



[2019] UKFTT 577 (TC)

TC07371

EXCISE DUTY – assessment for duty and penalty in relation to excise goods seized –whether the Appellant was owner of the goods or was otherwise liable – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/02508

BETWEEN

BABATUNDE KHALID ALATISHE

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE DAVID BEDENHAM
JOHN ROBINSON**

Sitting in public at Taylor House, London on 6 August 2019

The Appellant appeared in person

Joseph Millington, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. On 19 December 2016, the Appellant arrived at Gatwick airport having travelled by air from Sofia. The Appellant entered the green channel in the company of another individual. In this decision we have referred to that other individual only as “DE”. We have decided to anonymise DE’s identity because DE played no part in these proceedings and so has had no opportunity to make representations in relation to our findings of fact (some of which are adverse to DE).
2. When the Appellant and DE entered the green channel, DE was pushing a trolley that had two suitcases on it. Border Force officers stopped the Appellant and DE and asked who the suitcases on the trolley being pushed by DE belonged to. The Appellant told Border Force that one of the suitcases was his. That suitcase was found to contain 7,000 cigarettes and 1 kg of hand rolling tobacco (“the Goods”). When asked by a Border Force officer whether the Goods were his, the Appellant said they were. The Appellant later told Border Force that the Goods were not his, and actually belonged to DE.
3. Border Force seized the Goods. That seizure was not challenged. Border Force also seized from DE other excise goods that were contained in the other suitcase on the trolley being pushed by DE.
4. On 16 November 2017, HMRC assessed the Appellant to excise duty in the sum of £2,127 pursuant to s 12(1A) of the Finance Act 1994 (“FA 1994”). HMRC also issued to the Appellant a penalty pursuant to paragraph 4 of Schedule 41 to the Finance Act 2008 (“FA 2008”) in the sum of £446.
5. The Appellant asked HMRC to conduct a review of the decision to issue the assessment and penalty. The reviewing officer upheld the decision to issue the assessment and penalty.
6. The Appellant appealed to the FTT. The Appellant’s case is that he is not liable for the excise duty or to the penalty because he was not the owner of the Goods (rather, he says they belonged to DE) and had no knowledge that DE was bringing the Goods into the UK.
7. HMRC’s case is that the Goods either belonged to the Appellant or, alternatively, he agreed to assist DE in bringing the Goods into the UK. Either way, HMRC submit that the Appellant is liable for the excise duty on the Goods and to the penalty.
8. HMRC initially applied to strike out the Appellant’s appeal in relation to the excise duty assessment relying upon the Court of Appeal decision in *HMRC v Jones and Anor* [2011] EWCA Civ 824 and the Upper Tribunal decision in *Race v HMRC* [2014] UKUT 331 (TC). At the hearing of the appeal, HMRC withdrew that application. Had HMRC not withdrawn the application, we would have dismissed it. We see nothing in the decisions in *Jones* or *Race* that prevent this Tribunal from considering whether or not a person assessed to duty is a person who can properly be held liable for that duty.

THE APPELLANT’S CASE

9. In his Notice of Appeal, the Appellant stated:

“I was not the owner of the seized goods, therefore I would like the excise duty and penalty to be revoked.”
10. In a cover letter accompanying the Notice of Appeal, the Appellant stated:

“...I was not the owner of the seized goods...”

In summary, by way of background, I was stopped by Officers of Border Force as I was walking through the Customs Nothing to Declare Channel with a fellow student from my university course, [DE]. Upon inspection, cigarettes and rolling tobacco were discovered in [DE's] baggage and were consequently seized by Officer Johnson. I was unaware of what was held in [DE's] baggage. [DE] and I were travelling separately. I have been incorrectly coerced into a situation on the sole fact that I was walking with [DE].

...

...I was never in receipt of Notice 12A which HMRC and Border Force should have issued to me when [DE's] goods were seized...the Notice is pivotal to my case.

...

I would ask you to consider the delays on HMRC's part in having an adverse effect on my case; HMRC did not formally write to me until approximately ten months after the incident, which has had a detrimental effect on my case.

..."

11. At the hearing, the Appellant:

- (1) acknowledged that he had been provided with Notice 12A, and so did not seek to advance any point arising from a failure to provide him with the Notice;
- (2) did not seek to advance any argument based on "delay" by HMRC or seek to suggest that any such delay had caused him any prejudice in advancing his appeal;
- (3) stated that the reference in the notice of appeal to him having been "coerced" was a poor choice of language, and clarified that he had simply meant to indicate that he felt he had been assessed in relation to an importation that he had played no part in; and
- (4) confirmed that his case was that he was not the owner of the Goods (despite what he initially told Border Force) and had not sought to assist DE in bringing the Goods into the UK.

HMRC'S CASE

12. In relation to the excise duty assessment, HMRC's case is that the Appellant was, at the UK duty point, "holding" the Goods for the purposes of Regulation 13 of the Excise Goods (Holding, Movement and Duty Point) regulations 2010 ("HMDP 2010") either because he was the owner of the Goods or, alternatively, because he had agreed to assist DE in bringing the Goods into the UK.

13. In relation to the penalty, HMRC's case is that the Appellant was "concerned in carrying...or otherwise dealing with excise goods on which duty is outstanding and has not been deferred" within the meaning of paragraph 4 of Schedule 41 FA 2008. HMRC further submitted that the amount of the penalty was unimpeachable.

THE LAW

14. Excise duty is charged on the Goods by s 2 of the Tobacco Products Duty Act 1979. Regulation 14 of the Tobacco Products Regulations 2001 provides that the duty is due at the excise duty point.

15. Regulation 13 of HMDP 2010 provides in material part:

“(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person -

- (a) making the delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held

...

(b) by a private individual (‘P’), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.”

16. In *HMRC v Martyn Perfect* [2017] UKUT 0476, the Upper Tribunal at [51] (referring to the Court of Appeal decisions in *R v Philip Tatham* [2014] EWCA Crim 226 and *R v Taylor and Wood* [2013] EWCA Crim 1151) stated:

“the Court of Appeal recognises that a person can ‘hold’ the goods for the purposes of the regulations even though he or she has no beneficial interest in them, and even though he or she may not be in physical possession of them, so long as he or she is capable of exercising de jure and/or de facto control over them, whether temporarily or permanently, either directly or through an agent. This is to construe the word ‘holding’ (and by necessary extension the word ‘delivery’) broadly. However, the Court of Appeal has confirmed that a person who lacks actual and constructive knowledge will not ‘hold’ the goods for the purposes of the regulations. This is to recognise that the broad words are subject to an exception for those who are ‘innocent agents’.”

17. The Upper Tribunal’s decision in *Perfect* was appealed to the Court of Appeal (*HMRC v Perfect* [2019] EWCA Civ 465). The Court of Appeal has made a reference to the Court of Justice of the European Union in relation to whether or not the concept of “holding” is subject to an “innocent agent” exception. That reference is pending.

18. In *HMRC v Susan Jacobson* [2018] UKUT 0018 (TC), the Upper Tribunal at [46] stated:

“There is room for debate as to the precise point that a person entering the UK on a commercial flight *first* holds goods for the purposes of Regulation 13 of the 2010 Regulations. Mr Puzey referred to the decision of the Court of Appeal in *R v Bajwa* [2012] 1 WLR 601 which confirmed at [32], [75], and [89] that the time at which the duty becomes chargeable on tobacco is when the ship carrying it enters the limits of the UK port... Mr Puzey contended that a similar rule applied for aircraft which meant that duty became chargeable when they entered UK air space or, at the latest, when they touched down at a UK airport. We do not have to decide whether one or other of those two events constitutes the excise duty point, however, because it is clear that a person is holding goods in the UK for the purposes of Regulation 13 at the latest by the time

they have carried hand luggage off the aircraft or collected hold-luggage in the terminal.”

19. Regulation 20 of the HMDP 2010 provides in relevant part:

“(1) Subject to –

(a) the provisions of these Regulations and any other regulations made under the customs and excise Acts about accounting and payment;

...

Duty must be paid at or before an excise duty point.”

20. Regulation 88 of HMDP 2010 provides that where there is a contravention of the regulations in relation to excise goods in respect of which duty was due but not paid, those goods are liable to forfeiture.

21. Section 49 of CEMA 1979 provides that goods imported without payment of applicable duty are liable to forfeiture.

22. Pursuant to s 139(1) CEMA 1979, any thing liable to forfeiture under the customs and excise Acts may be seized or detained by an appropriate officer. Schedule 3 to CEMA 1979 provides the mechanism for challenging such a seizure of goods.

23. Section 12(1A) of FA 1994 provides:

“Subject to subsection (4) below, where it appears to the Commissioners –

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.”

24. Paragraph 4 of Schedule 41 to FA 2008 provides that a penalty is payable by a person who acquires or is concerned in carrying, removing, depositing, keeping or otherwise dealing with excise goods on which duty is outstanding and has not been deferred.

25. Paragraph 5(4) of Schedule 41 FA 2008 provides:

“P’s acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid is –

(a) “deliberate and concealed” if it is done deliberately and P makes arrangements to conceal it, and

(b) “deliberate but not concealed” if it is done deliberately but P does not make arrangements to conceal it.”

26. Paragraph 6B of Schedule 41 FA 2008 provides that the penalty payable for a “deliberate and concealed” act or failure is 100% of the potential lost revenue; for a “deliberate but not concealed” act or failure is 70% of the potential lost revenue; and in any other case is 30% of the potential lost revenue.

27. Paragraphs 12-13 of Schedule 41 FA 2008 provide for a reduction to the amount of a penalty if disclosure is made by the person liable to the penalty.

28. Paragraph 14 of Schedule 41 FA 2008 provides that “if HMRC think it right because of special circumstances, they may reduce a penalty.” Inability to pay cannot amount to a special circumstance.

29. Paragraph 20 of Schedule 41 FA 2008 provides that liability to a penalty does not arise if there was a reasonable excuse for the act or failure. This provision only applies to acts or failures which were not deliberate.

30. Paragraph 17(1) of Schedule 41 FA 2008 provides for an appeal to the FTT against a decision that a penalty is payable. Paragraph 17(2) provides for an appeal to the FTT against the amount of the penalty.

31. Paragraph 19 of Schedule 41 FA 2008 provides in relevant part:

“(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may –

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14 –

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) “*flawed*” means flawed when considered in the light of the principles applicable in proceedings for judicial review.”

EVIDENCE AND FINDINGS OF FACT

32. We heard live evidence from the Appellant, Julie Fagan (an HMRC officer) and Andrew Johnson (a Border Force officer).

33. The following matters were not in dispute and we find:

(1) The Appellant is a student at a university in Bulgaria.

(2) The Appellant’s family live in Surrey.

(3) DE attends the same university as the Appellant. DE’s family also live in the UK, in the Midlands.

(4) On 19 December 2016, the Appellant arrived at Gatwick airport having travelled by air from Sofia.

(5) DE was on the same flight as the Appellant.

(6) The Appellant and DE entered the green channel together. DE was pushing a luggage trolley containing two suitcases. They were stopped by Border Force officers.

(7) A Border Force officer asked the Appellant and DE who the suitcases on the trolley being pushed by DE belonged to. The Appellant stated that one of the suitcases was his.

(8) Border Force conducted an initial inspection of the suitcases and found the Goods in the suitcase that the Appellant has claimed ownership of. Tobacco products were also found in the other suitcase that was on the trolley pushed by DE.

(9) The Appellant (along with the suitcase he had claimed ownership of and an item of hand luggage which he accepts was his) were taken to a search bench for a more detailed baggage inspection. There was then the following exchange between the Appellant (“A”) and Officer Andrew Johnson (“AJ”):

“AJ: Are these your bags?

A: Yes

AJ: And do half the cigarettes belong to you?

A: Yes

AJ: OK, well I’m going to have a look in your bags...

AJ: [indicating the Goods], so who do these cigarettes belong to?

A: These ones are mine.

AJ: And the tobacco?

A: Yes

...”

(10) The Goods were seized from the Appellant.

(11) The tobacco products found in the other suitcase were seized from DE.

(12) The Appellant was invited to stay for an interview but declined.

34. Officer Johnson’s notebook further records that during a personal search of the Appellant (which occurred after the baggage search but before seizure of the Goods), the Appellant stated that the “[suit]cases and cigarettes didn’t belong to him and that his friend [DE] had asked him to bring it through for him”. In his evidence, the Appellant stated that he “does not recall” saying that and, in any event, DE had not asked the Appellant to bring the tobacco products into the UK. Officer Johnson stated in evidence that he had no reason to doubt the accuracy of his notes. As set out in more detail below, we did not find the Appellant to be a credible witness, and we are of the view that the account set out in the contemporaneous notebook (which account the Appellant does not in fact deny, but rather says he “does not recall”) is to be preferred. We therefore accept the accuracy of Officer Johnson’s notebook and find that the Appellant did tell Officer Johnson that the suitcase and the Goods did not belong to the Appellant and that DE had asked the Appellant to bring the Goods into the UK for him.

35. In his evidence to us, the Appellant stated:

(1) when he was at Sofia airport, he bumped into DE. DE was buying cigarettes. DE said the cigarettes were for a relative who “owned a shop”. DE did not say that the cigarettes were going to be sold in the shop. The Appellant believes DE put these cigarettes in his (DE’s) hand luggage.

(2) he and DE were on the same flight to Gatwick but had not booked their flights together and did not sit together or speak on the flight.

(3) he did not have any checked baggage, only hand luggage. This was supported by an email from the airline.

(4) he was a regular traveller and knew the importance of knowing what was in his luggage.

(5) on arrival at Gatwick, he again saw DE and decided to wait for DE, who was waiting for his suitcases to come off the baggage carousel. He did this because of his “good nature....I thought maybe my parents can help him to arrange a cab.”

(6) he walked through the green channel with DE, who was pushing a trolley containing two suitcases and some hand luggage.

(7) when Border Forces asked who the suitcases on the trolley belonged to, he said one of them was his. This was not the truth. He told this lie because he “just wanted to get through customs”.

(8) at the time he asserted that the suitcase was his, he had no idea that it contained the Goods. He did not know what was in the suitcase.

(9) he had not discussed with DE that he would claim the suitcase was his. This was “just something I came up with when asked [by Border Force]”.

(10) once he became aware that the suitcase contained the Goods, he thought he would “raise more suspicion” if he then stated that the suitcase and the Goods were not his.

(11) once he realised the severity of the situation he told Border Force that the Goods were not his.

(12) he can show through his bank statements that he did not buy the Goods.

(13) he did not stay for an interview as the Goods were not his and he had no interest in making any claim to them, and his parents were waiting for him.

36. We did not find the Appellant to be a reliable witness. His version of events was incredible, illogical or otherwise unbelievable in several important respects, specifically:

(1) DE had travelled from Sofia and was heading to the Midlands. The Appellant was heading home to Surrey. We do not accept that, despite having no checked baggage of his own, the Appellant decided to wait for DE (who was collecting two suitcases from the baggage carousel) simply to see if the Appellant’s parents could assist DE to arrange a cab. The Appellant gave no explanation as to why he thought DE might need such assistance.

(2) The Appellant acknowledged he was a regular traveller who understood the importance of knowing what was in his luggage. The Appellant’s assertion that he claimed the suitcase as his own without knowing its contents does not, then, ring true.

(3) On his own case, the Appellant was untruthful with a Border Force officer (by claiming the suitcase was his when he says it in fact belonged to DE). On any view, being untruthful with a Border Force officer is a serious matter. The Appellant’s assertion that he told this lie because he “wanted to get through customs” is illogical. The Appellant did not explain why (despite claiming that he did not have any idea as to what was in the suitcases) he thought that claiming one suitcase as his own would assist him and DE in “getting through”.

(4) The Appellant asserts that he had not discussed with DE that he would claim the suitcase was his. This is illogical and does not ring true. If there was no prior discussion about this, the Appellant ran the significant risk that DE would, by telling the truth, contradict his claim to ownership.

(5) On his own case, even once he was aware that the Goods were in the suitcase he had claimed as his own, the Appellant continued to lie to Border Force by confirming that the suitcase and the Goods were his. He said he did this because he thought that telling the truth would “raise more suspicion”. The Appellant’s (admitted) willingness

to be untruthful with Border Force officials so as to achieve his own ends (i.e. to ensure that no further suspicion was raised) is a factor that we have taken into account when assessing the credibility of the evidence he gave to us.

(6) The Appellant told us that he could not recall telling Officer Johnson that DE had asked him to bring the Goods into the UK for him. We have found that he did make that statement to Officer Johnson. We find it inconceivable that the Appellant would have no recollection of making such a significant statement.

37. Taking into account all of the evidence before us, we find the following on the balance of probabilities:

(1) The Appellant did not check in the suitcase that he later claimed ownership of. We reach this conclusion because the Appellant provided an email from the airline which supports that he had no checked baggage on the Sofia to London flight. In those circumstances, we conclude that the suitcase containing the Goods was checked in by DE who, on arrival at Gatwick, collected the suitcase (along with his other checked baggage) and pushed it on a luggage trolley into the green channel.

(2) The Goods belonged to DE. We reach this conclusion because the Goods were in the suitcase that was checked in by DE.

(3) The Appellant agreed with DE that he would wait for DE to reclaim the checked baggage, accompany DE into the green channel and would, if any questions were asked at any stage, claim the suitcase and the Goods (which he knew were in the suitcase) as his own. In reaching this conclusion we have taken into account that the Appellant waited with DE at baggage reclaim (despite having no checked baggage) and that, in the absence of such an agreement, the Appellant would have run the very real risk that DE would tell the truth and thereby contradict the Appellant. Further, in the absence of such an agreement it is inconceivable that the Appellant would have decided to lay claim to a suitcase that he had not checked in, which was being pushed by someone else and which (if the Appellant was to be believed) he did not know the contents of.

(4) The agreement between the Appellant and DE (that the Appellant would if any questions were asked claim the suitcase and the Goods as his own) was made prior to boarding the aircraft in Sofia. We reach this conclusion because the Appellant told us that he did not sit with or speak to DE on the aircraft. Accordingly, the agreement was either made prior to boarding the aircraft, or was made once the Appellant and DE had disembarked the aircraft at Gatwick. We consider the former to be much more likely because DE would not have wanted to leave making this arrangement until they had disembarked the aircraft in the UK because that would have given rise to a risk that he and the Appellant would not see each other prior to reaching the green channel. Further, it is unlikely that DE and the Appellant would have discussed these matters while walking around the airport where the false statements were shortly to be made for fear that their discussion might be overheard.

(5) When Border Force officers stopped the Appellant and DE, the Appellant claimed ownership of the suitcase and the Goods pursuant to the agreement reached with DE.

38. Officer Fagin explained that the penalty issued to the Appellant was on the ‘non-deliberate’ basis and that a 90% reduction was applied for “telling, helping and giving”. Consistent with our findings of fact, we consider the Appellant to have been fortunate not to have been issued with a “deliberate” penalty and to have been given such a significant reduction for “telling, helping and giving”.

THE APPEAL AGAINST THE EXCISE DUTY ASSESSMENT

39. It seems to us that the very earliest that the UK duty point can have occurred was when the aircraft entered UK air space (see *R v Bajwa* [2012] 1 WLR 601 and *Jacobson*). Prior to the UK duty point arising (indeed prior to boarding the aircraft in Sofia), the Appellant had agreed with DE that on arrival at Gatwick he would wait for DE to reclaim the checked baggage, accompany DE into the green channel and would, if any questions were asked at any stage, claim the suitcase and the Goods as his own. We therefore conclude that the Appellant was “holding” the Goods for the purposes of Regulation 13 of HMDP 2010 because, pursuant to the agreement made with DE, he was at the UK duty point “capable of exercising de jure and/or de facto control over them”. Given our findings of fact, any “innocent agent” exception (the existence or not of which is yet to be determined by the CJEU) is of no relevance. The Appellant is therefore liable to pay the excise duty on the Goods.

40. Accordingly, we dismiss the Appellant’s appeal against the excise duty assessment.

THE APPEALS AGAINST THE PENALTY

41. At the very latest, the UK duty point arose when the suitcase containing the Goods was collected in the terminal (see *Jacobson*). After that point, the Appellant, by claiming pursuant to the agreement with DE that the suitcase and the Goods were his, was a person who was concerned in carrying or otherwise dealing with excise goods on which duty was outstanding. Given our findings of fact we are satisfied that the Appellant did not have a reasonable excuse for his actions. The Appellant is therefore liable to a penalty pursuant to Paragraph 4 of Schedule 41 to FA 2008.

42. No specific challenge was made by the Appellant in relation to the amount of the penalty but, for the sake of completeness, we record that we are satisfied that the amount of the penalty cannot be impeached. Indeed, as stated above, we consider the Appellant fortunate that he was not issued with a “deliberate” penalty. Had the Appellant made a specific challenge to the amount of the penalty (i.e. appealed against the amount of the penalty pursuant to paragraph 17(2) of Schedule 41 FA 2008), we might have looked to increase the amount of the penalty pursuant to the power provided by paragraph 19(2)(b) of Schedule 41 FA 2008.

43. Given our findings of fact, we conclude that HMRC’s view that there were no special circumstances justifying a reduction in the penalty amount cannot be said to be flawed in any way.

44. Accordingly, we dismiss the Appellant’s appeal against the excise duty assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

RELEASE DATE: 13 SEPTEMBER 2019