



Neutral Citation: [2024] UKFTT 00459 (TC)

Case Number: TC09183

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Manchester

Appeal reference: TC/2020/03276

CUSTOMS AND EXCISE DUTY PENALTIES - importation of cigarettes - penalties imposed for conduct involving dishonesty – dishonesty -- appeal allowed

Heard on: 15 February 2024

Judgment date: 30 May 2024

Before

**TRIBUNAL JUDGE NEWSTEAD TAYLOR
MS ANN CHRISTIAN**

Between

MR KEVIN LEONARD MURPHY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Murphy, in person.

For the Respondents: Ms Birtles and Mr Holt, litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal concerns a civil evasion penalty in the sum of £975 (“the Penalty”), issued on 24 June 2020, pursuant to Ss. 8(1) of the Finance Act (‘FA’) 1994 and 25(1) FA 2003, as a result of the Appellant’s allegedly dishonest attempt to evade customs and excise duties on 3 February 2019.

EVIDENCE

2. We were provided with a Hearing Bundle of 417 pages.

3. We heard oral evidence from the Appellant, Officer Entwistle and Officer Dunwoody. All witnesses were cross-examined and answered our questions. We are satisfied that all of the witnesses were doing their best to assist the Tribunal.

(1) As to the Appellant, whilst, in general, he admits to having a ‘shocking’ memory (especially for dates and times), we accept that he has a good recollection of the events in question because they were particularly unusual and therefore memorable for him, especially in light of the Appellant’s health problems preceding the holiday, see below, and the fact that this was the first time the Appellant had brought cigarettes home from a holiday.

(2) As to Officer Dunwoody’s evidence, she admitted that she did not have a complete recollection of events due to the passage of time. There was no evidence that these events were particularly memorable or unusual for her and, consequently, we are not surprised that her recollection, over 5 years later, is incomplete.

(3) As to Officer’s Entwistle’s evidence, we note that when deciding whether or not the Appellant’s conduct involved dishonesty he did not see the customs declaration form BOR1422 allegedly completed by the Appellant. Instead, he relied on Officer Dunwoody’s reference in her notebook to “*No declaration made on customs declaration from – completed by Mr Murphy*”.

4. On the basis of all of the evidence, we make the following findings of fact on the balance of probabilities.

FINDINGS OF FACT

5. The Appellant told us that he suffers from PTSD caused by a life-changing accident that resulted in him being in a coma for 3-days. Following the accident, the Appellant’s mother gave him money for a holiday. HMRC did not challenge this evidence.

6. In January 2019, the Appellant went on holiday to Cambodia. At the time, the Appellant was a heavy smoker, smoking 40 cigarettes a day. Whilst on holiday, the Appellant decided to spend half of the money he had left at the end of the holiday on cigarettes, which were 9p per pack in Cambodia, and save the other half to pay the duty. He bought 5,208 AKA King Size cigarettes (“the Cigarettes”). He did not do any research as to the amount of duty payable. He (mistakenly) thought that the duty, like the price of the cigarettes, would be low and that he would be making a saving. On one occasion the Appellant had brought hand rolled tobacco home from a holiday for a friend, but this was the first time that he had brought cigarettes home.

7. On his return, the Appellant travelled from Phnom Penn to Bangkok to Abu Dhabi to Manchester. On arrival at Manchester Airport, he collected his suitcase and waited for his Nike sportsbag containing the cigarettes (“the Bag”). It was the Appellant’s intention to collect the Bag, go to the red channel, declare the Cigarettes and pay the duty. However, the

Bag did not arrive. The Appellant went to the desk near the carousel to report the Bag missing. He was asked to wait whilst the Bag was located. He waited for 10-15 minutes. He was then told that the Bag was in Abu Dhabi. He provided his name and address. He was not asked what was in the Bag. He did not declare the cigarettes, which were not in his possession at the time, before leaving the airport.

8. It is HMRC's case that it is standard practice for a customs declaration form ("BOR 1422") to be completed in respect of missing luggage. HMRC contends that the Appellant completed a BOR 1422. The Appellant denies this. We accept that Officer Dunwoody saw a BOR 1422 which she used to link the Bag to the Appellant. Officer Dunwoody explained that on a BOR 1422 a traveller can declare, by ticking a 'Yes' box or a 'No' box, if they are carrying goods in excess of their allowances. Where the 'Yes' box is ticked, there is space overleaf to provide the details of the goods. Where the 'No' box is ticked, the BOR 1422 is held by the handling agents. However, Officer Dunwoody could not recall, due to the passage of time, if either the 'Yes' box, 'No' box or neither box was ticked on the BOR 1422 allegedly completed by the Appellant. Further, Officer Dunwoody's evidence was that the BOR 1422 was signed by the Appellant. We have carefully considered this evidence and conclude that Officer Dunwoody is mistaken on the point. We have balanced the Appellant's very clear evidence that he did not complete a BOR 1422 against Officer Dunwoody's incomplete recollection of events, noting that there was no explanation for Officer Dunwoody's ability to recall the signature but not to recall which declaration boxes had been signed. Unfortunately, the BOR 1422 seen by Officer Dunwoody was not provided to the Tribunal because it is no longer in HMRC's possession or control. Accordingly, we were unable to consider the document ourselves. In all of the circumstances, we prefer the evidence of the Appellant on this point. Whilst we are satisfied that a BOR 1422 was completed with the Appellant's name, address and a description of the Bag, we are not satisfied that the form was completed by the Appellant, signed by the Appellant or contained any customs declaration either way.

9. For the avoidance of doubt, in her closing speech Ms Birtles attempted to read to the Tribunal the wording of a BOR 1422. No application had been made to adduce this evidence. In fact, the evidence had closed and both Officers Dunwoody and Entwistle had left. We explained to Ms Birtles that she could not give evidence, even if it was a public document. Also, it was unclear if this was a current version of the BOR 1422 or the version in force in February 2019. The evidential gap created by the missing BOR 1422 was apparent from the outset of the hearing, with both the Tribunal and the Appellant enquiring as to the document's whereabouts. If HMRC wanted to refer to and rely on a specimen BOR 1422 then an application should have been made at the start of the hearing. It wasn't. We considered it prejudicial and contrary to Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to allow HMRC, at this stage and without any or any adequate explanation, to refer to and rely on an unknown BOR 1422.

10. On 3 February 2019, the Bag arrived at Manchester airport from Bangkok via Abu Dhabi and was presented to Border Force for examination. Officer Dunwoody searched the bag and discovered the Cigarettes, which exceeded the personal allowance for a person travelling outside the EU.

11. The Cigarettes were seized. A BOR156 – Seizure Information Notice, BOR 162 – Warning Letter, Notice 1 and Notice 12a were placed inside the Bag. The Bag was returned to the Appellant who became aware of the documents located inside. The Appellant telephoned the number on the letters asking to pay the duty and collect the Cigarettes. He was

told that the Cigarettes had been destroyed. The Appellant did not appeal against the seizure of the cigarettes. He did not think there was any point as the Cigarettes had been destroyed.

12. On 29 January 2020, the Post Detection Audit Team wrote to the Appellant notifying him of their intention to investigate his conduct surrounding the (attempted) smuggling of tobacco into the UK, with a view to establishing whether his conduct was dishonest and therefore whether it was appropriate to issue a penalty. The Appellant was invited to make any disclosures he wished to.

13. On 3 February 2020, the Appellant telephoned and spoke to Officer Roberts. HMRC rely on an attendance note in respect of this call. The Appellant disputes the accuracy of that attendance note. In particular, he denies saying that ‘he never brings back more than his 200 allowance.’ We are satisfied that the Appellant did not say this as the incident in question was the first time that the Appellant had brought cigarettes back from a holiday. However, he accepts stating that he never filled out any paperwork regarding the Bag. He was given a telephone number to call regarding the Bag. He did not get an opportunity to declare the goods as he intended. Following the seizure, the Cigarettes had been destroyed and he never appealed the seizure as he thought this was a waste of time.

14. On 12 February 2020, the Appellant was issued a reminder letter seeking a response to the 29 January 2020 letter by 28 February 2020 (“the Reminder Letter”). We note that in fact the Appellant had responded to the 29 January 2020 letter by telephone on 3 February 2020. The reminder letter stated that the Appellant may be liable to pay £1,951 or more. At this point and for the first time, the Appellant googled the amount of duty payable on the Cigarettes. He was surprised at the answer.

15. On 19 February 2020, the Appellant telephoned and spoke to Officer Crozier. The Appellant referred to the Reminder Letter and asserted that he had responded to that letter by telephone on 3 February 2020. Officer Crozier explained that, as he should have been told but wasn’t, the Appellant had to respond in writing, but could not respond via email.

16. On 24 February 2020, HMRC received the Appellant’s letter dated 20 February 2020. In the letter, the Appellant confirmed that:

- (1) Whilst on holiday, he had decided that he would see how much money he had left at the end of his holiday and spend half on cigarettes and save the rest to pay the duty.
- (2) He doesn’t normally bring cigarettes back home, but as he is a smoker and they were only 9p a pack he decided he would on this occasion.
- (3) When he arrived at Manchester Airport, he was informed that the Bag had not made it onto the flight and that somebody would be in touch.
- (4) The next day the Bag was returned to his home address minus the Cigarettes. There was a note inside. He contacted the Airport to arrange collection of the Cigarettes and pay the duty, but was told this wasn’t an option, so he presumed, even though he was not happy, that this was the end of the matter.

17. On 24 June 2020, Officer Entwistle wrote to the Appellant advising that HMRC considered his actions dishonest and the Penalty had been imposed, consisting of a customs civil evasion penalty in the sum of £209 and an excise civil evasion penalty in the sum of £766. The amount of duty evaded was £1,951. HMRC allowed a reduction of 50% for the Appellant’s disclosure and co-operation.

18. On 26 June 2020, the Appellant telephoned and spoke with Officer Roberts. The Appellant, who was upset, disagreed with the Penalty as he never got the opportunity to

declare the Cigarettes and pay the duty which he fully intended to do. The Appellant indicated that he would appeal to the Tribunal.

19. On 21 July 2020, the Appellant issued the Notice of Appeal.

RELEVANT LEGAL PROVISIONS

20. There was no dispute that the following provisions are those relevant to this appeal.

(I) EXCISE DUTY:

21. Section 8 FA 1994 provides:

“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.

...

(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 FA 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 Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009.

(II) CUSTOMS DUTY:

23. Sections 25(1) and 29(1)(a) FA 2003 provide as follows:

“25 Penalty for evasion

(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.

...

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 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.”

24. S.31 (1) (a) FA 2003 provides a 20-year time limit for a penalty under s.25 (1) FA 2003, albeit in accordance with s.31 (2) FA 2003 “ *A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice..* In this case, the Penalty was issued on 24 June 2020 which is less than 2 years after 3 February 2019. There are no time limits specified in the FA 1994. Accordingly, the Penalty is in time.

25. The Travellers’ Allowance Order 1994 provides limits for the importation of relevant goods from third countries (effectively a non-EU country). As set out above, the limit for tobacco products is 200 cigarettes or 250 grams of smoking tobacco.

26. In *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67, the Supreme Court held that the test of dishonesty is a two-stage test considering subjective and objective elements, 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 factfinder 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.”

27. In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, Lord Nicholls stated, at [106]:

“In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does

an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.”

28. The burden of proof in establishing 'conduct involving dishonesty' lies with HMRC, see s16 (6) of FA 1994 in respect of excise duty and s33(7)(a) of FA 2003 in respect of customs duty and import VAT. The standard of proof is the civil standard of the balance of probabilities, *Bintu Binette Krubally N'diaye* [2015] UKFTT 380.

THE APPELLANT'S POSITION

29. In summary, the Appellant's position is that he never got the opportunity to declare the goods and pay the duty which he fully intended to do. He is particularly aggrieved at being, as he sees it, found guilty of smuggling without a trial, albeit this is not a criminal matter. He also feels bullied by HMRC.

HMRC's POSITION

30. HMRC contend that the Appellant dishonestly attempted to evade import VAT, excise and customs duties, and, accordingly, the Penalty is due. HMRC refer to and rely on the following points:

(1) The Appellant bought 5,208 cigarettes from Bangkok via Abu Dhabi, being 26 times in excess of his personal allowance of 200 cigarettes. The Appellant did not declare the Cigarettes on the BOR 1422 or before leaving Manchester Airport.

(2) Numerous notices posted around Manchester Airport detail personal allowance limits.

(3) Clear unambiguous signage is also present at the entrance to the channels. It is therefore improbable that the Appellant did not know of his personal limits when importing tobacco, or that he should have made a customs declaration on the missing baggage form.

(4) The Appellant was issued with a BOR162 (Warning letter) which explained that the seizure was without prejudice to any other action that HMRC may take including issuing a penalty.

(5) As a person who has been found to have exceeded their personal allowance it is HMRC's standard practice to seize the goods concerned and issue a penalty.

(6) The Respondents contend that as the Appellant dishonestly attempted to evade import VAT, excise and customs duties, a penalty is due under sections 8(1) & 8(4) Finance Act 1994, and Section 25(1) Finance Act 2003.

DECISION

31. We have considered all of the evidence, both oral and documentary, along with the parties helpful submissions.

32. S.8 FA 1994 and s.25 FA 2003 provide 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. Accordingly, the gateway to a penalty under both s.8 FA 1994 and s.25 FA 2003 is dishonesty. Therefore, the question for us is whether or not the Appellant's conduct was dishonest. In determining this question we must apply the test in *Ivey v Genting*.

33. We are satisfied that the Appellant's actions were not dishonest. In reaching this decision we refer to and rely on the following primary points.

34. It was always the Appellant's intention to declare the Cigarettes and pay the duty. He has been consistent on this point since his letter of 20 February 2020. Specifically, he intended to collect the Bag, enter the Red Channel, declare the Cigarettes and pay the duty. He had saved half of his money in order to pay the duty. We accept that this was the first time that he had brought cigarettes back from holiday and that he was simply mistaken as to amount of duty payable. The fact that he was mistaken as to the amount of the duty does not negate his intention.

35. The Bag was mishandled and, consequently, was unavailable for collection on his arrival. He reported the Bag missing. He provided his details. He did not complete a BOR 1422. He did not make any dishonest declaration on a BOR 1422, for example he did not tick the 'No' box on a BOR 1422. He was not asked if he had goods to declare in the Bag. On exiting the Airport, he was entitled to use the Green Channel as he was not carrying any excise goods. HMRC did not provide any evidence of signs at Manchester Airport informing the Appellant of the steps to take to declare goods in mishandled bags. We find that there were no such signs. He left the Airport without the Cigarettes believing that he would declare the Cigarettes and pay the duty on their arrival. This is supported by his telephone call the day after receiving the Bag back, asking to pay the duty and collect the Cigarettes.

36. In all of the circumstances, the subjective test of dishonesty in *Ivey* is not satisfied.

37. In *Blake v The Commissioners for His Majesty's Revenue & Customs* [2023] UKFTT 284 TC ("*Blake*") Judge Hyde considered the case of *William Reed v The Commissioners for Her Majesty's Revenue & Customs* [2018] UKFTT 0749 ("*Reed*"). In *Reed*, Mr Reed was caught importing cigarettes in his hand luggage as he walked through the green channel. However, he had also abandoned, on the luggage carousel, a suitcase containing 10,000 cigarettes which had split open. The Tribunal was satisfied that Mr Reed's conduct involved dishonesty. At paragraphs 84-86 of *Reed*, the Tribunal said:

"84. In relation to the contents in the suitcase, Mr Reed's explanation why he did not collect the suitcase was consistent with the situation he found himself in on clearing customs. Mr Reed could see the officers on duty at the customs channel; he could see that the suitcase had become damaged and being tied up in string; he could see that the contents of the suitcase had become visible from the damage. It was plain to him that if he had taken the damaged suitcase with the exposed contents down the green channel, he would have been intercepted.

85. The subjective element we take into consideration includes: (i) Mr Reed is a regular traveller to Tenerife; (ii) he is aware of the duty-free allowance for cigarettes, (iii) he knew he was carrying excess in the suitcase and hand luggage; (iv) he knew duty was payable as he said he could not afford to pay it; (v) he understood the significance of choosing the green channel to clear customs.

86. By ordinary standards, Mr Reed's behaviour would be characterised as dishonest. HMRC have met the burden of proof required in establishing dishonesty on the balance of probabilities for the penalties to be imposable."

38. The facts in *Blake* were not dissimilar to *Reed*. Mr Blake also intended to bring the cigarettes through the green channel. However, he was stopped by Border Force before entering the Green Channel. Notably, at the point he was stopped he could still have decided to declare the goods. The Tribunal in *Blake* respectfully disagreed with *Reed*. At paragraph 76 of *Blake*, the Tribunal said:

“76. Whilst not bound by William Reed, we are reluctant to disagree with the Tribunal’s reasoning by such a respected panel. Nevertheless, we have difficulty accepting that the Appellant’s conduct up to the point of being challenged by Mr Ford amounted to conduct involving dishonesty. The Appellant intended to evade duties but at the point he was challenged his conduct (stripping away the history of evasion and his intention), was entirely consistent with declaring the goods. His conduct at the relevant point included intended dishonesty rather than actual dishonesty. Imposing penalties at this point appears to us to be bringing forward the point of liability to include intention, rather like criminalising a shoplifter who carries goods openly but puts the goods back when challenged by the security guard before leaving the store. If intention prior to entering the green channel is the test to be applied then the limits of the penalty are unclear.”

39. We are not bound by either *Reed* or *Blake*. We agree with Judge Hyde’s points at *Blake* §77. However, in contrast with both *Reed* and *Blake*, in this case the Appellant did not intend to evade duty. He always intended to declare the Cigarettes and pay the duty. He was not asked about the contents of the Bag when reporting it missing. He did not complete a BOR 1422 and, consequently, did not make any dishonest declaration. At the point of leaving the airport, he was not carrying the Cigarettes, which remained in Abu Dhabi. On receipt of the Bag minus the Cigarettes, the Appellant telephoned to pay the duty and collect the Cigarettes. In *Blake*, Mr Blake was carrying the excise goods in question, in the baggage reclaim area. His conduct was held not to be dishonest because, in essence, he was deprived of the opportunity of declaring the goods by being confronted before entering the green channel. On the facts of this appeal, we consider that the Appellant was similarly deprived of the opportunity of declaring the Cigarettes prior to their seizure.

40. In all the circumstances, we do not consider that the Appellant’s conduct was dishonest by the objective standards of ordinary decent people. Therefore, the condition for imposing the Penalty, namely ‘conduct involving dishonesty’, has not be met and the appeal is allowed. We also wish to express a note of concern with paragraph 31 of HMRC’s Statement of Case stating *“As a person who has been found to have exceeded their personal allowance it is HMRC’s standard practice to seize the goods concerned and issue a penalty.”* The issuing of a penalty is not a matter of standard practice. It is dependent upon establishing ‘conduct involving dishonesty’ which requires careful consideration prior to issuing a penalty.

41. For the avoidance of doubt, if we are wrong and the Appellant’s conduct was dishonest, we consider that the 50% reduction given by HMRC is reasonable considering the disclosure and co-operation provided by the Appellant.

CONCLUSION

42. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

JENNIFER NEWSTEAD TAYLOR

TRIBUNAL JUDGE

Release date: 30th MAY 2024