



Neutral Citation: [2023] UKFTT 00367 (TC)

Case Number: TC08789

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2021/11202

*Civil evasion penalty – seized cigarettes – whether taxpayer owned cigarettes – yes – appeal refused*

**Heard on:** 9 February 2023  
**Judgment date:** 12 April 2023

**Before**

**TRIBUNAL JUDGE MCGREGOR  
MICHAEL BELL**

**Between**

**OLADIPUPO ABIJOLA FAGBEWESA**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: Niall Macpherson Mickel of counsel, instructed by Londinium Solicitors

For the Respondents: Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. This is an appeal against a civil evasion penalty issued on 21 June 2021 in the sum of £26,835 charged in relation to cigarettes seized at Heathrow airport in February 2020.

### LATENESS OF APPEAL

2. The Notice of Appeal was submitted to the Tribunal just over a month late, received on 23 September 2021. Explanation for the lateness was given in the Notice of Appeal. The reasons were:

- (1) The conclusion letter, dated 14 July 2021, was not received by Mr Fagbewesa until 14 August 2021 because he had been away in Nigeria caring for his sick mother for a 3 week period from 25 July 2021;
- (2) He works nights and therefore has limited time in the day to seek legal advice;
- (3) He found affordable legal advice on 27 August 2021;
- (4) English is not his first language and he had trouble understanding the procedure.

3. Counsel for HMRC stated that HMRC raise no objection to the allowing of the late appeal.

4. Based on the reasons given and the absence of objection from HMRC, we decided to admit the appeal late.

### EVIDENCE

5. We heard witness evidence from:

- (1) Border Force officer Curtis;
- (2) HMRC officer Crozier; and
- (3) Mr Fagbewesa.

6. All witnesses were cross-examined.

7. We also had a bundle of documents of 178 pages including a number of exhibits to the witness statements.

### LAW

8. Section 8 of Finance Act 1994 (FA 1994) provides for a penalty for the evasion of excise duty as follows (to the extent relevant to this appeal):

“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)-(7)

(8) Where, by reason of conduct falling within subsection (1) above, a person is convicted of an offence, that conduct shall not also give rise to liability to a penalty under this section.”

9. Where a penalty has arisen, section 8(4) provides for the rights of this Tribunal on appeal:

(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.

10. Section 8(5) provides that on appeal we may not take into account insufficiency of funds available to any person for paying any duty of excise or for paying the amount of the penalty, or the fact that there has been no or no significant loss of duty.

11. With regards to customs duty or import VAT civil evasion penalties, section 25 of Finance Act 2003 (FA 2003) provides:

(1) In any case where--

(a) a person engages in any conduct for the purpose 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.

12. Section 25(6) of FA 2003 provides a similar exclusion from penalty where criminal charges are brought.

13. Section 33 of FA 2003 provides:

(1) In subsection (2) that a person who has received a demand notice in relation to a penalty under section 25 may appeal to the Tribunal;

(2) In subsection (6) that this Tribunal has powers to quash or vary a decision and substitute its own decision; and

(3) In subsection (7), that the burden of proof as regards section 25(1) lies on HMRC, but it is otherwise for the appellant to show that the grounds of appeal have been established.

14. Section 29 of FA 2003 provides the Tribunal’s powers on appeal:

- (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 of 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.

#### **SCOPE OF APPEAL**

15. While there had been a number of legal arguments put forward prior to the hearing, by the time of the hearing, the parties had agreed that the core question for us to decide was whether Mr Fagbewesa was the owner of the cigarettes that were seized.
16. For the purposes of this appeal, Mr Carey submitted that HMRC accepted that if we found that the cigarettes did not belong to Mr Fagbewesa, the penalty would fall away.
17. On the other side, for the purposes of this appeal, Mr Macpherson Mickel conceded that if we find that Mr Fagbewesa was the owner of the cigarettes, then the dishonesty automatically follows.
18. Therefore, our findings of fact on the ownership of the cigarettes are determinative of the appeal.

#### **FINDINGS OF BACKGROUND FACT**

19. The core background fact pattern was not in dispute, which was as follows:
  - (1) Mr Fagbewesa was scheduled to return from Lagos, Nigeria to Heathrow Airport, UK on 11 February 2020;
  - (2) The flight was delayed due to bad weather;
  - (3) He finally arrived at Heathrow on 14 February 2020;
  - (4) His bags had not arrived at the same time;
  - (5) On 15 February 2020, Mr Fagbewesa's bags arrived at Heathrow and were checked by the Border Force;
  - (6) Empty bags were returned to Mr Fagbewesa at home on 16 February 2020;
  - (7) On 12 May 2021, HMRC wrote to Mr Fagbewesa seeking information in relation to the seized goods, and noting that they had reason to believe that he had engaged in conduct involving dishonesty;

(8) On 26 May 2021 the Respondents wrote to the Appellant again. The letter stated that the Appellant may be exposed to a penalty in the sum of £28,248.

(9) On 21 June 2021, HMRC issued a Notice of Assessment to the Appellant in the sum of £26,835 pursuant to s 25(1) Finance Act 2003 and s 8(1) Finance Act 1994. The calculation included a 5% reduction for cooperation.

20. We will turn to the disputed facts in our discussion below.

#### **PARTIES ARGUMENTS**

21. Mr Macpherson Mickel submits that:

(1) The bags were outside of Mr Fagbewesa's control from 11 February 2020 when they were checked in at Lagos airport until they were returned to him on 15 February 2020;

(2) Mr Fagbewesa did not put any cigarettes in the bags and they were not in there when he checked in his bags at Lagos airport;

(3) the appellant is being expected to prove a negative;

(4) while his evidence may not be 100% reliable given the effluxion of time (approximately 3 years), he is a credible witness and is very clear that he did not know about the cigarettes;

(5) speculation as to how the cigarettes got into the bags is not relevant to the question; and

(6) HMRC have not met the balance of probabilities burden of showing that Mr Fagbewesa owned the cigarettes.

22. Mr Carey submits that:

(1) The story of not owning the cigarettes has been dreamt up in order to avoid the penalty;

(2) The only potential way in which Mr Fagbewesa's position can be true requires a conspiracy that is implausible in the extreme, namely that persons unknown obtained access to the bags after check in and they, or another accomplice, expected to be able to obtain access to the bags again before Mr Fagbewesa picked up the bags at Heathrow, all on the "fly-side", that is within the secure parts of both airports;

(3) Mr Fagbewesa's evidence is not credible, in particular:

(a) His evidence about what he asked BA to investigate regarding his missing luggage;

(b) The existence and timing of a second letter to HMRC;

(c) The absence of any denials until the amount of the penalty came to light.

#### **DISCUSSION**

23. As noted above, our task is mainly to establish the facts.

24. We heard evidence from Mr Curtis regarding the discovery and seizure of the cigarettes.

25. We also heard evidence from Mr Crozier regarding the timeline in the run up to raising the assessment and his decision-making process for so doing.

26. We found both of these witnesses to be honest, credible and reliable.

27. We also heard evidence from Mr Fagbewesa. We did not find his evidence credible or reliable. There were many inconsistencies in his evidence, both internally within the evidence given at the hearing and externally when compared with evidence provided previously in witness statements and in documentary correspondence with HMRC.

28. We find that when Mr Fagbewesa realised that his bags were not available to collect on 14 February 2020, he approached staff for British Airways (the carrier for his flight) who advised him that he needed to fill out a BOR 1422, being the Border Force form called “Clearance of Missing or Delayed Baggage – Non EU arrivals”.

29. We find that Mr Fagbewesa filled out that form, identifying his 4 black bags. He signed the form immediately under the declaration that reads: “I declare that I have read ‘Bringing goods into the UK from outside the EU’ poster and the warning and that the answers to the questions and the particulars I have given on this form are true and complete’. He also provided his address and telephone number and dated the form. The form did not disclose any cigarettes.

30. We find that on the morning of 15 February 2020, Mr Curtis inspected 4 black holdalls that were unaccompanied. He was handed the BOR 1422 by the member of BA staff who had alerted him to the bags and he matched the bags to the details on the BOR 1422. The luggage tags on the bags included Mr Fagbewesa’s name and the flight number.

31. Having felt the bags, Mr Curtis considered that they contained boxes and decided to investigate further. He opened the bags.

32. There was some dispute about whether the bags were locked and how Mr Curtis had opened them:

- (1) Mr Curtis’ witness statement referred to having opened the padlocks using a key;
- (2) At the hearing, Mr Curtis clarified that he meant that he opened them using the jiggler that Border Force officers carry for the purposes of opening locks on bags – a kind of skeleton key;
- (3) In the skeleton argument for the Appellant, Mr Macpherson Mickel had suggested that the use of a key meant that the keys must have been attached the luggage;
- (4) The written witness statement of Mr Fagbewesa did not mention padlocks or keys at all;
- (5) In evidence given orally at the hearing, Mr Fagbewesa stated that his holdalls were not locked at all and that any padlocks on them were added after he had checked them in in Lagos. He also stated that he had told his solicitor at the beginning that the bags were not locked.

33. We prefer Mr Curtis’ evidence that the bags were padlocked and they were opened by the officer using his skeleton key or jiggler.

34. We accept Mr Curtis’ evidence that the bags contained 61,800 cigarettes. He removed the cigarettes from the bags, moved them into polythene bags and seized them. The bags were then taken into storage. Mr Curtis inserted a form into the holdalls which were then delivered to Mr Fagbewesa as set out above.

35. Mr Fagbewesa’s evidence (in his first witness statement) also confirmed that the bags contained what he described as a “UK customs warning letter saying they found tobacco products in my luggage”.

36. We find that a seizure information notice, accompanied by a Notice 12 A was inserted into the bags delivered to Mr Fagbewesa.

37. The next disputed issue is what Mr Fagbewesa did about his lost luggage:

(1) In his letter of appeal to HMRC dated 2 February 2021, Mr Fagbewesa stated: “I phoned BA customer service and I explained to them the situation of what has happened to my bags. I was told the matter will be investigated and will be resolved. It was after few weeks UK went into national lockdown due to the COVID-19 pandemic. I have attached with this letter, emails evidence I received from British airways airline regarding this matter”.

(2) There were a number of emails attached to that letter, most of which related to the delay to the flight, but one, dated 21 May 2020 is from BA customer services and has a case reference number. The heading is “Thank you, we are on the case”. It proceeds to state: “Thank you for telling us about your issue. We are now directing your case to the appropriate department and you should hear back from us shortly.” What follows are generic statements about customer relations response times and where to find contact details.

(3) In his first witness statement, dated 16 September 2021, he stated that he made “several attempts to contact British Airways about the lost luggage and this notice but no one was contacting me”.

(4) The second witness statement does not refer to any contact with British Airways but a series of emails with British Airways were exhibited to the statement. All of these emails are dated 11 -13 February 2020 and relate to the delay of the flight.

(5) In oral witness evidence, Mr Fagbewesa said that he contacted BA “straight away” after his empty bags were delivered and asked them to investigate where his lost possessions were. He said that BA had stated that they would investigate. He said that he had contacted them since but not had any reply.

(6) In response to later questions during his evidence, Mr Fagbewesa stated that BA had said they didn’t take any responsibility for the contents of the bag. When pressed as to when BA had said this to him, Mr Fagbewesa then said that BA had not in fact said that to him but that this was his view of the matter.

(7) Further, Mr Fagbewesa said that he had expected them to investigate because they sent an email saying that they would investigate. He referred to the email listed in (2) above. When asked if he followed up after that email, Mr Fagbewesa said he had not.

38. This evidence from Mr Fagbewesa was both internally and externally inconsistent. The only external evidence of contact with BA (other than those related to the timing of the flight itself) was an email in May 2020 which does not refer to baggage or the flight number in question. We find that it is probable that Mr Fagbewesa contacted BA once to discuss his lost luggage but that he did not follow up and pursue the contents of his bags.

39. The next matter in dispute is the extent of Mr Fagbewesa’s engagement with HMRC following their opening letter on 12 May 2021.

(1) The evidence in the bundle was:

(a) a copy of the 12 May 2021 letter, which was signed by Mr Fagbewesa and dated 29 May 2021; and

(b) a letter from Mr Fagbewesa, which is dated 2 February 2021 and headed “Letter of Appeal” in which Mr Fagbewesa sets out his position that the cigarettes

are not his and explains the delayed flight. We will refer to this letter as the Reply Letter.

(2) The date of the Reply Letter is uncertain:

(a) It is dated 2 February 2021;

(b) It refers to a letter from HMRC dated 21 June 2021;

(c) In oral evidence, Mr Fagbewesa initially said that the 2 February 2021 date was correct. When it was pointed out that he cannot have written a reply to a letter from HMRC dated 21 June 2021 several months earlier, he said it must have been a typo and must be “after June”. When asked if he thought it should have been 2 February 2022, he said yes. He explained that he was taking his time to reply because he was working and looking after his children and the letter from HMRC had been a shock;

(d) The Notice of Appeal submitted to the Tribunal, which was received on 24 September 2021, included a copy of the Reply Letter;

(e) Mr Crozier’s evidence was that the Reply Letter was received on 7 July 2021;

(f) The letter dated 14 July 2021 from HMRC to Mr Fagbewesa referred to having received a letter on 7 July 2021 and refers to the contents of the Reply Letter.

(3) Additionally, Mr Fagbewesa stated in his oral evidence that he in fact sent two letters to HMRC, with the second letter having been sent in response to the 29 May 2021 letter and before both the letter issuing the penalty on 21 June 2021 and the Reply Letter. He submitted that he typed the first letter himself on his computer. When it was put to him that he could have brought a copy of such a letter if it was on his computer, he said that he could have but he hadn’t.

40. Again, we found Mr Fagbewesa’s evidence to be inconsistent both internally and externally. We find that:

(1) there was no additional letter sent before the penalty was issued; and

(2) the Reply Letter was sent at some point between 21 June 2021 and 7 July 2021.

41. Mr Macpherson Mickel, when cross-examining Mr Crozier, challenged his decision making. He suggested that Mr Crozier had inferred guilt from the absence of a reply from Mr Fagbewesa and had not changed that position following the provision of evidence by Mr Fagbewesa.

42. Mr Crozier accepted that he had made an inference of guilt from the absence of evidence and stood behind this approach. He noted that the evidence provided by Mr Fagbewesa did not change his conclusion because it did not provide any indication that the cigarettes were not his. He also noted that he had given a 5% reduction in penalty mitigation because Mr Fagbewesa had replied to the original letter by sending a signed copy.

43. Finally, we turn to the question of how the cigarettes would have got into the bag if Mr Fagbewesa did not put them there. Mr Carey argued that the alternatives were implausible in the extreme, requiring several people acting in concert within the airline industry in both Lagos and Heathrow in order to have had access to the bags after Mr Fagebwesa had checked them in and before he picked them up at Heathrow. Mr Macpherson Mickel highlighted that the luggage had been outside of Mr Fagbewesa’s control for several days and it was possible that someone else had interfered with the luggage in that time



44. Mr Curtis answered questions about the processes behind the scenes when luggage arrived at Heathrow and Mr Fagbewesa answered questions about the process of luggage checking at Lagos airport. However, apart from what Mr Fagbewesa personally witnessed in the airport itself, neither of them were giving evidence of actual events that they witnessed, but rather their view of their general experience and understanding. While we accept that Mr Curtis was trying to be helpful, he made it clear he was responding outside of his normal work area.

45. We find that third party responsibility for the cigarettes is very unlikely, but possible.

46. As we have noted, we found Mr Fagbewesa's oral evidence to be inconsistent. A period of just shy of three years had elapsed between the flight into the UK and the hearing of the appeal and therefore an element of lost memory is to be expected. However, the inconsistency extended to questions asked with only minutes in between during his oral evidence. He was evasive when being asked questions that would lead to him having to give inconsistent answers and he gave as little information in response to questions as he could. Put simply, we did not believe that he did not own the cigarettes.

47. We find, on the balance of probabilities, that Mr Fagbewesa owned the cigarettes that were seized from his bags. As noted above, having found ownership, dishonesty and liability for the penalty follows automatically.

48. We also find that a reduction of 5% for the amount of co-operation given, being only sending back the signed letter, was a reasonable reduction.

49. Therefore, the penalty stands.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

50. 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.

**ABIGAIL MCGREGOR  
TRIBUNAL JUDGE**

**Release date: 12<sup>th</sup> APRIL 2023**