



Neutral Citation: [2022] UKFTT 00212 (TC)

Case Number: TC08535

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal references: TC/2020/1239
TC/2020/1240

CUSTOMS and EXCISE – civil evasion penalties – whether Appellants were stopped in the green channel – whether Appellants acted dishonestly – appeals refused and decisions upheld

Judgment date: 11 May 2022

Decided by:

TRIBUNAL JUDGE ANNE REDSTON

Between

**NICOLA MCQUEEN
SUSAN ELIZABETH HARRIS**

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

The Tribunal determined the appeals on 5 May 2022 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. All parties consented to the appeals being determined in this way and the Tribunal considered that it was in the interests of justice to do so.

The Tribunal decided the appeals having first read the Notices of Appeal dated 6 March 2020 (with enclosures) and HMRC’s Statement of Case dated 14 July 2020 together with a Bundle prepared by HMRC, which included the letters from the Appellants to HMRC dated 3 December 2019 and 2 January 2020.

DECISION

INTRODUCTION

1. In November 2018, Mrs Harris and her daughter Ms McQueen returned to the UK from a holiday in the Gran Canaries. Their bags were searched at Gatwick by Officer Kirkpatrick who seized 5,880 cigarettes and 250g of hand rolling tobacco (“HRT”) as being in excess of their personal allowances.
2. On 18 December 2019, HM Revenue & Customs (“HMRC”) issued Mrs Harris with civil evasion penalties of £564, and on the following day, they issued Ms McQueen with penalties of the same amount. Mrs Harris and Ms McQueen appealed to the Tribunal against the penalties.
3. For the reasons summarised below, I agreed with HMRC and confirmed the penalties. On 13 May 2022 I issued a summary decision dismissing the appeals. The Appellants applied for a full decision, and this is that decision.

THE EVIDENCE

4. The Tribunal was provided with a Bundle which included the documents set out on the frontispiece of this decision. On the basis of the evidence within the Bundle, the Tribunal made the findings of fact below.

FINDINGS OF FACT

5. On 5 November 2018, the Appellants went to Gran Canaries for a holiday. They had both been there twice previously within the last few years. Before she left the UK, Ms McQueen was approached by a work colleague who asked her to buy 2,940 cigarettes and 250g of HRT. She was initially reluctant, but agreed after he said he was not going to sell the goods. He provided Ms McQueen with the money and it was agreed she would not make a profit on the transaction.
6. Once in Gran Canaries, the Appellants purchased 2,940 cigarettes for Mrs Harris, plus a further 2,940 cigarettes and 250 grams of HRT for Ms McQueen’s work colleague and packed them with their clothes in their suitcases. They arrived at Gatwick on 12 November 2018.
7. Officer Kirkpatrick was on duty at Gatwick when their plane landed, and was conducting examinations of baggage in the drop-off area, ie before the baggage had been collected by the passengers. At 20.35 he found a bag which “indicated the passenger may be carrying excess revenue goods, namely cigarettes”.

The conflicting evidence

8. The evidence as to what happened next is disputed. The Appellants’ evidence is as follows:
 - (1) they initially believed that as Gran Canaries was part of Spain, the personal allowance limits for non-EU countries did not apply. They also believed that as Ms McQueen was not making a profit, the importation was not commercial. For those two reasons they believed they could import the cigarettes and HRT without paying any tax or duties;
 - (2) on the flight back the Appellants began to have doubts about whether this was right, and decided to enter the red channel and ask a customs officer about the position;
 - (3) they collected their luggage from the carousel, but before they could enter a channel they were stopped by Officer Kirkpatrick. They told him they had cigarettes to declare. He took them to the “customs channel” where they opened their cases and showed him the cigarettes and HRT.

9. Officer Kirkpatrick's evidence is that he stopped the Appellants in the green channel at 20.50 as he recognised one of the bags they were carrying. They were asked if they were carrying anything on behalf of anyone else, and they said no. The Appellants confirmed they were aware they were in the green channel and initially stated they had no goods to declare, but later said they did not know their allowances. Officer Kirkpatrick explained their allowances and the Appellants then admitted to having excess goods.

10. In deciding who was correct I took into account the following factors:

(1) The Appellants had travelled to Gran Canarias twice before, which makes it more likely that they knew it was not part of the EU.

(2) Officer Kirkpatrick wrote up his notebook on 12 November 2018, just after the seizure, and long before HMRC made their decision to impose penalties.

(3) In their evidence, the Appellants do not deny they were asked the questions set out in Officer Kirkpatrick's Notebook. The part of the Notebook with which they disagree is his statement that they were stopped in the green channel and not in the baggage hall.

(4) One of the questions Officer Kirkpatrick asked the Appellants was whether they were carrying goods for someone else, and they did not tell Officer Kirkpatrick they were carrying half the cigarettes and all the HRT for a friend at Ms McQueen's workplace. This fact only emerged in later correspondence with HMRC.

(5) Officer Kirkpatrick's Notebook also records that he first asked the Appellants if they had goods to declare and they said no. It was only after he asked them if they knew the permitted allowance that they accepted they had exceeded those allowances. The Appellants' account of this conversation does not say that they were asked whether they had goods to declare.

(6) The Appellants were not asked to sign Officer Kirkpatrick's notebook.

11. I have to decide who is telling the truth about this encounter. I take into account that the Appellants did not tell the truth when asked if they were carrying the goods for someone else. In addition, Officer Kirkpatrick's record of what happened was written up immediately afterwards, and it is therefore likely he had a clear memory of the questions he asked, and the replies which were given. The Appellants have also not denied that Officer Kirkpatrick asked the questions listed in his Notebook, and he would not have needed to ask if the Appellants had goods to declare if they had told him about the cigarettes and HRT immediately they were stopped.

12. Taking into account all the evidence and having assessed its credibility, I find Officer Kirkpatrick's account of the events at the airport to be more reliable, and I find it to be factually correct.

The seizure and the penalties

13. Officer Kirkpatrick seized the 5,880 cigarettes and 250g of HRT as being in excess of the Appellants' allowances, and issued them with Notices 1, 12A, BOR156 (seizure information notices) and BOR162 (warning letters); the latter two were signed by Ms McQueen.

14. On 11 November 2019, Officer Reed of HMRC wrote to each of the Appellants saying an investigation was being opened into whether to charge them with civil evasion penalties, and asking for a response within 30 days; the Appellants replied on 9 December 2019.

15. On 18 December 2019, HMRC issued each Appellant with customs penalty of £127, reduced from a possible maximum of £284, and an excise penalty of £437, reduced from a

possible maximum of £973; the total penalties charged to each Appellant were thus £564. The reduction stood into account both the extent of the Appellants' disclosure and their co-operation. The Appellants appealed the penalties to the Tribunal.

THE LAW

16. The legislation set out below is cited only so far as relevant to the issues in this appeal.

Excise duty

17. Chapter II of Part I of the Finance Act ("FA") 1994 is headed "Appeals and Penalties." Section 8 comes under subheading "civil penalties" and so far as relevant to this decision reads as follows:

"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)-(3)...

(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..."

18. FA 1994 s 16(6) provides that the burden of proving dishonesty rests with HMRC.

Customs duty and import VAT

19. FA 2003 s 25(1) provides that where a person has engaged "in any conduct for the purpose of evading" customs duty and/or import VAT and that conduct involves dishonesty, that person is liable to penalties up to the value of the duty or VAT evaded. FA 2003 s 33(7)(b) provides that the burden of proving dishonesty lies with HMRC.

The test for dishonesty

20. A civil evasion penalty can only be levied if a person has behaved dishonestly. The legal test for dishonesty was clarified by the Supreme Court in *Ivey v Genting* [2017] UKSC 67, and is as follows:

"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."

21. The standard of proof is the civil standard, being the balance of probabilities.

THE TRIBUNAL'S VIEW

22. I have found as facts that the Appellants:

- (1) entered the green channel with cigarettes and HRT very significantly in excess of their personal allowances;
- (2) when questioned by Officer Kirkpatrick, initially said they had no goods to declare; and
- (3) stated that they were not carrying goods for another person, when they knew that was not true.

23. I agree with HMRC that this is conduct which by the standards of ordinary decent people would be regarded as dishonest, and thus that the Appellants are liable to civil evasion penalties. I considered the amount of the reduction to those penalties, from £1,257 to £564 and find that the reductions are appropriate.

24. I therefore confirm HMRC's decisions and refuse the Appellants' appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

25. 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.

**ANNE REDSTON
TRIBUNAL JUDGE**

Release date: 11 JULY 2022

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 8 July 2022.