channel to be interviewed and for his bags to be searched. We make this finding because Officer Ali was very clear in her evidence as to what happened and as to where the interview room was located, whereas Mr Muir appeared confused as to the layout of the area. Further, this is consistent with the recording in Officer Ali's notebook that she asked, "before you walk through the Green Channel do you have anything to declare?".

6. On searching Mr Muir's bags, Officer Ali found 800 Lucky Strike King size filter cigarettes, 600 Regal cigarettes, 1,400 Lambert & Butler cigarettes, 120 Lambert & Butler non-sealed cigarettes, 600 Superking cigarettes, 100 cigars and 4.9 litres of spirits ("the Goods").

7. Mr Muir said that he wanted to pay the duty on the Goods. However, when Officer Ali told him that it would cost up to a thousand pounds, he said that he would not pay that and left the Goods to be seized, with the exception of his allowance of 200 cigarettes.

8. Forms BOR156, BOR162, Notice 1 and Notice 12A were given to Mr Muir.

9. By a notice of penalty assessment dated 22 May 2018, Officer Hands issued a joint customs civil evasion penalty in the sum of £353 and an excise civil evasion penalty in the sum of £1,043, totalling £1,396 ("the Penalties"). This included no reduction for disclosure or co-operation.

10. By a letter dated 8 July 2018, Mr Muir said that he had not done anything dishonest.

11. The Penalties were reduced by Mr Hands on 17 September 2018 in order to allow reductions of 10% for disclosure and 10% for co-operation. The amounts of the Penalties were therefore reduced to £282 for the customs civil evasion penalty and £834 for the excise civil evasion penalty, totalling £1,116.

12. Mr Muir requested a review of the decision by a letter dated 22 November 2018. He said that he had not done anything wrong, was not given the opportunity to declare the Goods via the red or green channel and that he had been ill.

13. By a letter dated 10 January 2019, HMRC upheld the Penalties on review.

14. Mr Muir lodged a notice of appeal, which was received by the Tribunal on 6 February 2019.

15. To his great credit, Mr Muir made various frank concessions in the course of his oral evidence. Importantly, he accepted that if he had not been caught he would not have declared the Goods. He said that they were for his own personal use and it was “not a big deal.” He said that HMRC’s priority should be to stop drugs damaging the country and that nothing was achieved by pursuing him.

16. Mr Muir also accepted in evidence that he had underdeclared the amount of the Goods when asked. Mr Muir said that it made no difference because he was accepting that he was over the allowances.

17. Mr Muir accepted that he had “broken the rules” as he put it. On being asked whether or not he was aware of the restrictions, Mr Muir responded by saying that he had brought more than 200 cigarettes into the country on previous occasions, albeit not thousands. He said, “Some might say I have brought them in before and got away with it.”

ISSUES

18. Mr Muir’s grounds of appeal stated as follows:

“I was stopped at Manchester Airport (England) – in the passport control section. Asked if I had any cigarettes which I stated that yes. I was stopped by the passport control, then taken with passport officers to reclaim my luggage. I was not given the opportunity to go through custom control to make a claim regarding these cigarettes. I was then take to the search area. I was asked again if I had any cigarettes again I admitted yes that I had cigarettes in my luggage. I told the officers that I was willing to pay the duty due on these cigarettes. They emptied my luggage they told me at the time the duty would be over £1,500. I said that I could not afford to pay such a large amount in duty, I therefore handed over the said cigarettes to the officers. They accepted that I wanted to hand over the cigarettes therefore not bringing any home to my address. 2 year later I have been served with a notice of duty still to pay. After a number of appeals, it has become clear that the officers involved in this matter have lied throughout this appeal.

...

I would like this matter to be dismissed on the grounds that I handed over the cigarettes at the airport.”

19. The following issues arise from the grounds of appeal:

- (1) The legal framework.
- (2) Whether or not Mr Muir acted dishonestly.
- (3) Whether or not Mr Muir was given the opportunity to declare the Goods (and, if not, the ramifications of the same).
- (4) Whether or not the Penalties are proportionate given that the Goods were seized.

(5) The conduct of the Officers.

THE LEGAL FRAMEWORK

20. The legal framework was not in dispute.

21. Sections 8(1) and (4) of the Finance Act 1994 provide as follows:

“8 Penalty for evasion of excise duty

(1) Subject to the following provisions of this section, in any case where -

(a) any person engages in 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.

...

(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.”

22. Section 8 of the Finance Act 1994 was repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 with the exception of the dishonesty penalty, which was preserved by the Schedule 41 (Appointed Day and Transitional Provisions) Order 2009.

23. Sections 25(1) and 29(1)(a) of the Finance Act 2003 provide as follows:

“25 Penalty for evasion

(1) In any case where –

(a) a person engages in any conduct for the purposes of evading any relevant tax or duty, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

...

29 Reduction of penalty under section 25 or 26

(1) Where a person is liable to a penalty under section 25 or 26 –

(a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or 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 previously made by the Commissioners.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are –

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or 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 or any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.”

24. The Travellers’ Allowance Order 1994 provides for the limits for the importation of relevant goods from third countries (whereby a “third country” is defined in relation to relief from excise duties as a place to which Council Directive 92/12/EEC of 25 February 1992 does not apply). The limit for cigarettes is 200.

25. The test for dishonesty has been clarified by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords v Genting* [2017] UKSC 67, unifying the principles for civil and criminal cases. Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) stated as follows at [74]:

“[74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. 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.”

DISHONESTY

26. We find that Mr Muir did act dishonestly. We repeat our factual findings at paragraphs 2 to 17 (and especially 15 to 17) above in this regard. From a subjective perspective, therefore, we find that Mr Muir knew that the Goods were over the allowance, that he was intending not to declare them at all and that when asked he underdeclared them. From an objective perspective, this was dishonest by the standards of ordinary decent people.

DECLARATION

27. As set out above, we find that Mr Muir did have the opportunity to declare the Goods. However, he underdeclared them. In any event, even if he had not had the opportunity to declare the Goods, this would not preclude his conduct from being dishonest.

28. Further, the excise duty point is not dependant upon going through the green channel. In *HMRC v Jacobson* [2018] UKUT 0018 TCC (Zacaroli J and Judge Greg Sinfield), the Upper Tribunal held as follows at [46]:

“[46] There is room for debate as to the precise point that a person entering the UK on a commercial flight *first* holds goods for the purposes of Regulation 13 of the 2010 Regulations. Mr Puzey referred to the decision of the Court of Appeal in *R v Bajwa* [2012] 1 WLR 601 which confirmed at [32], [75] and [89] that the time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port. *Bajwa* shows that the duty point does not require the presence of facilities to make a payment of that duty, for example on board a ship entering the limits of a UK port. Mr Puzey contended that a similar rule applied for aircraft which meant that duty became chargeable when they entered UK air space or, at the latest, when they touched down at a UK airport. We do not have to decide whether one or other of those two events constitutes the excise duty point, however, because it is clear that a person is holding goods in the UK for the purposes of Regulation 13 at the latest by the time they have carried hand-luggage off the aircraft or collected hold-luggage in the terminal. Accordingly, we have no doubt that the excise duty point had occurred in this case before Ms Jacobson reached the green channel.”

PROPORTIONALITY

29. As regards proportionality, we note that in *Staniszewski v HMRC* [2016] UKFTT 128 (TC) (Judge John Brooks) (albeit not binding on us and in any event *obiter*), the First-tier Tribunal stated as follows at [51]:

“With regard to proportionality in relation to excise duty penalties, although, not part of this preliminary hearing, I consider that an analogy can be drawn with the VAT default surcharge regime which has been considered by the Upper Tribunal in *HMRC v Total Technology Limited* [2013] STC 681 and *HMRC v Trinity Mirror plc* (see above) in which the regime itself was held to be fair, or as the Upper Tribunal at [100] of *Total Technology* said:

‘...it does not suffer from any flaw which renders it non-compliant with the principle of proportionality’.”

30. We respectfully agree. As such, it is not disproportionate for the Goods to be seized and for a penalty to be imposed.

THE CONDUCT OF THE BORDER FORCE AND HMRC

31. Mr Muir stated in his grounds for appeal that the Border Force and HMRC had lied throughout. However, even in the hearing, he did not explain what he took issue with. We therefore do not accept this.

32. Mr Muir had also been keen to obtain CCTV footage. No application had been made for this, it is not clear whether any still exists, and it is not clear what Mr Muir sought to achieve from this as the circumstances of his search and interview were not in issue save for in respect of whether or not he went through the green channel and when he was asked whether he had anything to declare (both matters which we have resolved as set out above).

33. It seems that Mr Muir’s main issue with the conduct of the Border Force and HMRC is that he felt that he had been treated badly by the first officer that he met at passport control (notably not Officer Ali or her colleague). We are sympathetic to Mr Muir in this regard. However, this does not affect any of the matters which we have to decide within this appeal.

ADDITIONAL MATTERS

34. For completeness, we note that Mr Muir did not take issue with the level of reductions. If he had, we would not have made any further reductions. This is because he did not make disclosures or co-operate fully prior to the Penalties being made. Crucially, it was only at the hearing that he admitted that he would not have declared the Goods if he had not been stopped and that he had done the same before.

DISPOSITION

35. It follows that we must dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

36. 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.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 3 AUGUST 2020