



[2022] UKFTT 33 (TC)

TC 08385

EXCISE - Importation of hand-rolling tobacco from Gibraltar - Civil Penalties - Whether Appellant dishonest? - Yes, Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/01564

BETWEEN

JOHN MOTTRAM

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Stoke-on-Trent Combined Court Centre on 24 January 2022

No appearance by or on behalf of the Appellant

**Mr James Fraczyk, Counsel, instructed by HM Revenue and Customs' Solicitor's Office
and General Counsel, for the Respondents**

DECISION

SUMMARY

1. I heard this appeal on 24 January 2022 despite the absence of Mr Mottram. For the reasons set out more fully below, I have decided to dismiss his appeal against penalties amounting to £1,288 (an excise civil evasion penalty of £1,032 and a customs civil evasion penalty of £256) imposed on him in a letter dated 10 February 2020 ('the Penalties'). I uphold the Penalties in full.

HEARING IN THE ABSENCE OF MR MOTTRAM

2. The hearing was listed to start, on a face-to-face basis, at 10am. The Court staff placed 'Tannoy' calls for Mr Mottram throughout the court building at 10 and 10.15am. There was no response. I was satisfied that he was not present in the building. There was no information that he had been in touch with the Tribunal, or the Court, to say that he could not attend. Having checked with the Tribunal's administration, I am satisfied that a Notice of Hearing was sent, on 9 November 2021, to the address which Mr Mottram gave HMRC in his letters to them. That Notice of Hearing was not returned to the Tribunal as undelivered. Unfortunately, there was no phone number or email address for Mr Mottram in the papers so no attempt to contact Mr Mottram could be made on the morning.

3. Rule 33 of the Tribunal's Rules (The First-Tier Tribunal (Tax Chamber) Rules 2009) gives me the power to proceed with a hearing in the absence of a party when I am satisfied that they have been given notice of a hearing - I am - and where it is in the interests of justice to do so. I am satisfied as to the latter requirement. Even though this is an appeal in which honesty is in issue, the interests of justice include using the Tribunal's time and resources - both of which are finite - proportionately. This appeal had been listed (very unusually) for a face-to-face hearing, and HMRC had attended, both by counsel and by the assessing officer, Mr Entwistle. Mr Entwistle had travelled from the North-east of England, and had stayed overnight in Stoke. Those were good reasons to proceed. Moreover, it would not have been fair or proportionate to have adjourned the hearing to some unspecified future date when the seizure in question was 3 years ago, and the decision to impose the Penalties was made 2 years ago. There was nothing from Mr Mottram as to why he was not at the hearing, and no evidence to suggest that Mr Mottram would attend any adjourned hearing - ie, no evidence that an adjournment would serve any useful purpose.

THE FACTS

4. I remind myself that this is a penalty appeal, and therefore HMRC bears the burden of establishing that the penalties are due and payable. In the event of disputed fact, the relevant standard of proof is the balance of probabilities - namely, whether something is likelier than not.

5. I find the following facts:

(1) At about 8.20pm on 9 January 2019, Mr Mottram was stopped by Officer Currin in the Green Channel at Terminal 1 of Manchester Airport, having flown to the UK from Gibraltar;

(2) The following exchanges took place, as recorded in the Officer's Note Book:

"Q: Do you have anything to declare to customs?

A: Tobacco

Q: How much?

A: A lot in this bag" (it is recorded that Mr Mottram pointed at a black hold-

all bag)

Later:

Q: Are you aware of your allowances?

A: No

Q: 200 cigarettes or 250g of tobacco

A: I have come from Gibraltar. That's Spain isn't it?

Q: No, it's not part of the EU.

A: Oh, I thought it was."

(3) A baggage search was conducted. Mr Mottram had two bags - the black hold-all referred to above, and a small suitcase which he was still carrying. 11kg of Cutters' Choice hand rolling tobacco was found in his bags.

6. The tobacco was seized as liable to forfeiture. Mr Mottram was given a Seizure Information Notice, which he signed, and a form BOR 156, which he confirmed having received. Mr Mottram did not make any claim in the Magistrates' Court for restoration of the tobacco. The tobacco is now forfeit.

7. Just under a year after the seizure, namely on 6 January 2020, HMRC wrote to Mr Mottram stating that it was enquiring into his customs duty, import VAT and excise duty affairs, and had reason to believe that conduct involving dishonesty may have occurred. HMRC sent Mr Mottram form CC/FS9 ("The Human Rights Act and Penalties") and Notices 160 ("Compliance Checks into indirect tax matters") and 300 ("Customs civil investigation of suspected evasion").

8. By way of a letter dated 12 January 2020, Mr Mottram wrote to HMRC saying that he was willing to help them all he could. In his letter, he made the following points:

(1) He had only been abroad about 5 times in 15 years;

(2) Between January 2018 and January 2020, he had only travelled abroad twice - once to Malaga, and once to Gibraltar (ie., the trip in question);

(3) He had not bought any tobacco in Malaga;

(4) He believed that he was entitled to bring back what he had from Gibraltar;

(5) He had paid tax in Gibraltar 'and as Gibraltar is [an] English colony I thought as long as I paid tax there I was OK';

(6) He was not a smuggler, and not involved in smuggling, and was not trying to evade any tax.

9. On 10 February 2020, HMRC wrote imposing the Penalties.

10. By way of a letter dated 20 February 2020, Mr Mottram asked for a review of the Penalties. He did not provide any further information.

11. At the hearing, I heard evidence from Officer Andrew Entwistle. He confirmed that the contents of his witness statement dated 10 September 2021 were true. In forming a view that the Penalties were appropriate, he had considered the officer's notebook, and Mr Mottram's letter. He had formed the view that Mr Mottram was a regular enough traveller to understand allowances and what they were, and he did not believe that Mr Mottram was being entirely truthful in what he had said to HMRC, both at the time of the seizure, or subsequently.

DISCUSSION

12. I must first determine whether Mr Mottram is liable to the Penalties at all. That is a question of determining whether his conduct involved dishonesty. Secondly, if he is liable, I must go on to consider whether the amount of the Penalties is correct.

DISHONESTY

13. The statutory provisions imposing penalties for evasion of duties are contained in section 8 Finance Act 1994 and section 25 Finance Act 2003. In both cases, the provision is that, in any case where any person engages in any conduct for the purpose of evading duty, and that person's conduct involves dishonesty (whether or not such as to give rise to any criminal liability), then that person shall be liable to a penalty of an amount equal to the amount of the duties evaded or sought to be evaded.

14. The burden of proof of dishonesty lies on HMRC: s 16(6) Finance Act 1994 and s 33(7) Finance Act 2003.

15. The standard of proof is the ordinary civil standard (being the balance of probabilities): *Khawaja v HMRC* [2013] UKUT 0353(TCC).

16. The applicable test for dishonesty was stated by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67 (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."

17. I find that Mr Mottram's conduct in entering the green channel was for the purpose of evading duty, and did involve dishonesty.

18. This is for the following reasons:

19. I am confident that Mr Mottram knew that there were allowances. He had been abroad on a number of occasions (although he does not say where, or what mode of transport he used). On at least one previous occasion, being no more than a year before the seizure, he had flown back into the UK from Spain. On that occasion he will have seen the notices prominently displayed in all UK airports as to allowances. He will have seen notices to the same effect when arriving back from Gibraltar in January 2019. Those all make clear that the allowance for tobacco is 250 grams: see the Travellers' Allowances Order 1994 (SI 1994/955) Table.

20. I find that he knew he should not have been in the green channel. I find that he deliberately chose to enter the 'nothing to declare' channel despite knowing that he was carrying 11kg (equals 24 pounds, or just under two stones) of tobacco. That is not only a substantial amount of tobacco (equivalent to about 1/2 the weight of most short-haul flight luggage allowances) but is also a significant multiple of the amount actually allowed. If the tobacco was in 50g pouches, he was carrying 220 pouches. His allowance was 5 such pouches.

21. Good evidence of Mr Mottram's actual state of knowledge or belief is what is recorded as having been said by him at the time of the seizure. Mr Mottram does not challenge the accuracy of the officer's notebook.

22. Mr Mottram is recorded as volunteering the suggestion to the officer that he thought that Gibraltar was 'Spain'.

23. I do not believe that Mr Mottram - a UK passport holder who lives in the UK, and who had just been to Gibraltar - did genuinely believe that Gibraltar was in Spain. It was not a reasonable belief to hold, especially for someone who had just spent some time there, and indeed had been there only some hours earlier. Regardless of Gibraltar's then-status in relation to the EU (which is something which could potentially have been subject to confusion in January 2019), Gibraltar is not in Spain, and has not been for over 300 years. There is a border with Spain, a prominent British presence, including (not least) a very large Royal Navy base. I find that Mr Mottram was venturing the 'Spain' suggestion tactically, not believing it to be true, but trying to create the inference that tobacco bought in Gibraltar and imported to the UK should be treated identically to tobacco bought in Spain. To be clear, I find that his suggestion that Gibraltar was Spain involved dishonesty on his part in relation to the evasion of duty.

24. This finding is supported by what was said by Mr Mottram in his letter a year or so after the seizure. His account in his letter of January 2020 is materially different from the account which he had given the officer in January 2019. In January 2020, he was seeking to argue that he had paid tax in Gibraltar, and because Gibraltar is an 'English colony' (which I have taken as shorthand for a British Overseas Territory) he thought that as long as he paid tax there, he was 'OK'. But that is not the explanation which he gave Officer Currin when he was stopped, and it is plainly inconsistent with what he told Officer Currin when he was stopped: he can never have believed, at one and the same time, both that Gibraltar was Spain, and that it was 'an English colony'. Mr Mottram's account in January 2020 undermines his earlier account, and itself is supportive of a finding that Mr Mottram's conduct at the time of the seizure was done with the purpose of evading duty, and involved dishonesty.

25. I also find that Mr Mottram initially directed the officer's attention to the black hold-all bag, and not to the suitcase (which also contained tobacco). My finding on this is on balance because the officer's notebook suggests that Mr Mottram said "A lot in this suitcase", but the word "suitcase" is then crossed out and corrected in the notebook by the officer (a correction made at the time) and replaced with 'bag'. What is clear is that when Mr Mottram was asked how much tobacco he had, and let the officer initially believe that it was only in one of the two bags he had with him. He knew that there was tobacco in both bags, but did not say so. The tobacco in the suitcase was only discovered when both bags were searched.

26. Therefore, the Penalties were, in principle, properly and lawfully imposed.

THE AMOUNT OF THE PENALTIES

27. I have the power to consider the amount of the Penalties. I have the power to consider the amount: sections 8(4) of the Finance Act 1994 and section 29 of the Finance Act 2003.

28. HMRC's policy is set out in their Notice 300 "customs civil investigation of suspected evasion":

"3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100% import duties evaded will normally be reduced as follows:

- up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them

- up to 40% - fully embracing and meeting responsibilities under the procedure by, for example; supplying information promptly, providing details of the amounts involved, attending meetings and answering questions

In most cases, therefore, the maximum reduction obtainable will be 80% of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure."

29. HMRC has given a 60% reduction: 30% for disclosure, and 30% for co-operation.

30. I do not see any reason to interfere with those reductions, and indeed Mr Mottram does not ask for them to be increased.

31. Looked at afresh, I consider the 60% reduction to be entirely reasonable. Mr Mottram wrote one short letter to HMRC, and that letter put forward a different explanation than that which he had given to HMRC at the time of the seizure. It is easy to see why the full reduction was not being provided. Mr Mottram was not really giving a truthful explanation, and was not really giving much information at all.

CONCLUSION

32. For the reasons given above, Mr Mottram's appeal is dismissed, and the Penalties are upheld.

RIGHT TO APPLY FOR DECISION TO BE SET ASIDE

33. In certain circumstances, including where a party was not present at a hearing related to the proceedings, the Tribunal may set aside a decision and remake it if the Tribunal considers it is in the interests of justice to do so. A party applying for a decision to be set aside under Rule 38 must make a written application to the Tribunal so that it is received no later than 28 days after the date on which the Tribunal sent notice of the decision to the party.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 01 FEBRUARY 2022