



TC04804

Appeal number: TC/2015/0205

Excise and Customs Duty - importation of tobacco products - appeal against Civil Evasion Penalties - s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 - whether dishonesty - yes - whether allowances given to reduce penalties correct - yes - appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

SAYED AFSHIN PISHVAEI

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DEREK ROBERTSON**

Sitting in public at Leeds Magistrates and Family Court, Westgate, Leeds on 14 September 2015

The Appellant in person Mr. Andrew Scott, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Sayed Afshin Pishvaei (“the Appellant”) against a decision by HM Revenue and Customs (“HMRC”) on 13 October 2013, to issue Excise and Customs Civil Evasion Penalties in the total sum of £974 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty.
2. HMRC make a cross application for the Appellant’s appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chambers) Rules 2009 Rules, on the basis that the Tribunal has no jurisdiction to hear the appeal or alternatively that there is no reasonable prospect of the Appellant’s appeal succeeding.

Background

3. On 6 September 2013, the Appellant was stopped and questioned by Officer Brazier, a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Terminal 3, Manchester Airport, arriving with his wife from Tehran, Iran via Istanbul.
4. Iran is a “third country” in respect of which there is a personal allowance of 200 cigarettes for returning travellers.
5. Officer Brazier asked both passengers a series of initial questions including whether they were aware of prohibitions, restrictions and duty free allowances for goods in respect of cigarettes, alcohol and tobacco. Both passengers confirmed they understood the allowances. The Appellant then stated that he had twenty packets of cigarettes.
6. Officer Brazier carried out a search of both passengers’ luggage which she recorded as revealing a total of 11,800 cigarettes and 3.65kg of meat and dairy products (“the goods”). The tobacco consisted of 10,600 Bahman cigarettes and 1,200 Kent cigarettes. That quantity of cigarettes represented more than fifty-nine times the Appellant’s personal allowance of 200.
7. In evidence at the hearing, the Appellant said that he thought he had told Officer Brazier that he had 20 *cartons* of cigarettes. Each packet of cigarettes would contain 20 cigarettes, which mathematically means that if the Appellant was carrying 11,800 cigarettes, there were 29.5 packets in each carton. That is clearly not possible. A more likely explanation is that the Appellant had 12,000 cigarettes in 20 cartons and that each carton contained 30 packets of 20 cigarettes. That therefore suggests that Officer Brazier allowed the Appellant 200 and seized 11,800. Officer Brazier’s notes were very brief and it appears not written contemporaneously with the seizure. The Appellant was assessed on 11,800 less 200 cigarettes allowance and any mistake in that regard was therefore to his advantage.

8. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended) Officer Brazier seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice BOR156 and Warning Letter BOR162, both of which the Appellant signed.

9. The legality of seizure was not challenged in the Magistrates' court and the seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

10. On 17 April 2014 Officer Whittaker of HMRC's International Trade and Compliance Section, wrote to the Appellant informing him HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, imposed under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised as to the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on a prompt response and co-operation with HMRC's enquires. The Appellant was given the opportunity to provide any relevant information which he thought should be taken into account in calculating the amount of the penalty.

11. In her letter, Officer Whittaker explained that if the Appellant was willing to co-operate with the enquiry he should provide the following within thirty days of the date of this letter:

- "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public. Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- Details of how your travel and the purchase of goods were financed on each occasion.
- Confirmation of the quantities of goods involved on each occasion.
- Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
- Details of all international travel during the period under enquiry, including the reasons for travel.
- An explanation of what you did with, or intended to do with, the smuggled goods.
- Any documentation you think will support the information you are providing.
- Any other information or explanations you think may be of use to this enquiry".

12. By letter dated 28 April 2014, the Appellant and his wife replied, returning the copy letter acknowledging that he understood its contents. He said:

5 “We receive two separate letters for myself and my wife. We are one family with two children and we travel to my own country to visit our family and then we back to UK. When I was in my country the Customs informed us we could bring back 10 cartons for each valid flight ticket. Because we were in receipt of four flight tickets we were comfortable that I could bring 38 cartons into the country. These 38 cartons cost is less than they would cost in Great Britain. They were totally intended for me and my wife and for personal use. We have now found what amount we are allowed to bring back in future. This is absolutely our mistake and we will never do it again.”

13. On 7 May 2014, Officer Whittaker acknowledged the Appellant’s letter of 17 April 2014 and requested further information from the Appellant including,:

- 15 • If the Appellant held four valid flight tickets, the names and addresses of the other travellers and their relationship to him.
- Details/evidence of the cost of the excise goods seized
- the Appellant’s current source of income and evidence of any taxable benefits paid during the enquiry period
- 20 • details of all travel in the period under enquiry
- evidence of purchase of the airline travel tickets.

14. Officer Whittaker wrote to the Appellant again on 18 June 2014 asking for a response by 30 June 2014, in the absence of which she would make a decision with regard to the imposition of a penalty

25 15. On 28 June 2014 or thereabouts the Appellant responded, broadly reiterating what he and his wife had said in their letter of 17 April 2014, but without providing the information requested by Officer Whitaker.

30 16. On 7 August 2014 HMRC issued a Civil Evasion Penalty to the Appellant. The evaded duties, relating to the Appellant’s half share of the 11,800 cigarettes, that is 5,900 cigarettes, were initially calculated on £1,536 evaded Excise Duty and £60 evaded Customs Duty. The corresponding Excise Civil Evasion Penalty was calculated at £691 and the Customs (and Import VAT) Civil Evasion Penalty £27, making a total penalty of £718. HMRC had allowed a 30% reduction for disclosure and 25% for co-operation (out of a maximum of 40%), that is, a reduction of 55%.
35 The penalty also took into account the Appellant’s 200 cigarettes personal allowance.

17. For the purposes of Excise Duty, it is the recommended retail price in the UK which is used as the calculation basis. HMRC say that the retail price (£5.86) of the cheapest known brand has been used to calculate the Excise Duty and that accordingly the Appellant has received the maximum possible benefit in that regard.

40 18. On 4 September 2014 the Appellant asked for a review of HMRC’s decision. He said that whilst accepting that he had brought cigarettes into the UK in excess of his

personal allowance this was due to a misunderstanding on his part about cartons/packets. He repeated that for the reasons set out in his letter of 28 April 2014 he thought he could bring in 40 cartons. He said that he now recognised that the obligation was on him to ascertain his personal allowance. He added that he and his wife are in receipt of State benefits and having to pay £1596 (the Appellant was mistakenly adding the evaded duties) would cause hardship. He reiterated that he and his wife were not being dishonest when they went through the green channel and asked HMRC to reduce the penalties further. The Appellant said that he would prefer to assume culpability for all the cigarettes.

10 19. On 13 October 2014 HMRC responded with a revised assessment, on the basis that the Appellant accepted responsibility for the total duty evaded on 11,800 cigarettes. The total duty evaded was £3,248 made up of £2,604 evaded Excise Duty and a £644 evaded Customs Duty. HMRC allowed an increased reduction of 70% made up of a 35% reduction for disclosure, and a 35% reduction for cooperation. The
15 Customs Civil Evasion Penalty was therefore reduced to £193 and the Excise Civil Evasion Penalty reduced to £781, the total penalty being £974.

20. On 10 November 2014 the Appellant asked for a further independent review. Officer Whitaker therefore transferred the matter to HMRC's Compliance Appeals and Reviews Department in Glasgow.

20 21. Officer Marshall reviewed the decision on 10 December 2014. In her letter to the Appellant, she explained the reasons why the decision had to be upheld. She said that she did not believe it was credible that the Appellant believed he was entitled to import 11,800 cigarettes, which represented 59 times his allowance. She had been provided with evidence that this was not the first occasion that the Appellant had
25 returned to the UK from a third country, and as such she would have expected him to be aware of the allowances for importing excise goods. In her view, a penalty reduction of 70%, given the level of disclosure and cooperation was appropriate.

22. On 9 January 2015 the Appellant lodged a Notice of Appeal with the Tribunal Service.

30 **The Law**

23. The legislation relevant to this appeal is:

Finance Act 1994, Sections 8(1) and 8(4)

Penalty for evasion of excise duty.

(1) Subject to the following provisions of this section, in any case where –

- 35 (a) any person engages in any conduct for the purpose of evading any duty of excise, and
(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded.

(4) Where a person is liable to a penalty under this section—

- 5 (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. (...)

Finance Act 2003, Sections 25(1) and 29(1)(a)

10 s25 Penalty for evasion.

(1) in any case where

- (a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and
- 15 (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded. (...)

29 Reduction of penalty under section 25 or 26.

(1) Where a person is liable to a penalty under section 25 or 26—

- 20 (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
- 25 any part of the reduction previously made by the Commissioners. (...)

Customs and Excise Management Act 1979, Sections 49(1), 78(3) and 139

49(1) Where-

- a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are,
- 30 without payment of that duty-
- (i) unshipped in any port,
- those goods shall ...be liable to forfeiture.

Customs and Excise control of persons entering or leaving the United Kingdom.

- 35 S78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)

S139 Provisions as to detention, seizure and condemnation of goods

(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

5 (2) Where any thing is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—

(a) deliver that thing to the nearest convenient office of Customs and Excise; or

10 (b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

15 (3) Where the person seizing or detaining any thing as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

(4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say—

20 (a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

(b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

25 (c) nothing in [section 31 of the Police (Northern Ireland) Act 19987 shall apply in relation to that thing.

30 (5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

(6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of any thing as being forfeited, under the Customs and Excise Acts.

35 (7) If any person, not being an officer, by whom any thing is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

40 (8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

Paragraph 5 Schedule 3 CEMA states:

If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing no such notice has been given to the

Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

Travellers' Allowance Order 1994

5 1. This Order may be cited as the Travellers' Allowances Order 1994 and shall come into force on 1st April 1994.

2. (1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage,.

(2) For the purposes of this article—

15 (a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

(b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;

20 (c) "third country", in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991

25 3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

30 HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- 35
- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
 - his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
 - The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

40 The penalty can be mitigated (reduced) to any amount, including nil. Our policy on how the penalty can be reduced is set out in Section 3.

3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100 per cent import duties evaded will normally be reduced as follows:

- 5
- Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
 - Up to 40 per cent - fully embracing and meeting responsibilities under the procedure by, for example: supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.

10 In most cases, therefore, the maximum reduction obtainable will be 80 per cent of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

HMRC Notice 160 Compliance checks into indirect tax matters

15 2.3 How can penalties be reduced?

It is for you decide whether or not to co-operate with our check, but if you do you should be truthful as making a statement to us you know to be false, you could face prosecution.

If you choose to co-operate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

20 You should tell us about anything you think is relevant when we are working out the level of the penalty. At the end of the check we will take into account the extent of your cooperation.

2.3.1 Reductions under Civil Evasion Penalty Rules

The maximum penalty of 100% tax evaded will normally be reduced as follows:

- 25
- up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them
 - up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.

30 In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

The Appellant's Case

35 24. The Appellant's grounds of appeal as stated in correspondence and his Notice of Appeal are that:

- 40
- It was a genuine case of misunderstanding on his part, due to the difference in meaning of a carton and a packet of cigarettes. On arrival at Manchester airport when asked if he was carrying any goods in respect of which there were restrictions and prohibitions, he readily acknowledged

that he was bringing in cigarettes. He said that he had 20 cartons (each containing 30 packets of 20).

- The cigarettes were for the personal use of the Appellant and his wife.
- 5 • Because he was misled by Iranian Customs Control, he thought that the quantity he was carrying was within his personal allowances.
- He did not fully understand the restrictions and allowances.
- He did not understand the difference between the red and the green Channels.
- It was not his intention to be dishonest.
- 10 • He had fully co-operated with HMRC's enquiry.
- He cannot afford the penalties.

25. At the hearing, the Appellant gave evidence on oath. He said that he had lived in the UK for twelve years. His English was good. He smokes about 30 cigarettes a day, and his wife smokes about 20. 12,000 cigarettes will last them about eight months.
15 They had been to Iran three times; they go every three years. The flights cost them approximately £1,700. He saves up for the flights. He said that in Iran cigarettes were approximately one tenth of their price in the UK. He and his wife had eight suitcases. The cigarettes were spread around the luggage but he would have been able to fit the
20 cigarettes he was carrying into one large suitcase. He said he thought from what he had been told by the Iranian authorities that, allowances were calculated by weight and that because they had paid for four flight tickets they would be well within any allowances. He was not able to say what he thought the allowances were. He said that he was not being dishonest when asked how many cigarettes he was carrying. He and his wife had 10 cartons each, which is why he said that they had 20.

25 **HMRC's Case**

26. HMRC contends that the Appellant was stopped in the green channel, which automatically constituted a false declaration that he had no goods attracting Excise or Customs Duty. It is a deemed fact that the goods were legally seized and therefore that he had entered the green channel with goods in excess of his allowances.

30 27. Officer Brazier gave evidence on oath. She said that the Appellant had said that he did not understand the difference between the red and green channels. The signs near the channels clearly state the restricted allowances for individuals arriving from third countries and are written in English. She could not be certain that the Appellant had not referred to cartons rather than packets when he said that he was carrying 20.
35 She could not recall any conversation about the size of the cartons/packets. She agreed that she had not written everything down that had been said. Her notes were

note made contemporaneously but were completed approximately 20 minutes after the goods were seized.

28. Mr. Scott for HMRC said that:

5 The Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes. In any event, a reasonable person would check the allowances before importing such a large number of cigarettes. When initially questioned by Officer Brazier the Appellant said that he had 20 packets of cigarettes. If an Iranian packet contains 20 cigarettes that is 500 cigarettes, whereas he actually had 11,800. Even 500 cigarettes exceeded his allowance.

10 29. Mr Scott said that HMRC are entitled, under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003, to issue the Appellant with a penalty because he acted dishonestly and deliberately took the action to positively evade duty and tax.

15 30. The penalties under these provisions require the Appellant to have been dishonest. A finding of dishonesty requires that the act undertaken (entering the green channel with an amount of cigarettes above the allowance), was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what he was doing was, by those standards, dishonest.

31. Entering the green channel with non-duty paid excise goods above the allowance is objectively dishonest by the standards of an ordinary, reasonable person.

20 32. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word ‘dishonesty’.

25 “It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of evading tax, then by adding that the conduct must involve dishonesty before the penalty is to attach, Parliament must have intended to add a further element in addition to the mental element of intending to evade tax. We think that that element can only be that when he did, or omitted to do, the act with the intention of evading tax, he knew that according to the ordinary standards of reasonable and honest people what he was doing would be regarded as dishonest.”

30 33. Dishonesty in this context follows the guidance given by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053, CA, where a two-step test for showing dishonesty was set out:

35 “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 what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be
40 dishonest, even if he asserts or genuinely believes that he is morally justified in acting as

he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.”

5 34. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest,
trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the
High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 -
unreported) is found in the case of *Barlow Clowes International Limited (in
liquidation) and others v Eurotrust International Limited and others* [2005] UKPC
10 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v
Tan* [1995] 2 AC 378 was the correct test and was summarised as follows:

15 “...although a dishonest state of mind is a subjective mental state, the standard by which
the law determines whether it is dishonest is objective. If by ordinary standards a
defendant’s mental state would be characterised as dishonest, it is irrelevant that the
defendant judges by different standards. The Court of Appeal held this to be a correct
statement of the law and their Lordships agree.”

35. The Appellant’s actions in attempting to clear customs without paying any duties,
by walking through the green, ‘nothing to declare’ channel with the goods,
demonstrates his intent to positively evade duty and tax.

20 36. The legislation at s 8(1) of the Finance Act 1994 and s 29(1)(a) Finance Act 2003
provide that the Commissioners, or on appeal, an appeal tribunal may reduce the
penalty up to nil.

25 37. HMRC exercised its discretion as to the amount of discount to be allowed. A
35% deduction was allowed for early disclosure and a further 35% for co-operation,
which in the circumstances was considered reasonable. Officer Whitaker who
undertook the review said that she had not been able to give a 40% allowance for
either disclosure or cooperation because the Appellant had failed to provide the
information requested. She believed it was inherently improbable that the
Appellant, having travelled to Iran three times in the previous nine years, believed
30 he was entitled to import 11,800 cigarettes, which represented almost 60 times his
allowance.

38. Mr Scott said that the Appellant had not put forward any grounds of appeal which
could allow the Tribunal to reduce the penalty as assessed.

Conclusion

35 39. The Appellant imported the cigarettes from Iran, a non EU country. There are
strict limits on the number of cigarettes that can be brought into the UK. The issue as
to whether or not the cigarettes were for personal use does not arise. In any event, the
facts of the matter are not in dispute and the Appellant did not challenge the legality
of seizure of the goods within the statutory time limit. Where there is no timely
40 challenge, the law provides that the goods are deemed to be condemned as forfeited
and what that means in practice, is that, in law, the Appellant is deemed to have

imported the goods for commercial use. That is a final decision and the Tribunal has no jurisdiction to consider that issue any further.

5 40. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed and for the correct amount. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities.

10 41. In determining the Appellant's culpability we take into account that:

(i) It is well known that tax and duty is payable on imported cigarettes;

(ii) Iran is clearly a non EU country and so no confusion is possible in respect of the "unlimited for own use" provisions when importing from other EU countries;

15 (iii) The Appellant stated that he did not know his allowances; however, the airport has signage which described the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. In any event, a reasonable person would have the foresight to check the allowances;

(iv) The Appellant appears to have been a regular traveller and would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes.

20 42. The Appellant was dishonest if he knew:

(i) that there were restrictions on the personal import of cigarettes to the UK from Iran, and

(ii) that he was carrying a greater number of cigarettes than the permissible limit.

25 It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods. The Appellant should have been fully aware that he was bringing more goods into the
30 country than he was entitled to without declaring them.

43. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax. He entered the green channel, indicating that he had nothing to declare. We do not accept that he did not know the difference between the red and green channels. He was aware that there are restrictions. He says
35 that he had spoken to the Iranian customs authorities about the restrictions. Having travelled to the UK from Iran twice previously he should have been aware of the limits on the amount of tobacco that can be brought into the country.

5 44. The Appellant has not offered any grounds on which he could successfully challenge the decision to issue the penalty. Hardship is not a valid ground of appeal. Finance Act 1994 Section 8(5)(a) and Finance Act 2003 Section 29(2)&(3)(a) preclude the Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering a reduction of the penalty.

45. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

10 46. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account and the fact that the Appellant
15 was not entirely open with Officer Whitaker having not provided the information she requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation. A reduction of 35% was given for each aspect, resulting in a total reduction of 70% and a penalty of £974.00, being 30% of the revenue potentially evaded.

20 47. The Appellant has not shown grounds to successfully appeal the decision to issue the penalties. The penalty has been calculated correctly and made to best judgement.

48. The appeal is accordingly dismissed and the penalties totalling £974 confirmed.

25 49. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 21 DECEMBER 2015