



TC07361

Appeal number: TC/2018/01987

EXCISE DUTY – penalties – section 8 Finance Act 1994 and section 25 Finance Act 2003 – importing tobacco and cigarettes without payment of duty – dishonestly seeking to evade duty – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TREVOR GEORGE BAILLIE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JONATHAN CANNAN
 MR IAN ABRAMS**

Sitting in public in Manchester on 24 July 2019

Mr Baillie appeared in person

Ms Kelly Bond of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

Background

1. On 7 February 2017 Mr Baillie was stopped at Manchester Airport having
5 arrived on a flight from Goa. He was found to be carrying 5,200 cigarettes and 600g
of hand rolling tobacco in his luggage (“the Goods”). The Goods were seized on the
basis that Mr Baillie had exceeded the duty-free allowance for cigarettes and tobacco
imported from a third country, he had entered the green channel indicating that he had
no excise goods to declare and duty had not been paid. Mr Baillie did not challenge
10 the lawfulness of the seizure.

2. Following correspondence, on 9 January 2018 a civil evasion penalty
assessment was issued to Mr Baillie in the sum of £854 (“the Penalty”). This
comprised £698 for evasion of excise duty and £156 for evasion of customs duty. The
Penalty was issued on the basis that Mr Baillie had engaged in conduct involving
15 dishonesty for the purpose of evading duty.

3. Mr Baillie has not been assessed to excise duty or customs duty on the Goods.
The total amount of duty which would have been payable on the Goods was £1,709.
The maximum penalty was 100% of the total duty sought to be evaded but after a
reduction of 50% to reflect disclosure and co-operation in HMRC’s enquiries the
20 Penalty was assessed at 50% of the total duty.

4. In this appeal Mr Baillie challenges the Penalty. His case, set out in
correspondence leading up to the appeal, the notice of appeal and his evidence to us is
essentially as follows:

25 (1) The cigarettes were intended as gifts for his family, the tobacco was for
his own use.

(2) Some of the tobacco had been purchased at Manchester Airport on the
outward leg of his journey.

(3) He was not aware that there was any limit on cigarettes and tobacco
imported for personal use.

30 (4) He was stopped before entering the green channel.

(5) He had no intention of evading duty and had not acted dishonestly.

5. HMRC contend that we can be satisfied on the evidence that Mr Baillie was
dishonestly intending to evade excise duty and customs duty.

6. We can set out the legal background relatively briefly. Travellers arriving in the
35 UK from third countries outside the EU are relieved from excise duty, customs duty
and VAT (recoverable as customs duty) on up to 200 cigarettes or 250g of tobacco (or
a combination of the two) which are not being imported for a commercial purpose.
Where goods in excess of that limit are imported and no duty is paid then the goods
can be seized. There is also provision for excise duty and customs duty to be assessed
40 and for a penalty to be assessed.

7. Excise goods such as cigarettes and tobacco can be purchased duty-free at Manchester Airport where the traveller is travelling to a destination outside the EU. If those goods are subsequently imported into the UK then duty is payable on them in the ordinary course, subject to the applicable duty-free allowances.

5 8. In this case the Goods were seized but no assessments to excise duty or customs duty were issued. We are solely concerned with the Penalty.

9. *Section 8 Finance Act 1994* makes provision for HMRC to assess a penalty in relation to evasion of excise duty as follows:

- 10 “(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),
- 15 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—
- 20 (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
- 25 reduction made by the Commissioners.
- (5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—
- 30 (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;
- (b) the fact that there has, in the case in question or in that case taken with any
- 35 other cases, been no or no significant loss of duty.”

10. The provisions for penalties in relation to evasion of customs duty are not materially different. They are contained in *sections 25 and 29 Finance Act 2003*.

40 11. The test for dishonesty is that set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. It is an objective test by reference to the standards of ordinary decent people. The test was described by the Court as follows:

45 “74 ...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

5 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.”

12. This appeal is made pursuant to *s16 Finance Act 1994* and *s33 Finance Act 2003*. We have full jurisdiction to consider whether the penalty has been properly imposed and we also have jurisdiction to reduce the penalty to any amount we think proper if we think there are grounds to do so, but not on the grounds of inability to pay.

13. The burden of proof is on HMRC to establish that Mr Baillie engaged in conduct for the purpose of evading duty and that his conduct involved dishonesty. Otherwise the burden of proof is on Mr Baillie.

14. We had witness statements from Mr Adrian Ford and Mr Lee Crozier. Officer Ford is a Border Force officer who stopped and interviewed Mr Baillie at Manchester Airport. Mr Crozier is the HMRC officer who enquired into the circumstances of the importation and who issued the Penalty to Mr Baillie. We heard oral evidence from both those witnesses.

15. Mr Baillie gave oral evidence before us.

Findings of Fact

16. HMRC’s case on dishonesty is that Mr Baillie had 5,200 cigarettes and 600g of tobacco in his luggage and went through the green “nothing to declare” channel at Manchester Airport. He did so despite the fact that there was considerable signage between disembarking the aircraft and entering the customs channel which identifies the duty-free allowances for importing cigarettes and tobacco from countries outside the EU. HMRC rely on the substantial quantity of cigarettes and tobacco being imported, that Mr Baillie was an experienced traveller, made no attempt to check the duty-free allowances and that he told Officer Ford that he understood the duty-free allowances. We are invited to infer that Mr Baillie knew that the Goods he was importing were in excess of the duty-free allowance and/or he knew that he was required to declare and pay duty on the Goods. In those circumstances we are invited to find that Mr Baillie was dishonestly seeking to evade duty when he passed through the green channel.

17. The principal issue on the appeal is essentially one of fact. We must make findings as to Mr Baillie’s knowledge. In particular, whether he was aware that he was required to declare and pay duty on the Goods. In the light of our findings as to Mr Baillie’s knowledge, we must then consider whether his conduct was dishonest by reference to the standards of ordinary decent people.

18. On the basis of the evidence before us and on the balance of probabilities we make the following findings of fact.

19. Mr Baillie was 59 years of age at the time of his trip to Goa, which he made together with his partner, Rita. He has three sons and a daughter aged between 20 and 41. At the time of seizure Officer Ford assumed that Rita was Mr Baillie's wife. In fact, they are not married but nothing turns on that for present purposes.

20. Mr Baillie told us that his children paid for he and Rita to have a holiday in Goa for his birthday. His evidence was that he is a heavy smoker and smokes approximately 3 × 50g pouches of hand rolling tobacco a week. When he was at Manchester Airport he purchased 10 × 50g pouches of Golden Virginia tobacco which he took to Goa. Whilst in Goa Mr Baillie said that he had purchased about 6 x 50g pouches of Drum tobacco. Golden Virginia is stronger than Drum and he would generally mix 2/3^{ds} Golden Virginia to 1/3rd Drum. The cigarettes were purchased in India and at Doha during a stopover on the flight back. The tobacco was for his own use and the cigarettes were intended as gifts for his children as a "thank you" for arranging the holiday.

21. Mr Baillie stated in correspondence that he was stopped at Manchester Airport before entering the green channel. On his own case he was intending to enter the green channel because he did not realise duty was payable on the Goods. Officer Ford's evidence was that Mr Baillie was stopped only after he had entered the green channel. We accept Officer Ford's evidence on this matter. It is not credible that Officer Ford would have stopped Mr Baillie before he made his declaration of nothing to declare by entering the green channel.

22. We accept Officer Ford's evidence that there is clear signage explaining travellers' duty-free allowances on cigarettes and tobacco being brought into the UK from outside the EU. There are signs at the baggage carousels and there is also a red telephone at the side of the green channel for travellers to make enquiries before entering the green channel.

23. Officer Ford's notebook entry for his interview with Mr Baillie is what he described as an "abbreviated" note. It was written up when Officer Ford returned to his office after the Goods had been seized and after Mr Baillie had left the green channel. The note states:

"Baggage, P + R, allowance questions asked and understood."

24. In his witness statement Officer Ford set out the questions in full. We accept that they are standard questions asked of all passengers and that Mr Baillie was asked those questions. They included whether Mr Baillie packed his own bags and was aware of the contents, whether he was aware of the prohibitions and restrictions on importing drugs, weapons and certain other items. For present purposes the two relevant questions were as follows:

"Do you understand you are in the green nothing to declare channel?"

Do you understand your duty-free allowances on cigarettes tobacco and alcohol?"

25. Officer Ford told us that Mr Baillie answered these questions "in the affirmative". In other words, he told Officer Ford that he understood he was in the green nothing to declare channel and he understood his duty-free allowances on cigarettes and tobacco.

26. Mr Baillie's account of the interview was significantly different. His evidence was that he told Officer Ford that he did not know about any duty-free allowances. When Officer Ford then pointed out the existence of signs setting out the allowances he told Officer Ford that he did not know about the signs. We do not accept Mr Baillie's evidence. If Mr Baillie had told Officer Ford that he did not know about any duty-free allowances then we are satisfied that Officer Ford would have included that response in his notebook, even though it was an abbreviated note.

27. We accept Officer Ford's evidence that Mr Baillie confirmed that he understood the duty-free allowances. However, that does not establish that Mr Baillie was correct in his understanding of the allowances. Mr Baillie's told us that he understood there was no limit on cigarettes and tobacco which were being imported for personal use, including as gifts for family members. We return to that evidence below.

28. Officer Ford fairly acknowledged that he had no recollection of stopping Mr Baillie or of his interview with Mr Baillie. He relied solely on his notebook entry. Officer Ford told us that he "assumed" Mr Baillie understood that the duty-free allowance was 200 cigarettes or 250g of tobacco.

29. Mr Baillie said for the first time in his oral evidence that he only had 150g of Golden Virginia tobacco left by the time he returned to Manchester Airport and that is what was seized by Officer Ford. It is clear from the seizure information notice and Officer Ford's evidence that 600g of tobacco were seized from Mr Baillie. We accept Officer Ford's evidence in this regard.

30. The difference between 150g (3 pouches) and 600g (12 pouches) is large. It is notable that Mr Baillie did not question the discrepancy prior to the hearing of the appeal. In the circumstances it is difficult to see how Mr Baillie could have been genuinely mistaken in his evidence to us as to the amount of tobacco seized.

31. Mr Baillie was in India for 4 weeks. Smoking at the rate of approximately 150g per week he would use 600g whilst in India. If he purchased 500g of Golden Virginia tobacco at Manchester Airport and 300g of Drum tobacco in India then he would have 200g left on his return to Manchester. However, we are satisfied that he had at least 600g left on his return to Manchester. Mr Baillie was unable to offer any explanation for this difference.

32. Mr Baillie also said that he had 1 x 50g pouch of Drum tobacco in a bum bag which Officer Ford did not find. It is notable that Mr Baillie did not disclose the existence of that Drum tobacco to Officer Ford. If Mr Baillie did have another pouch of Drum tobacco we infer that Mr Baillie thought, correctly as it turned out, that he

could get away without disclosing it to Officer Ford. That is not the conduct of an honest traveller.

5 33. Mr Baillie stated in correspondence that he had never been in trouble with the police or any other body of law in the past. However, he accepted in his evidence that when he was 19 years old he had been involved in crimes of violence for which he spent time in a Borstal detention centre. Ms Bond submitted that this inconsistency affected Mr Baillie's credibility. We do not accept that submission. We are not satisfied that Mr Baillie was seeking to mislead anyone about his criminal record as a teenager some 40 years earlier.

10 34. Mr Baillie also mentioned in his notice of appeal that he was on medication at the time he was travelling. However, he told us that this was not something he relied on in support of his appeal.

15 35. Mr Baillie's evidence was that he had 12 sleeves of cigarettes in one of his suitcases, each sleeve containing 200 cigarettes, and 10 sleeves in his hand luggage. He stated that Rita had two, three or four sleeves of cigarettes in her bag which he said were intended as gifts to a friend for minding their dogs whilst they were away. He said that these had wrongly been included in the cigarettes seized from Mr Baillie. However, the Goods were all treated as seized from Mr Baillie and it was Mr Baillie who was given and signed a seizure information notice identifying the Goods. We are
20 satisfied that all the cigarettes and tobacco were being imported by Mr Baillie.

25 36. Mr Baillie told us that if he had thought that he was not allowed to import the Goods without paying duty on them then he would not have done so. It never entered his head that there were limits on cigarettes and tobacco which were for personal use. He told us that he did not recall seeing any signs at Manchester Airport setting out the duty-free allowances, but if he had seen them he had not read them.

30 37. We do not accept this evidence. At the time of this trip Mr Baillie had visited India on two previous occasions and had also previously visited Spain. He told Officer Ford that he understood there were duty-free allowances, even if he did not acknowledge to Officer Ford his understanding as to what those allowances were. We are satisfied that Mr Baillie did know that there were limits on the quantity of cigarettes and tobacco he could bring back to the UK from a country outside the EU. If he did not know the actual limits of 200 cigarettes and 250g of tobacco that was because he turned a blind eye and deliberately did not check what the limits were.

35 38. Ms Bond submitted that given such knowledge an honest traveller would have made enquiries as to the level of duty-free allowances. We accept that submission. Mr Baillie was importing a large quantity of excise goods, in particular the cigarettes. He did not say how he came to believe that there was no limit on the cigarettes and tobacco that could be brought back from India for personal use or as gifts for family members. Even if he did have that belief, if he was being honest he would still have
40 wanted to check the position using a reliable source. He could easily have done so by reading the signage at the airport or by using the enquiry phone next to the green channel.

39. Mr Baillie’s evidence was that 3 pouches of the tobacco which were seized had been purchased by him at Manchester Airport on the outward leg of his journey. In the absence of any documentary or other supporting evidence we are not satisfied that is the case. Even if they were, we find that Mr Baillie would have known that they were purchased duty-free and he did not have a genuine belief that he could import them into the UK without payment of duty at the end of his holiday.

40. In the light of all the evidence we are satisfied on the balance of probabilities that prior to entering the green channel Mr Baillie was aware that there were restrictions on the quantity of cigarettes and tobacco purchased duty-free either at Manchester Airport, at Doha or in India which could be brought into the UK without payment of duty. We are satisfied that Mr Baillie was aware that by going through the green channel he was evading duty on the Goods.

Decision

41. In the light of our findings of fact we are satisfied that Mr Baillie went through the green channel for the purpose of evading duty. In the light of our findings as to his knowledge, that conduct clearly involved dishonesty by reference to the standards of ordinary decent people and HMRC were entitled to assess the Penalty.

42. The penalty is based on the amount of duty sought to be evaded. We have considered the calculation of the excise duty and customs duty on the Goods. We are satisfied that Mr Baillie sought to evade duty of £1,709.

43. Mr Baillie has challenged his liability to the Penalty but not the amount of the Penalty as such. He has to some extent co-operated with HMRC in their enquiries but he has continued to maintain that he was not seeking to evade duty. In all the circumstances we consider that the reduction of 50% in the penalty given by HMRC was appropriate. For the reasons given above we confirm the Penalty and dismiss the appeal.

44. 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.

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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 06 SEPTEMBER 2019

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