[2015] UKFTT 0380 (TC)

TC04562

Appeal number: TC/2014/02294

CUSTOMS DUTY – VAT – EXCISE DUTY – civil evasion penalties – whether the civil or criminal standard of proof applies – consideration of the case law – held, the civil standard applied – whether FA 2008, s 8 continues to apply to excise penalties – the test for dishonesty in civil cases – whether appellant dishonest – held, yes – error in HMRC demand notice – excise duty penalty incorrectly increased – statutory deeming rule as applied to import VAT penalty – whether import VAT penalty deemed to be a customs duty penalty – whether Tribunal has the jurisdiction to increase the customs duty penalty – held, yes – exercise of Tribunal discretion – appeal dismissed and penalty amount upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

BINTU BINETTE KRUBALLY N'DIAYE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS GILL HUNTER

Sitting in public at Fox Court, Gray's Inn Road, London on 10 April 2015 and 23 June 2015

The Appellant in person

Sadiya Choudhury of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 22 May 2013, Ms Krubally N'Diaye returned to the UK from the Gambia with more cigarettes than are legally allowed. HMRC issued her with a civil evasion penalty notice ("the Penalty Notice") on the basis that she had been dishonest.

2. Ms Krubally N'Diaye appealed the Penalty Notice on the grounds that she had not been dishonest, but had simply made a mistake. Having considered the facts and the law, we found that she acted dishonestly, see in particular §89.

3. Ms Krubally N'Diaye also argued that the standard of proof applicable to her case was the criminal standard "beyond reasonable doubt" and not the civil standard, being "the balance of probabilities." We found that the standard of proof was the civil standard, see §51.

4. There was a further technical issue. The amount shown on the Penalty Notice was £563, relating to evasion of excise duty, customs duty and import VAT. Only excise duty and customs duty were identified on the face of the Penalty Notice; the amount calculated as due for evasion of import VAT had been absorbed into the figure for excise duty, see §123.

5. Ms Choudhury accepted that this was an error, and said that the amount calculated as due for evasion of import VAT should instead have been included in the figure for the customs duty penalty. She submitted that the Tribunal had the jurisdiction to rectify the error and should do so. Having analysed the relevant statutory provisions, we agreed with Ms Choudhury.

6. The penalty charged had been mitigated by 50%. We confirmed that mitigation percentage, see §132 and §195.

7. The total penalties payable by Ms Krubally N'Diaye therefore remain at £563.

The evidence

8. Before the hearing HMRC provided the Tribunal and Ms Krubally N'Diaye with a bundle of documents, which included the correspondence between the parties (with attachments) and between the parties and the Tribunal. It also contained:

(1) extracts from the notebook of Officer Suresh Pillai, the Border Force Officer who seized Ms Krubally N'Diaye's cigarettes;

(2) a Seizure Information Notice dated 22 May 2013;

(3) an HMRC "Offence Report" which set out the background to the decision to issue the Penalty Notice, together with the related duty calculation schedules.

9. Officer Pillai provided a witness statement and gave oral evidence. He was cross-examined by Ms Krubally N'Diaye and answered questions from the Tribunal. Attached to Officer Pillai's witness statement were colour pictures of parts of the arrival terminal at Gatwick Airport, being the luggage carousels and the entrances to the red and green channels. Although these pictures were taken after the seizure of

Ms Krubally N'Diaye's cigarettes, Officer Pillai said that nothing had changed between that date and the date the pictures were taken, and that it had been the same for some years previously. Ms Krubally N'Diaye did not challenge this and we find that the pictures accurately reflect the Gatwick arrivals area both when Ms Krubally N'Diaye arrived there on 22 May 2013 and when she returned to the UK from two visits to the Gambia in 2012.

10. Ms Krubally N'Diaye brought a bundle to the hearing because she had been advised that this was the correct procedure. It contained:

(1) some of the same correspondence as in HMRC's bundle;

(2) Officer Pillai's witness statement and the photographs;

(3) Ms Krubally N'Diaye's submissions; and

(4) her notes for use at the hearing.

11. Copies of (3) were made for the use of the Tribunal and HMRC. Ms Krubally N'Diaye also brought her current passport. Copies of the pages with immigration and emigration stamps were made for the Tribunal and HMRC.

12. From that evidence we find the following facts, which are not in dispute. We also identify a number of areas where the facts are disputed and we deal with those later in our decision.

The facts not in dispute

13. Ms Krubally N'Diaye was born in the Gambia, but she has lived in the UK for around 45 years. She is a qualified nurse and midwife; before her retirement in 2012 she worked as a "link lecturer" supporting nursing students. She is a regular smoker (10-20 a day) although she has at times tried to stop.

14. Ms Krubally N'Diaye has never been overseas other than to the Gambia, where some of her family members still live. Before the 2013 visit, she had made 11 previous trips. The three most recent were in 2006 (once) and 2012 (twice). Those journeys were also from and to Gatwick. When she made the two trips in 2012 she returned with cigarettes.

15. In early May 2013 Ms Krubally N'Diaye visited the Gambia again. She returned to the UK on 21 May 2013. Shortly before her departure she visited the local market and bought cigarettes. Further cigarettes were bought both from a stall near her hotel, and at Banjul airport. The number of cigarettes purchased is in dispute and we consider this at §90. Ms Krubally N'Diaye accepted that she also carried half a packet of cigarettes in her handbag.

16. She packed the cigarettes purchased at the market and those bought from the stall near the hotel on top of other items in her main luggage; those purchased at Banjul airport she put in her hand luggage.

17. After she had checked in for the flight, the airport tannoy asked her to report to customs. When she did so, the Gambian customs officer asked her what was in her

checked luggage, as it appeared to contain unidentified items; Ms Krubally N'Diaye told him that she had packets of cigarettes. The customs officer did not require her to open her suitcase.

18. When Ms Krubally N'Diaye arrived at Gatwick she entered the arrivals hall and waited for her checked luggage to arrive. The carousel delivered luggage to all the other passengers, but not to her. She remained alone by the carousel for around 20 minutes after the other passengers had left; her total waiting time after arriving at Gatwick and before entering customs was around an hour and a half. Finally her suitcase appeared. Stickers had been placed on the bag saying "priority luggage" and "load last and unload first," although Ms Krubally N'Diaye did not notice these stickers until after she had arrived home.

19. Above every Gatwick luggage carousel is an illuminated sign headed "bringing goods into the UK." It then says, against a blue background:

> "**From within the EU**: you can bring in as much duty paid alcohol and tobacco as you like as long as it is for your own use and transported by you."

20. It continues, against a green background, with the words:

> "**From outside the EU**: the following allowances are free of duty or tax, as long as the goods are for your own use and are transported by you. Use the green channel if you do not exceed those limits."

21. On the next line of the sign are pictures of cigarettes, wine, beer, brandy and two other items, one of which is a watch. The legal limit for non-EU importation is beneath each picture. The words under the packet of cigarettes are "200 cigarettes or 100 cigarillos or 50 cigars or 250g tobacco."

22. The next passage is set against a red background, and reads:

> "If you have goods exceeding your allowances or are carrying commercial, banned or restricted goods, you must declare them in the red channel or use the red point phone. If you are unsure whether you need to declare your goods, speak to an officer."

23. This information is repeated on two boards placed on either side of the "Nothing to Declare" green channel. Each board is slightly larger than a normal door, with the top half containing the information and the lower half blank.

24. Under cross-examination, Ms Krubally N'Diaye denied that she had read any of these signs. HMRC did not accept that this was true, and we consider this issue further at §113.

25. Ms Krubally N'Diaye entered the green channel and was stopped by Officer Pillai. By May 2013 he had around two years' experience in that role. He intercepts around 40-50 people a day, and makes between 20-50 seizures a week.

26. Officer Pillai's Notebook is his record of the seizure. Ms Krubally N'Diaye challenged parts of that evidence, and we address those challenges at §96. Ms Krubally N'Diaye did accept that:

(1) Officer Pillai asked her whether she understood she was in the Customs Green Channel and she confirmed she did know that;

(2) when Officer Pillai opened Ms Krubally N'Diaye's bags, he found the cigarettes which were on the top of her luggage and seized them (other than the half packet in her handbag); and

(3) Ms Krubally N'Diaye then asked Officer Pillai to return 200 cigarettes to her, as that was her allowance and Officer Pillai refused.

27. Ms Krubally N'Diaye thought she was not being treated with the respect normally given to the elderly in her culture, and suspected that she was being picked on because she was black. She lost her temper: in her own words at the Tribunal, she was "fuming and screaming blue murder." This echoes her letter to HMRC dated 14 March 2014 in which she says she was "fuming with rage and crying foul play." That letter also records that she had accused Officer Pillai of singling her out, out of spite. Officer Pillai did not remember this tirade, telling the Tribunal that "it happens all the time when people cannot get their cigarettes back." We accept Ms Krubally N'Diaye's evidence about her reaction to the seizure.

28. Officer Pillai's evidence is that he handed Ms Krubally N'Diaye the following documents:

(1) the Seizure Information Notice;

(2) a warning letter about seized goods;

(3) a warning of liability to prosecution;

(4) Notice 1, which sets out the allowances and restrictions; and

(5) Notice 12A, entitled "what you can do if things are seized by HMRC."

29. Ms Krubally N'Diaye accepted that she was given Notices 1 and 12A, but disputes receipt of the other documents, and we consider this at §105 below.

30. As we have said, Ms Krubally N'Diaye was upset by the seizure, and in her letter of 14 March 2014 she says that "it took months to eradicate the traumatic experience encountered with a ruthless and seemingly racist customs staff from my thoughts."

31. On 30 January 2013, some eight months after the seizure, Officer Dawson, an HMRC Audit Officer, wrote to Ms Krubally N'Diaye informing her that an enquiry had been opened into her attempt to smuggle cigarettes into the UK and warning that penalties might be imposed for dishonest conduct. He invited Ms Krubally N'Diaye to co-operate with the enquiry and set out a list of questions, one of which asked her to provide the price paid for the cigarettes in the Gambia.

32. No reply was received, because Ms Krubally N'Diaye was unwell. She replied to a follow-up letter in great detail, although she did not tell Officer Dawson the price she had paid for the cigarettes. On 2 April 2014, Officer Dawson informed Ms Krubally N'Diaye that HMRC were imposing penalties totalling £563, after mitigation of 50%.

33. On 23 April 2014, Ms Krubally N'Diaye appealed to the Tribunal.

The law

Excise duty

34. 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.
>
> (5) …
>
> (6) Statements made or documents produced by or on behalf of a person shall not be inadmissible in—
>
> (a) any criminal proceedings against that person in respect of any offence in connection with or in relation to any duty of excise,
>
> (b) …
>
> by reason only that any of the matters specified in subsection (7) below has been drawn to his attention and that he was, or may have been, induced by that matter having been brought to his attention to make the statements or produce the documents.

(7) The matters mentioned in subsection (6) above are—

(a) that the Commissioners have power, in relation to any duty of excise, to assess an amount due by way of a civil penalty, instead of instituting criminal proceedings;

(b)-(d)…

(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."

35. Ms Choudhury told us that this provision applied to Ms Krubally N'Diaye's case and that the position is unaffected by changes made by FA 2008, Sch 40. That Schedule is headed "Penalties: amendment of Schedule 24 to Finance Act 2007." All but one of the paragraphs of that Schedule amend Schedule 24, as indicated by the heading to that Schedule. However, para 21(d)(i) reads: "in consequence of this Schedule, the following provisions are omitted" and there follow a list which includes FA 1994, s 8.

36. However, FA 2008, s 122 gives HMRC the following wide powers in relation to Schedule 40:

"**122 Penalties for errors**

(1) Schedule 40 contains provisions amending Schedule 24 to FA 2007 (penalties for errors in returns etc).

(2) That Schedule comes into force on such day as the Treasury may by order appoint.

(3) An order under subsection (2)

(a) may commence a provision generally or only for specified purposes, and

(b) may appoint different days for different provisions or for different purposes.

(4) The Treasury may by order make any incidental, supplemental, consequential, transitional, transitory or saving provision which may appear appropriate in consequence of, or otherwise in connection with, Schedule 24 to FA 2007 or Schedule 40.

(5) An order under subsection (4) may include provision amending, repealing or revoking any provision of any Act or subordinate legislation whenever passed or made (including this Act and any Act amended by it).

(6) An order under subsection (4) may make different provision for different purposes.

(7) The power to make an order under this section is exercisable by statutory instrument.

(8) ….

37. Article 4 of the Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 (SI 2009/511) states that FA 2008, Sch 40 para 21 repeals FA 1994, s 8 and certain other provisions "only in so far as those provisions relate to conduct involving dishonesty which gives rise to a penalty under Schedule 41 to the Finance Act 2008." Although FA 2008, Sch 41 does include penalties relating to "certain VAT and excise wrongdoing" none of those penalties relate to conduct involving dishonesty. We therefore agree with Ms Choudhury that FA 1994, s 8 is the applicable provision in this case.

38. FA 1994, s 16 is headed "Appeals to a tribunal" and makes provision for the review of a decision and an appeal to the Tribunal. It then continues, so far as relevant to this decision:

> "(6) On an appeal under this section the burden of proof as to--
>
> (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
>
> (b)-(c)….
>
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.
>
> (7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter."

Customs duty and import VAT

39. The interaction between the customs duty and import VAT is considered at §140, where the relevant legislation is set out.

40. The key provisions for this part of our decision are FA 2003, ss 25 and 33. Section 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, he is liable to penalties up to the value of the duty or VAT evaded. Subsection (6) reads:

> "Where, by reason of conduct falling within subsection (1) in the case of any relevant tax or duty, a person–
>
> (a) is convicted of an offence,
>
> (b) is given, and has not had withdrawn, a demand notice in respect of a penalty to which he is liable under section 26, or
>
> (c) is liable to a penalty imposed upon him under any other provision of the law relating to that relevant tax or duty,
>
> that conduct does not also give rise to liability to a penalty under this section in respect of that relevant tax or duty."

41. FA 2003, s 33(7)(b) provides that the burden of proving dishonesty lies with HMRC.

The test for dishonesty

42. The test for dishonesty in the criminal law was set out by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053:

> "In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest…If it was dishonest by those standards then the jury must consider whether the defendant himself must have realised that was he was doing was by those standards dishonest."

43. This is a two-step approach: the action must be dishonest "according to the ordinary standards of reasonable and honest people," and if it is, then "the defendant himself must have realised that was he was doing was by those standards dishonest." The first step is objective, the second, subjective.

44. In *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 ("*Abou-Ramah*"), the Court of Appeal clarified the test for dishonesty in civil breach of trust cases. Arden LJ, giving the leading judgment, first considered the Privy Council decisions in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, as well as the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] UKHL 12.

45. At [59] she said that in *Barlow Clowes* the Privy Council had considered the authorities and found that:

> "it is unnecessary to show subjective dishonesty in the sense of consciousness that the transaction is dishonest. It is sufficient if the defendant knows of the elements of the transaction which make it dishonest according to normally accepted standards of behaviour."

46. In other words, the second of the two steps in *Ghosh* does not apply. Although *Barlow Clowes* was a decision of the Privy Council, Arden J said it "gave guidance on" the earlier decision of the House of Lords in *Twinsectra*, which had been interpreted as requiring that a person needed to realise that his conduct was dishonest. She then endorsed the *Barlow Clowes* approach, see [68]-[69] of the decision.

47. However, the subjective is not entirely banished. In *Abou-Ramah* at [66], Arden J first summarises *Barlow Clowes* and then says:

> "On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has 'a strong subjective element in that it is a description of a type of conduct assessed in the light

> of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.'"

48. At [68(iv)] Arden LJ said that the test as formulated in *Abou-Ramah* applied "in the context of civil liability (as opposed to criminal responsibility)." We have therefore adopted the *Barlow Clowes* test for dishonesty rather than the two-step approach provided for in *Ghosh.*

49. The test we apply to Ms Krubally N'Diaye's case is therefore primarily objective: was her behaviour dishonest according to normally accepted standards of behaviour? We also need to consider what she actually knew at the time, not what a reasonable person in her position would have known or appreciated.

50. Ms Choudhury did not disagree with this analysis, although she submitted that "it was important not to overstate the subjective element."

The standard of proof

51. Ms Krubally N'Diaye contended that the standard of proof was the criminal standard of "beyond reasonable doubt" and that HMRC had not met that standard.

52. Ms Choudhury said that civil standard applied, being the "balance of probabilities." She cited *1st Indian Cavalry Club v C&E Commrs* [1988] STC 353 ("*Indian Cavalry Club*"); *C&E Commrs v Han and others* [2001] STC 1188 ("*Han*") and *Khawaja v HMRC* [2008] EWHC 1687 (Ch) ("*Khawaja High Court*"). She accepted that the penalties imposed on Ms Krubally N'Diaye were criminal for the purposes of Article 6 of the European Convention on Human Rights ("the Convention") but said that did not mean the criminal standard of proof applied to these proceedings.

The case law

53. In *Indian Cavalry Club* the Inner House of the Scottish Court of Session (Lord McCluskey, Lord Hamilton and Lord Johnston) considered the standard of proof to be applied in Scotland in relation to a VAT civil evasion penalty. The Court held that the civil standard applied, largely on the basis that the language and form of the relevant statutory provisions made a clear distinction between criminal liability and liability to a "civil penalty."

54. Lord McCluskey and Lord Johnston also referred to *Hansard,* where the relevant Minister confirmed that the civil standard of proof was intended, as well as to the Keith Report (1983, Cmnd 8822), by virtue of which the VAT penalty code was introduced and which acknowledged that any civil process would carry with it the civil standard of proof. Lord Hamilton, giving a concurring judgment, did not refer to *Hansard* but did rely on the Keith Report.

55. In *Han* the Court of Appeal decided three cases, two of which engaged the VAT civil evasion penalties under VATA s 60 and the third was an excise civil evasion penalty under FA 1994, s 8. The Court decided that the proceedings in each appeal were "criminal" for the purposes of the Convention, so that the taxpayers were

entitled to the procedural safeguards in Article 6. However, this did not mean that the penalties were criminal for all purposes, see [84] and [88] of the judgment.

56. Although Potter LJ stated at [12] that the civil standard of proof applied to the penalties, citing *Indian Cavalry Club*, he did not give any reasons. At [88] Mance LJ said the issue was not addressed, and that the relevant standard of proof "will need to be worked out on a case by case basis."

57. Thus, although *Han* decided an excise duty civil evasion penalty, it is of limited assistance in establishing the standard of proof to apply in such cases.

58. In *Khawaja High Court* the taxpayer had appealed against a number of penalties for negligently submitting income tax returns. At [25] Mann J, having considered *Indian Cavalry Club* and *Han* as well as the Keith Report, found that the civil standard of proof applied. He said at [28]:

> "It is quite plain from the decision in *Han* that one does not move seamlessly from a determination that proceedings are criminal for the purposes of art 6 to introducing all the domestic law consequences of proceedings being criminal."

59. Mr Khawaja's penalty appeals were then sent back to the First-tier Tribunal ("FTT") to be decided on the civil standard of proof. The FTT applied that standard but reduced the penalties slightly to take account of the taxpayer's co-operation, see *Khawaja v HMRC* [2012] UKFTT 183(TC).

60. That decision was then appealed to the Upper Tribunal and published under reference [2013] UKUT 0353(TCC) ("*Khawaja UT*"). Judges Berner and Herrington considered Mann J's earlier decision in the light of the arguments now put by the taxpayer in relation to the standard of proof.

61. After setting out Article 6.2 of the Convention, which reads "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law," the Upper Tribunal cited Lord Phillips in *R v Briggs-Price* [2009] AC 1026 at [24]:

> "Article 6(2) does not spell out the standard of proof that has to be applied in discharging the burden of proving that a defendant is guilty of a criminal offence. It does, however, provide that he has to be proved guilty 'according to law'. This requirement will not be satisfied unless the defendant is proved to be guilty in accordance with the domestic law of the state concerned."

62. The Upper Tribunal went on to say:

> "That in our judgment is decisive. The application of the civil standard of proof to penalty proceedings of the nature at issue in this appeal is in accordance with domestic law. There is no link with any conduct which is criminal in nature for domestic purposes, and to which the criminal standard ought properly to

> be applied. In those circumstances it is the civil standard which applies."

The issues

63. Ms Choudhury accepted that the penalties are criminal for the purposes of the Convention. As that is not in dispute, we have not examined it further. However, classification as criminal for Article 6 purposes does not answer the question as to the standard of proof in these proceedings, see *Han* and *Khawaja High Court* cited above.

64. We must therefore decide on the standard of proof which applies to Ms Krubally N'Diaye's case. We begin with the customs penalties and excise penalties and then consider the import VAT position.

Customs penalties and excise penalties

65. With one exception, the case law considers penalties for income tax and VAT, not penalties for evading duties. The exception is *Han*, which included an appeal against an excise civil evasion penalty. However, as we have seen, the Court heard no argument on the standard of proof.

66. This means that we do not have the benefit of direct precedent when deciding the standard of proof to apply. We are mindful, too, that the Keith Report, on which reliance was placed in a number of judgments, concerns only VAT.

67. We have nevertheless been assisted by the approach taken by Mann J in *Khawaja High Court* in relation to income tax penalties. His starting point was to consider the relevant statutory provisions, see [13]. He found that they contained nothing explicit about the standard of proof; the same is true of the legislation in issue here.

68. He next considered whether the proceedings were civil for domestic purposes. As regards the excise penalty, FA 1994, s 8 comes under the subheading of "civil penalties." Furthermore, the difference between these penalties and criminal penalties is made explicit by s 8(6)-(8), see §34. As regards the customs penalties at Part 3 of FA 2003, the contrast between the penalties in issue here, and criminal penalties, is clearly set out at s 25(6), see §40. We therefore find that both the excise duty penalty and the customs duty penalty are civil for domestic purposes.

69. At [14] of *Khawaja High Court*, Mann J cites *R (oao McCann) v Crown Court at Manchester* [2002] UKHL 39 ("*McCann*") at [37] *per* Lord Steyn:

> "Having concluded that the relevant proceedings are civil, in principle it follows that the standard of proof ordinarily applicable in civil proceedings, namely the balance of probabilities, should apply."

70. Although "in principle" the civil standard therefore applied to Mr Khawaja's income tax penalties, Mann J said at [15] that this was only a starting point. This is because some cases categorised as civil under domestic law nevertheless attract the

criminal standard of proof, see *In re Doherty* [2008] UKHL 33 and *In re B (Children)* [2008] UKHL 35, two judgments issued by the House of Lords on the same day.

71. In order to establish when that might be the position, we considered the particular cases referred to by Lord Brown in *In re Doherty* at [47] namely *McCann, B v Chief Constable of the Avon and Somerset Constabulary* [2001] 1 All ER 562 ("*B v Chief Constable*") and *Gough v Chief Constable of the Derbyshire Constabulary* [2002] EWCA Civ 35 ("*Gough*"). Two of these three cases (*B v Chief Constable* and *McCann*) were also singled out by Lord Hoffman and Lady Hale in *In re B* at [8]-[9] and [65]-[66] respectively.

72. In *B v Chief Constable* the issue was the making of a sex offender order, which was not itself a penalty (see [28]). However, breaching the order would have been a criminal offence, see the Prevention of Crime and Disorder Act 1998, s 2, at [18] of the decision.

73. In *Gough* the Court of Appeal decided that a football banning order preventing certain overseas travel, although a serious restraint on freedom, was nevertheless not a penalty, see [89]. Breaching a banning order is a criminal offence, see the legislation in the Annex to the judgment.

74. *McCann* concerned an anti-social behaviour order ("ASBO"). The House of Lords found that an ASBO does not constitute a penalty because its purpose was preventative, see [26]. However, breach of the order would have constituted a criminal offence, see [108].

75. These three cases, *B v Chief Constable*, *Gough* and *McCann*, were considered by the Court of Appeal in *R (oao LG) v Independent Appeal Panel for Tom Hood School* [2010] EWCA Civ 142 ("*Tom Hood*"). Wilson LJ, giving the leading judgment with which Rix LJ and Sir Scott-Baker agreed, said at [36] in relation to *McCann* that:

> "the feature of an ASBO which demands application of the criminal standard is its potentially penal consequence under the criminal law."

76. The same is true of the football banning order at issue in *Gough* and the sex offender order in *B v Chief Constable*, see §72 to §74 above.

77. The Upper Tribunal in *Khawaja UT* took a similar approach to the Court of Appeal in *Tom Hood*. Although they did not refer to *In re Doherty* or *In re B* they said at [44] that the civil standard applies to income tax penalties partly because there is "no link with any conduct which is criminal in nature for domestic purposes, and to which the criminal standard ought properly to be applied…"

78. Turning to the customs and excise penalty provisions in issue here, it is clear that there is no link between Ms Krubally N'Diaye's penalty for evading customs and/or excise duty and either (a) any criminal conduct or (b) any future penal consequences under the criminal law. As a result, we see no reason to depart from the

basic rule that a case which is classified as civil for domestic purposes attracts the civil standard of proof.

79. We find further support for our conclusion from *Indian Cavalry Club,* where the language and form of the legislation, and in particular the explicit contrast between civil and criminal penalties, was a very significant factor in the Court's decision that the civil standard applied. The same contrast between civil and criminal penalties is present in both sets of provisions in issue here, as we have already noted at §68.

80. In summary, these customs penalties and excise penalties attract the civil and not the criminal standard of proof because:

(1) the statutory provisions explicitly distinguish between these penalties and criminal penalties;

(2) the penalties are civil as a matter of domestic law;

(3) as a result, the civil standard of proof should normally apply; and

(4) unlike the *B v Chief Constable, Gough* and *McCann* line of cases, the penalties are not linked with criminal proceedings or consequences, so they are not within the category of civil cases to which a criminal standard of proof applies.

Import VAT

81. In relation to import VAT the statutory provisions are the same as those already analysed in relation to customs law, so the same conclusion follows.

82. Furthermore, the Inner House in *Indian Cavalry Club* found that the civil standard applies to civil evasion penalties arising under VATA s 60. Although that is a Scottish authority, there is a "well-settled practice" in tax matters that courts of first instance in England endeavour to keep in line with decisions of the Scottish courts, see *Secretary of State for Employment and Productivity v Clarke, Chapman & Co Ltd* [1971] 1 WLR 1094 at page 1102. *Indian Cavalry Club* was also referred to with approval in *Han.* It would be very surprising if a VAT civil evasion penalty imposed under VATA s 60 required a different standard of proof from a VAT civil evasion penalty imposed under FA 2003, s 25.

83. We therefore find that the civil standard of proof also applies in relation to penalties for evading import VAT.

The parties' submissions on the matters in dispute

Ms Krubally N'Diaye's submissions

84. Ms Krubally N'Diaye accepted that she had brought more cigarettes into the UK than the 200 which were allowed. She said that she had the following information about duty free limits:

(1) until 2010 she knew that the limit on importing cigarettes from outside the EU was 200;

(2) in around 2010 she heard on the radio that there had been an increase to the number of duty-free cigarettes to 4,000, but she paid little attention to this news item as she was trying to give up smoking;

(3) a work colleague told her that he regularly crossed the Channel and purchased 4,000 cigarettes duty-free;

(4) she heard what she called "Chinese whispers" at work, to the effect that staff regularly brought back 4,000 cigarettes for personal use and for family and friends.

85. Ms Krubally N'Diaye said that she had genuinely believed, based on this information, that the limit had been raised to 4,000 cigarettes. She further said that she had only purchased 4,000 cigarettes and not 4,200 cigarettes in the Gambia to import into the UK.

86. Ms Krubally N'Diaye initially suggested that her signature on the Seizure Information Notice, which stated that 4,200 cigarettes had been seized, had been forged, but later amended her evidence, saying that she had signed a blank Notice and Officer Pillai had incorrectly completed it with the wrong number of cigarettes after she had left the terminal. She submitted that his Notebook was incorrect and should be set aside by the Tribunal as unreliable.

87. Her case, in essence, was that she had genuinely believed the limit to be 4,000, and had only imported 4,000, so she was not dishonest.

Ms Choudhury's submissions

88. Ms Choudhury submitted that as a question of fact Ms Krubally N'Diaye had entered the green channel with 4,200 cigarettes and that she met the test for dishonesty because:

(1) she had seen the many signs at the airport on her return trips to the UK and knew that the limit was 200;

(2) her stories about a half-heard news story and office gossip were not credible;

(3) the contemporaneous evidence of Officer Pillai's notebook and the Seizure Information Notice was that she had imported 4,200 cigarettes; and

(4) even had Ms Krubally N'Diaye thought the limit was 4,000 (which HMRC did not accept), she was still 200 cigarettes over that limit, plus the half packet in her handbag which was not seized.

The facts in dispute

89. Before we can decide this case, we must make further findings of fact on the five issues in dispute:

(1) the number of cigarettes purchased in the Gambia and packed in Ms Krubally N'Diaye's luggage;

(2) whether Officer Pillai's notebook accurately records what occurred on the night of the seizure;

(3) whether Ms Krubally N'Diaye was provided with a completed Seizure Information Notice and other documents after the seizure;

(4) whether she had read the warning notices at the airport; and

(5) whether she believed that the legal limit was 4,000 cigarettes.

The number of cigarettes purchased in the Gambia and brought to the UK

90. Nowhere in Ms Krubally N'Diaye's correspondence or in her written submissions did she state the number of cigarettes purchased in the Gambia. As set out above, at the Tribunal her case was that she had bought only 4,000.

91. Under cross-examination, Ms Krubally N'Diaye said she bought "around 13 packets – either 12 or 13" and agreed that each packet contained 200 cigarettes. She later told the Tribunal that she also purchased two further packets at a stall near the hotel, and six more packets at the airport.

92. The Tribunal pointed out that this totalled either:

(1) 20 packets or 4,000 cigarettes (if Ms Krubally N'Diaye had purchased 12 packets in the market); or

(2) 21 packets or 4,200 cigarettes (if she had purchased 13 packets at the market).

93. Given this evidence, we asked Ms Krubally N'Diaye whether she was maintaining her position that she had only brought 4,000 cigarettes into the UK. Ms Krubally N'Diaye then amended her evidence, saying that she had "definitely bought 12 packets" in the market and not 13. We asked why she was now sure, when under cross-examination earlier that day she had said "12 or 13." She said she had now remembered that the first market stall had only seven packets of cigarettes left and so she had gone to a different stall to buy five more. She concluded by saying "I definitely bought 12. I thought the allowance was 4,000. I only bought 4,000."

94. We do not accept this late evidence, which we find to be unreliable. Nowhere in her written or earlier oral evidence had Ms Krubally N'Diaye mentioned needing to visit two separate market stalls.

95. On the basis of Ms Krubally N'Diaye's original evidence, we find that she bought either 4,000 or 4,200 cigarettes in the Gambia and brought the same amount into the UK (ignoring the half packet in her handbag). The answers to the next two questions will determine which of these figures is correct.

Whether Officer Pillai's Notebook was accurate

96. Officer Pillai told us, and we accepted, that his notebook was written up soon after Ms Krubally N'Diaye's cigarettes were seized. Ms Krubally N'Diaye disputed the order in which the questions were asked and whether some questions had been asked at all. She conducted an extensive and detailed cross-examination before

inviting the Tribunal to find that the Notebook was "plagued and riddled systematically with factual inaccuracies" so that Officer Pillai should not be regarded a credible witness.

97. One of these alleged inaccuracies was that Officer Pillai's Notebook records him as having stated "I'm also going to refer this to the HM Revenue & Customs." Ms Krubally N'Diaye said he had in fact said "Inland Revenue," not "HM Revenue and Customs." Officer Pillai confirmed that he always uses the term "HM Revenue & Customs." As the Inland Revenue was merged with HM Customs & Excise to become HMRC in 2005, and as Officer Pillai worked closely with HMRC, we find it inconceivable that Officer Pillai would have referred to "the Inland Revenue."

98. Officer Pillai's Notebook records that he asked Ms Krubally N'Diaye whether she was aware of her customs allowances; whether she was aware that controlled drugs, firearms, offensive weapons, obscene and indecent materials were all prohibited; and whether she was aware of the contents of her bags and whether they contained any sharp items. Ms Krubally N'Diaye said that he asked none of these questions. She also disputed the order of Mr Pillai's questioning: for instance, her recollection was that her passport was requested towards the end of the encounter, and not at the beginning.

99. Officer Pillai told us that he has a standard form of questioning which he invariably uses. We accept that. It would be surprising if a Border Force officer with two years' experience who stops 40-50 people a day, did not have a routine for asking questions. We find that all these routine questions were asked, and that they were asked in the order set out in Officer Pillai's Notebook. In coming to this conclusion we also take into account that the Notebook was written up almost contemporaneously with the events in question; in contrast Ms Krubally N'Diaye said in her letter of 14 March 2014 that she had tried to "eradicate" her memories of the seizure because she had found it so traumatic.

100. Ms Krubally N'Diaye also said that the Notebook account was incomplete: for example, Officer Pillai had asked her to identify certain other items in her luggage. Officer Pillai said that the Notebook did not record things which were irrelevant to the seizure. Again, we accept that.

101. Ms Krubally N'Diaye was in particular insistent that Officer Pillai had told her that she would be prosecuted, and this is not in the Notebook. Officer Pillai said that he would not have made that statement because prosecution is a matter for HMRC, not the Border Force. As already stated, the Notebook records that he told Ms Krubally N'Diaye that he was going to refer the matter to HMRC.

102. Ms Krubally N'Diaye's recollection on this point was particularly vivid and we find that Officer Pillai did refer to the possibility that prosecution might follow his referral to HMRC, even if he did not state it as a certainty.

103. But that omission does not undermine the credibility of the Notebook as a whole; the purpose of that record was to set out the details of the seizure. Whether or

not Ms Krubally N'Diaye was to be prosecuted was not relevant to the seizure itself, but merely a possible consequence. It follows that, with that one omission, we find Officer Pillai's Notebook to be a reliable account of what happened.

104. The Notebook records that Officer Pillai removed 4,200 cigarettes from Ms Krubally N'Diaye's luggage, and we accept that evidence and find it to be a fact.

Whether Ms Krubally N'Diaye signed blank forms

105. The Seizure Information Notice, the warning letter about seized goods and the warning of liability to prosecution, are all signed. The Seizure Information Notice sets out the detail of the cigarettes seized, and states that the total number is 4,200. It is dated and contains the following declaration:

> "I acknowledge receipt of form ENF 156 (original) and agree that the above description of the things seized is correct."

106. Ms Krubally N'Diaye initially suggested to Officer Pillai in cross-examination that the signatures on these documents were forged; she also suggested that they had been cut and pasted from another document into the forms. Officer Pillai rejected these allegations "110%." He said that the forms were fully completed in front of Ms Krubally N'Diaye and she then signed them.

107. When Ms Krubally N'Diaye gave evidence in chief she did not allege that the signatures were forged, or that they had been "cut and pasted" but rather that Officer Pillai had given her blank forms and said "just sign these forms and I will fill in the rest."

108. In answer to questions from the Tribunal, Ms Krubally N'Diaye said that she had never previously signed a blank form and then left it to someone else to complete the content, because as a professional she recognised this would have serious implications. She said that she had nevertheless signed these blank forms because she "didn't believe [Officer Pillai] would put in anything other than the amount [which she had brought into the UK]" and "I just didn't think he would be adding anything."

109. The Tribunal pointed out that she had been "fuming with rage and crying foul play," and that she had thought Officer Pillai had unfairly picked on her because she was black. Against that background, we asked whether she had nevertheless signed these forms when (a) the details of goods seized had been left blank and (b) the signature explicitly confirmed her agreement that "the above description of the things seized is correct." Ms Krubally N'Diaye insisted that this was what had happened, and that she had left the terminal without copies of these forms.

110. We find this evidence wholly implausible and do not accept it. Ms Krubally N'Diaye has never previously signed a blank form, because as a professional she knew it was dangerous. She had been extremely angry with Officer Pillai, and she believed he was treating her unfairly. It is inconceivable that she would have signed blank forms containing the explicit declaration set out at §105, and left Officer Pillai to complete the part setting out the number and nature of the seized goods.

111. Ms Krubally N'Diaye's evidence also runs directly counter to that of Officer Pillai. He told the Tribunal that he completed the Seizure Information Notice in front of Ms Krubally N'Diaye and she then signed it. He said that each form has four carbon copies and that he gives the top copy of each form to the passenger. He did not treat Ms Krubally N'Diaye any differently. We prefer his evidence to that of Ms Krubally N'Diaye and accept it.

112. It follows that we find as facts that Ms Krubally N'Diaye:

(1) imported 4,200 cigarettes plus the ½ packet in her handbag;

(2) signed the Seizure Information Notice after it had been completed stating that 4,200 cigarettes had been seized by the Border Force; and

(3) was given a copy of this Notice and the other two forms to take with her when she left the terminal.

Whether Ms Krubally N'Diaye read the advisory notices at Gatwick airport

113. Ms Krubally N'Diaye asked us to believe that she did not read the signs setting out the non-EU importation limit either on this occasion, or during either of her two journeys in 2012 (all other journeys were before 2010 when she said she understood the limit to have changed). Ms Choudhury invited us to find that her submissions were not credible.

114. Relevant facts are that:

(1) there were advisory signs above each carousel and at the entrance to the green channel;

(2) the signs clearly set out the different limits for EU and non-EU travel;

(3) Ms Krubally N'Diaye had arrived at Gatwick on two occasions in 2012 and the signs were also present at the airport on those occasions;

(4) on this occasion, Ms Krubally N'Diaye waited alone at the luggage conveyor for around 20 minutes, and the signs are above that conveyor.

115. We have already found that:

(1) Ms Krubally N'Diaye changed her evidence and asked the Tribunal to accept that she had only purchased 12 packets in the market, evidence which we reject as unreliable;

(2) she originally accused Officer Pillai of forging her signature, when in fact she had signed the forms herself;

(3) she said she had imported only 4,000 cigarettes when in fact she had imported 4,200;

(4) she said she had signed blank forms, and we have found that evidence to be untrue.

116. On the basis of the above we find that Ms Krubally N'Diaye was not an honest witness. Taking into account both the facts and this finding on credibility, we do not

accept that she failed to read the signs. Instead, we find on the balance of probabilities that she read the signs before she entered the green channel.

Whether Ms Krubally N'Diaye believed that the limit was 4,000 cigarettes

117. Ms Krubally N'Diaye asked the Tribunal to accept that she had understood the limit to be 4,000 cigarettes, and that her erroneous belief rested on a news item to which she had paid little attention, a conversation with a colleague who had returned from the EU, and generalised gossip at her workplaces.

118. In deciding whether she is telling the truth, we take into account the following:

(1) Ms Krubally N'Diaye did not import 4,000 cigarettes, but 4,200;

(2) she knew that from her many trips to the Gambia before 2010 that there was a different limit for EU and non-EU importations, and that the latter was 200. Yet, with the possible exception of the radio programme, to which she paid little attention, her work conversations relate to importations from the EU; and

(3) she read the signs at Gatwick before she entered the green channel.

119. On the basis of the above and our finding on credibility we find that Ms Krubally N'Diaye did not genuinely believe the limit to be 4,000 but rather knew it was 200 and nevertheless sought to import the other 4,000 cigarettes.

Whether Ms Krubally N'Diaye was dishonest

120. We have found as a fact that Ms Krubally N'Diaye did not believe that the limit was 4,000 but knew it was 200. This is the "strong subjective element" referred to by Lord Nichols in *Royal Brunei*, namely the "type of conduct assessed in the light of what a person actually knew at the time."

121. Ms Krubally N'Diaye therefore knew the legal limit but nevertheless sought to import 4,200 cigarettes into the UK. That is dishonest behaviour by the normally acceptable standards of honest people, so the test for dishonesty is met.

122. We find that Ms Krubally N'Diaye acted dishonestly and so is liable to a penalty.

The quantum of the penalty

123. We have also to decide the quantum of the penalties. There are two issues to consider.

124. One is the mitigation percentage. Ms Krubally N'Diaye said that, if she failed in her main submission, she should not be charged with a penalty at all, because it was a first offence. Ms Choudhury said that the penalty had been reduced by 50% in line with HMRC's published guidance, to recognise the co-operation and disclosure provided by Ms Krubally N'Diaye and that there should be no further mitigation.

125. The other issue can most easily be explained by setting out the Penalty Notice issued to Ms Krubally N'Diaye:

	Duty liable to penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty	£42	50%	50%	£21	£563
Excise civil evasion penalty	£1,085	50%	50%	£542	

126. Ms Choudhury said that the Penalty Notice had erroneously included import VAT within the figure for excise duty and that HMRC should instead have included the import VAT amount in that for customs duty, showing the two as a single figure. The Penalty Notice would then have looked something like this:

	Duty liable to penalty	Reduction allowed	Penalty charged	Amount of penalty	Total penalty
Customs civil evasion penalty including import VAT evasion penalty	£223	50%	50%	£111	£563
Excise civil evasion penalty	£904	50%	50%	£452	

127. In other words, the amount shown as an excise civil evasion penalty should have been reduced by £181 (before mitigation), and that for customs duty should have been increased by the same amount.

128. Ms Choudhury asked that the Tribunal infer from the Penalty Notice that HMRC intended to charge a penalty for the evasion of import VAT. We agree and find as a fact that HMRC's intention was that Ms Krubally N'Diaye should pay a penalty reflecting her evasion of import VAT.

129. We next consider these two issues, mitigation and the Penalty Notice, first in relation to the excise civil evasion penalty and then in relation to the customs civil evasion penalty.

The excise civil evasion penalty

130. Under FA 1994, s 8(4) the Tribunal can reduce an excise duty penalty "to such amount (including nil) as they think proper."

131. We find that it is "proper" to reduce the penalty so as to remove the part of which relates to the evasion of import VAT.

132. In relation to mitigation, we were not provided with HMRC's published guidance, but the HMRC Offence Report states that their practice is to reduce a penalty by up to 40% for "an early and truthful explanation of why the arrears arose and the true extent of them." HMRC did not accept that Ms Krubally N'Diaye's submissions were truthful, but at the time the penalty was levied, and mitigation decided, she had not challenged the "true extent" of the smuggling. On that basis,

HMRC reduced the penalty by 25%. It was only subsequently that Ms Krubally N'Diaye had submitted that only 4,000 cigarettes were imported, so challenging the "true extent" of the arrears.

133. The HMRC Offence Report also said that further mitigation up to a maximum of 40% was available for "fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions." HMRC reduced the penalty by a further 25% under this head, because Ms Krubally N'Diaye had replied to their letter within the prescribed deadline, but had not told HMRC how much the cigarettes had cost, so quantification of the irregularity had been a matter of HMRC's estimates.

134. The total mitigation was therefore 50% (25% under each head).

135. Ms Krubally N'Diaye submitted that the penalty should have been mitigated to nil on the basis that it was a first offence. HMRC's mitigation framework is to allow a maximum mitigation of 80% (2 x 40%), so that there is a minimum penalty of at least 20%. It seems to us that this is entirely appropriate, given that the penalty is for the dishonest evasion of excise duty, which requires that a person deliberately brought the excess cigarettes to the UK, knowing it was a breach of the legal limits. We do not agree that the penalty should be reduced to nil.

136. Furthermore, since HMRC set the mitigation percentage, Ms Krubally N'Diaye has challenged the "true extent" of the smuggling, arguing that she only imported 4,000 and not 4,200 cigarettes. We considered whether to reduce the mitigation percentage to take account of this change of position. However, we thought that HMRC's mitigation under the second head (co-operation) was arguably too low, because Ms Krubally N'Diaye had replied to the many questions asked by Officer Dawson in his letter of 30 January 2015, apart from providing the price of the cigarettes.

137. Taking the two together, we decided not to interfere with the 50% mitigation set by HMRC.

138. We therefore reduce the excise duty penalty from the assessed amount of £542 to £452 to remove the amount incorrectly representing Ms Krubally N'Diaye's liability to an import VAT penalty.

Customs duty and import VAT

139. The position here is more complex. We first set out the legislation and then Ms Choudhury's submissions, before discussing the possible alternatives.

The legislation

140. Import VAT is to be "charged and payable as if it were a duty of customs," see VATA s.1(4).

141. VATA s 16 provides as follows:

"Application of customs enactments

(1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—

(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; …

shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, EU customs duties.

(2) …"

142. The penalty legislation, set out at Part 3 of FA 2003, opens as follows:

s 24: Introductory

(1) This Part makes provision for and in connection with the imposition of liability to a penalty where a person—

(a) engages in any conduct for the purpose of evading any relevant tax or duty, or

(b) engages in any conduct by which he contravenes a duty, obligation, requirement or condition imposed by or under legislation relating to any relevant tax or duty.

(2) For the purposes of this Part 'relevant tax or duty' means any of the following—

(a) customs duty;

(b) community export duty;

(c) community import duty;

(d) import VAT;

(e) customs duty of a preferential tariff country."

143. FA 2003, s 25 is headed "penalty for evasion" and begins:

"(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."

144. FA 2013, s 29 is headed "Reduction of penalty under section 25 or 26" and reads:

> "(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…"

145. FA 2003, s 30 provides as follows

> **"Demands for penalties**
> (1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person or his representative a notice in writing (a 'demand notice') demanding payment of the amount due by way of penalty.
>
> (2) An amount demanded as due from a person or his representative in accordance with subsection (1) is recoverable as if it were an amount due from the person or, as the case may be, the representative as an amount of customs duty."

146. FA 2003, s 33 is headed "Right to appeal against certain decisions" and subsection (2) reads:

> "Where HMRC give a demand notice to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of–
>
> (a) their decision that the person is liable to a penalty under section 25 or 26, or
>
> (b) their decision as to the amount of the liability."

147. Subsection (6) reads:

> "The powers of an appeal tribunal on an appeal under this section include–
>
> (a) power to quash or vary a decision; and
>
> (b) power to substitute the tribunal's own decision for any decision so quashed."

The submissions

148. Ms Choudhury explained the error on the Penalty Notice to Ms Krubally N'Diaye and the Tribunal confirmed with her that she understood. However, she did not make any submissions.

149. To recapitulate what we said at §126, Ms Choudhury submitted that Ms Krubally N'Diaye's customs duty penalty was too low because the amount due for evading import VAT had been erroneously omitted from the customs duty penalty, being instead included in that for excise duty. She also said that HMRC should have then identified, on the face of the demand notice, that the penalty related to the evasion of both customs duty and import VAT.

150. She submitted, however, that the Tribunal had the jurisdiction under FA 2003, s 33(6) to vary HMRC's decision so as to increase the customs duty penalty to include that for evading import VAT. Further, the Tribunal should exercise that discretion so as to leave the total penalties charged on Ms Krubally N'Diaye unchanged at £563, as this was the correct overall sum taking into account the 50% mitigation granted by HMRC.

151. Ms Choudhury did not cite any case law authorities and we were unable to identify any. We therefore begin by setting out the questions in issue, followed by the general law on deeming provisions and the nature of a penalty. Finally, we consider the statutory provisions themselves.

The questions in issue

152. It is clear from FA 2003, s 33 that the Tribunal only has the jurisdiction to vary "a decision" made by HMRC. It is possible that Ms Choudhury is right and the Tribunal can vary the customs duty penalty decision. But it is also possible that the statute requires two decisions, one relating to customs duty and one to import VAT. If so, HMRC have made only the first decision and failed to make the second. If that is the position, the Tribunal cannot remedy the situation, because we only have jurisdiction to vary a decision; we cannot *make* a decision.

153. In order to decide whether we have the jurisdiction to vary the customs duty penalty, we have asked:

(1) whether there are (a) separate penalties for import VAT and customs duty; or (b) a single customs duty penalty, covering both the evasion of import VAT and the evasion of customs duty; and

(2) in the light of the answer to that first question, what is the nature of the decision made by HMRC; and what is our jurisdiction over that decision.

Deeming provisions

154. The case of *DV3 RS Ltd Partnership v HMRC* [2013] STC 2150 ("*DV3*") concerned the stamp duty land tax provisions, which are also contained within FA 2013. Section 44(4) provides (emphasis added) that "if the contract is substantially performed without having been completed, the contract is treated *as if it were* itself the transaction provided for in the contract" and s 45(3) says that s 44 has effect and "applies *as if there were* a contract for a land transaction" which contained certain specified elements.

155. At [13] Lewison LJ, giving the leading judgment with which Gloster LJ and Maurice Kay LJ agreed, said that "Sections 44 and 45 are what are sometimes called 'deeming provisions.'"

156. Pausing there, VATA s 1(4) provides that import VAT is to be "charged and payable as if it were a duty of customs." The use of the words "as if it were" shows that VATA s 1(4) is also a deeming provision. The question for us is how far that deeming provision extends, because here we are not dealing with import VAT itself, but rather a penalty for evading import VAT.

157. In *DV3* at [13] Lewison J said that the correct approach is that expounded by Gibson J in *Marshall v Kerr* [1993] STC 360 at 366:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

158. Lewison LJ went on to say that, although Gibson J's decision was subsequently reversed by the House of Lords, both sides in that case accepted the correctness of the principles he had set out, albeit not the application of those principles to the facts of that case, see [1994] STC 638 at 649.

159. We consider at §171 below how Gibson J's analysis applies to the statutory provisions at issue here.

The nature of a penalty

160. In *Whitney v IRC* [1926] AC 37 Lord Dunedin said:

> "Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

161. Although we are here dealing with penalties, we find that the same three-stage approach applies: Part 3 of FA 2003 refers to liability, to demand notices, and to recovery. Special Commissioner Malcolm Gammie QC came to the same conclusion

in relation to direct tax penalties, in *Bysermaw Properties Ltd v HMRC* [2008] STC (SCD) 322 at [89].

162. In order to decide whether (a) there are two penalties, one for evading import VAT and one for evading customs duty, or (b) a single customs duty penalty, we need to consider the position at each of the three stages of the penalty. We first consider liability, then recovery, and finally – because it is the most difficult – assessment.

Liability

163. FA 2003, s 24(1) provides for "the imposition of liability to *a penalty*" where a person "engages in conduct for the purpose of evading any relevant tax or duty" and Section 24(2) defines "relevant tax or duty" as being "any of the following" followed by a list which includes both import VAT and customs duty.

164. We cannot, however, infer from the reference to "a penalty" here and elsewhere in these provisions, that evading any or all of the tax/duties on the list gives rise to a single unified penalty liability. This is because the Interpretation Act, s 6 reads:

> **"Gender and number**
>
> In any Act, unless the contrary intention appears,
>
> (a)-(b)…
>
> (c) words in the singular include the plural and words in the plural include the singular."

165. So, unless the contrary intention appears in these civil penalty provisions, the mere reference to "a penalty" does not take us very far.

166. FA 2003, s 25(1) says that the 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." To work out the extent of the liability, we must therefore have regard to the substantive provisions under which the relevant tax or duty is calculated. Customs duty is calculated as a percentage of the value of the goods. We rely on the duty calculation schedules attached to the HMRC Offence Report to find that, for cigarettes, the duty rate is 57.67% of the value. Import VAT is calculated as 20% of the total value of the goods, after adding both excise duty and customs duty to the value.

167. The penalty liability is therefore computed in a way which mirrors the tax or duty, so that the penalty for evading import VAT is calculated differently from that for evading customs duty. This in itself indicates that there is no deeming.

168. Furthermore, VATA s 1(4), says that import VAT shall be "charged and payable" as if it were customs duty. It does not deem a *liability* to import VAT to be a liability to customs duty.

169. We therefore find that there is no deeming at the liability stage: instead, there are two separate penalty liabilities, each calculated based on the underlying substantive law.

Recovery

170. The position here is straightforward: FA 2003 s 30(2) provides that a penalty shown on a demand note is "recoverable as if it were an amount due from the person…as an amount of customs duty." The deeming is therefore explicit.

Demand

171. At the intermediate "demand" stage, our starting point is VATA s 1(4). This provides that import VAT is to be charged "as if" it were a duty of customs. In accordance with the guidance given in *Marshall v Kerr*, we need to decide whether a penalty for evading import VAT is to be charged "as if" it were a penalty for evading customs duty, because that is one of the "consequences and incidents inevitably flowing from or accompanying" the deeming provision at VATA s 1(4).

172. In *Marshall v Kerr*, Gibson J said that one must construe a deeming provision "consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained." Although that dictum referred to the words of the deeming provision itself, we think it is reasonable to take the same approach when considering whether something is a "consequence or incident" of that deeming provision.

173. The policy of VATA in relation to import VAT can be seen from VATA s 1(4) itself, and from VATA s 16, which says that customs enactments are to apply to "any VAT chargeable" on imports. Read together, it is clear that the policy intention is for import VAT to be deemed to be customs duty for the purpose of charging provisions.

174. Our preliminary answer is therefore that deeming a charge to an import VAT penalty to be a charge to customs duty penalty flows from and accompanies the deeming of import VAT to be customs duty under VATA s 1(4). To put it another way, it would be surprising if charging a penalty for evading import VAT fell outside the general policy approach set out in VATA.

175. However, *Marshall v Kerr* also requires us to establish whether we are "prohibited from" taking this approach, and VATA s 16 is expressly stated to be "subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears…" We carefully considered the statutory provisions to see whether we were prohibited from our preliminary conclusion, and/or whether a contrary intention was indicated by the words of the legislation.

176. We were initially worried by FA 2003, s 30(1), which provides that where a person is "liable to a penalty" the demand notice must demand payment of "the amount due by way of penalty." That subsection can be read as requiring that the notice demand *the import VAT penalty to which the person has become liable*, which in turn would lead to the conclusion that the two must be kept separate at the demand stage.

177. However, the subsection does not say that the demand notice must state "the penalty to which the person is liable" but rather "the amount due by way of penalty."

We find that it is possible to read it as simply requiring that the recipient of the demand notice be told the amount payable. Such a reading is compatible with a single merged penalty.

178. We therefore do not read FA 2003, s 30(1) as either prohibiting the deeming of a charge to an import VAT penalty to be a charge to customs duty penalty, or as expressing a contrary intention.

179. Our second concern was that, if our preliminary conclusion is right, FA 2003 s 30(2) is redundant. As we have already seen at §170, that subsection is an explicit deeming provision applying to recovery. But if a penalty for evading import VAT is deemed to be a customs duty penalty as a "consequence and incident" flowing from VATA s 1(4), then there is no need for a further explicit deeming provision.

180. However Lord Hoffman in *Walker v Centaur Clothes Group* [2000] STC 324 said at page 331:

> "I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway,"

181. We respectfully agree, and find that the redundancy of FA 2003 s 30(2) neither amounts to a prohibition on deeming nor indicates a contrary intention.

182. We therefore decide that the penalty for evading import VAT is correctly charged as a customs duty penalty on the demand notice. In other words, although there are separate liabilities to penalties for evading import VAT and evading customs duty, the import VAT penalty is deemed to be a customs duty penalty for the purposes of both the demand notice and recovery.

183. The two liabilities should be shown as a single merged customs duty figure on the demand notice. To comply with FA 2003, s 30(1), the demand notice should also identify that the figure includes the liability for evading import VAT. This was also Ms Choudhury's position: she said that HMRC should have identified, on the face of the demand note, that the amount charged as a customs duty penalty also included an amount for evasion of import VAT.

The Tribunal's jurisdiction

184. We turn to the Tribunal's jurisdiction. Under FA 2003 s 33(6) the Tribunal has the power to "quash or vary a decision" and to substitute our own decision "for any decision so quashed." Subsection (2) says that "a decision" is "a decision that the person is liable to a penalty under section 25."

185. However, FA 2003, s 25(1) provides that "person engages in any conduct for the purpose of evading any relevant tax or duty" and "his conduct involves dishonesty" then "that person *is liable* to a penalty." Liability therefore arises from the person's behaviour.

186. Despite the wording of FA 2003 s 33(2), it follows that HMRC do not make a decision that a person "is liable" to a penalty. Instead, HMRC decide whether or not to *charge* a penalty once a liability exists. FA 2003, s 33(2) must be read in that way, so that it is compatible with s 25(1).

187. The decision over which the Tribunal has jurisdiction on appeal is therefore HMRC's decision to charge a penalty once liability has been established.

188. Since an import VAT penalty is deemed to be a customs duty penalty at the demand stage, HMRC do not make a separate decision to levy an import VAT penalty. Instead, they make a single decision as to the amount of the customs duty penalty, taking into account the person's liability both to a customs duty penalty and to an import VAT penalty.

189. Here, Ms Krubally N'Diaye is liable to an import VAT penalty under FA 2003 s 25 because she engaged in conduct for the purposes of evading import VAT. We have found as a fact that HMRC intended to charge Ms Krubally N'Diaye a penalty consequent upon that liability, because they calculated the amount and included it on the demand notice.

190. However, HMRC mistakenly merged that amount with the excise duty penalty instead of with the customs duty penalty. As a result, HMRC decided to levy a customs duty penalty which was lower than intended. We have jurisdiction to vary that decision.

191. In deciding how to exercise that jurisdiction we rely on the familiar authority of *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 228 where Lord Greene MR said, in relation to the discretion given to public bodies, which includes courts and tribunals:

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."

192. He went on to say, at page 230, that:

> "the discretion must be exercised reasonably. Now what does that mean?…a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider."

193. It is clear from the facts that Ms Krubally N'Diaye was liable to the import VAT penalty and that HMRC intended to assess a penalty reflecting that liability. We are bound to take these matters into account when deciding whether we should vary

the decision as to the amount of the penalty. Furthermore, if we refused to exercise our jurisdiction so as to increase the customs duty penalty, Ms Krubally N'Diaye would obtain a windfall benefit as the result of what was, essentially, an administrative error by HMRC.

194. We have therefore decided to increase the customs duty penalty shown on the demand notice to take into account Ms Krubally N'Diaye's liability to a penalty of £222 for evasion of import VAT.

195. Our analysis of the mitigation position is the same as in relation to the excise duty penalty. For the reasons given at §132 above we have not interfered with the 50% mitigation percentage. The customs duty penalty is therefore £111.

Decision and appeal rights

196. We find that Ms Krubally N'Diaye was dishonest and we reject her appeal. In the exercise of our jurisdiction over the amount of the penalty we reduce the excise duty civil evasion penalty from £542 to £452 and increase the customs duty civil evasion penalty from £21 to £111. As a result the total penalties charged on Ms Krubally N'Diaye remain at £563.

197. 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: 06 AUGUST 2015