[2016] UKFTT 0301 (TC)

TC05070

Appeal number: TC/2015/05378

Customs and excise- civil penalties under s 8 FA 1994 and s 25 FA 2003 for evasion of excise duty, customs duty and import VAT- whether conduct dishonest

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALI HASSAN KASSAB **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
MOHAMMED FAROOQ

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 4 April 2016

The Appellant in person

Mr Daniel Sternberg, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to assessments for civil penalties for dishonest evasion of excise duty under s 8 Finance Act 1994 ("FA 1994") and dishonest evasion of customs duty and import VAT under s 25 Finance Act 2003 ("FA 2003").

2. The penalties were imposed following an interception of the appellant at London Heathrow airport on 18 May 2014, when the appellant's luggage was found to contain tobacco and cigarettes in excess of the permitted allowances. Taking account of a slight reduction following a review of the assessments the amount in dispute is £3,117, comprising £2,393 for excise duty evasion and £724 for customs duty and VAT evasion.

Preliminary point

3. The appellant appeared in person. Immediately prior to the hearing the appellant explained to the clerk, and subsequently to the Tribunal, that he had been expecting an interpreter to attend. His understanding was that the solicitor who had assisted him in preparing for the hearing had requested one. However, the Tribunal administration was not aware of this and the Tribunal correspondence we had seen (including the Notice of Appeal) made no reference to it. The appellant had also appointed no representative with whom the Tribunal could correspond. Having spoken to the appellant, and with his agreement, we decided that the hearing should proceed. The appellant's understanding of English appeared to us to be good. It was made clear that the appellant should indicate immediately if at any time he did not follow what was said. This happened on one or two occasions and the point in question was repeated or re-explained. Overall we satisfied ourselves that the appellant was able to participate fully in the proceedings and that there was a fair hearing. Whilst the appellant's spoken English was not entirely fluent it was adequate for the purpose of the hearing, and he was able both to ask and answer questions and make all the submissions he wished to make.

Evidence

4. We heard oral evidence from two witnesses for HMRC, Officer Ahad Miah, the Border force officer who had intercepted the appellant and Mrs Angela White, an Officer of HMRC who handled the enquiry and was at the time working in the International Trade & Excise Team in Local Compliance. We also heard evidence from the appellant. The appellant was cross-examined by Mr Sternberg and answered questions from the Tribunal. The appellant chose not to cross-examine HMRC's witnesses but they answered questions from the Tribunal. Documentary evidence included an extract from Officer Miah's notebook, original and copy documentation produced at the time of seizure, duty calculations and correspondence with HMRC, including the assessments and the conclusions of the review. The appellant also provided a witness statement.

Background: findings of facts not in dispute

5. The appellant is originally from Lebanon but has lived in the UK for around 11 years. His parents still live in Lebanon and he travels there to see them and other family members every 12 to 18 months. He spends two or at most three weeks there on each trip, since he has a wife and young family in the UK and cannot spend a long time away. He also has a brother and sister who are also both married and living in the UK.

6. The appellant has had some health problems in the past, both with his thyroid and more recently with his back. He previously worked part time but since the events the subject to the appeal he has not worked.

7. On 18 May 2014 the appellant arrived at Heathrow Terminal 3 on a flight from Beirut. The appellant was travelling alone. As well as seeing his family he had made the trip to seek medical advice about his back problems.

8. The appellant was intercepted by Officer Miah. On examination the appellant's luggage was found to contain a total of 20.7 kg of Al Fakher branded shisha tobacco, and 2,600 KSF (king size filter) cigarettes. These items were seized, together with the two bags containing them, and the appellant was permitted to proceed.

9. On 4 March 2015 Mrs White wrote to the appellant opening an enquiry, and inviting co-operation by providing answers to a number of questions listed in the letter. The letter explained that by co-operating the appellant would have the opportunity to reduce any penalties significantly. Following a reminder letter dated 18 March the appellant phoned Mrs White to ask what he should do, saying that it was the first time he had tried to bring cigarettes to the UK and that he did not realise there were restrictions on allowances. Mrs White advised the appellant to write answering as many of the questions in her original letter as he could, and also to sign a copy of the letter and return that as previously requested. She explained that it was in his interests to do this as the penalty would be reduced for co-operation and disclosure. The appellant subsequently sent a signed copy of the letter but did not respond to any of the questions.

10. Mrs White issued penalty assessments on 16 April 2015. She allowed a 5% reduction for disclosure and a further 5% for co-operation (reflecting the fact that the appellant did make some verbal and written response), resulting in a total penalty at that time of £3,121.

11. The appellant phoned again on 24 April with the help of a third party and spoke to a colleague of Mrs White. It was explained that it was the first time he had brought tobacco to the UK and he was unaware of his allowances. He was advised to write and request a review, to appeal or to request time to pay, and it was indicated that he would request a review.

12. The appellant wrote to Mrs White on 3 May to dispute the assessment. The letter, which the appellant explained was written by his solicitor but signed by him, confirmed that he was found carrying 20.7 kg of tobacco and 2,600 cigarettes but

maintained that he had understood that the written warning he had received was to be the only consequence, and that it was unfair to receive a penalty months later without warning. The letter also maintained that the appellant was given the choice when he was intercepted of either paying the duty and taking the items with him or having the items taken and paying a fine, that he chose the latter option but was given a written warning since this was his first offence and was warned he would be fined if he did it again.

13. Following further correspondence the matter was referred for review. The review decision was made on 26 June 2015. The review resulted in a £4 reduction in the overall penalty to £3,117 reflecting a slight adjustment to the duty calculation as a result of some doubt over the branding of the cigarettes involved. The penalty reduction of a total of 10% was confirmed. The revised calculation, sent on 10 July, shows excise duty of £2,659 and customs duty of £804, resulting in penalties of £2,393 and £724 respectively after the 10% reduction. A separate calculation produced for the Tribunal showed the method of calculation in more detail, including that £619 of the £804 relates to import VAT and £185 to customs duty.

14. The appellant appealed against the review decision by a notice of appeal dated 25 July 2015.

The law

15. Section 8 FA 1994 provides so far as relevant:

> "(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.
>
> …
>
> (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) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—
>
> (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty.

(6) Statements made or documents produced by or on behalf of a person shall not be inadmissible in—

(a) …

(b) any proceedings against that person for the recovery of any sum due from him in connection with or in relation to any duty of excise,

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) that it is the Commissioners' practice, without being able to give an undertaking as to whether they will make such an assessment in any case, to be influenced in determining whether to make such an assessment by the fact (where it is the case) that a person has made a full confession of any dishonest conduct to which he has been a party and has given full facilities for an investigation;

(c) that the Commissioners or, on appeal, an appeal tribunal have power to reduce a penalty under this section, as provided in subsection (4) above; and

(d) that, in determining the extent of such a reduction in the case of any person, the Commissioners or tribunal will have regard to the extent of the co-operation which he has given to the Commissioners in their investigation.

…"

16. Although s 8 FA 1994 appears to have been repealed by paragraph 21(d)(i) of Schedule 40 to Finance Act 2008 ("FA 2008"), the repeal has become effective only for limited purposes that are not relevant to this appeal. This reflects section 122 FA 2008, which contemplated that provisions of Schedule 40 could be brought into effect for limited purposes: see the discussion in *Bintu Binette Krubally N'Diaye v HMRC* [2015] UKFTT 380 (TC) at [35] to [37]. As explained there, regulation 4 of SI 2009/511 repeals s 8 insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 FA 2008, which is not relevant here. In addition, we note that regulation 6 of another statutory instrument, SI 2009/571, repeals s 8 only in respect of inaccuracies in documents or failure to notify an under assessment, which is again not relevant here.

17. Section 25(1) FA 2003 provides:

"(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."

18. "Relevant tax or duty" is defined under s 24 FA 2003 to include customs duty and import VAT. Section 29 FA 2003 contains provisions equivalent to s 8(4) and (5), providing as follows:

"(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.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith."

19. The effect of s 16(6)(a) FA 1994 and s 33(7) FA 2003 is that the burden of proof is on HMRC to show that the requirements of s 8(1) FA 1994 and s 25(1) FA 2003 are satisfied. As discussed in the *N'Diaye* case, the civil standard of proof applies, so HMRC must establish that the requirements are met on the balance of probabilities.

20. The Tribunal's powers are set out at s 16(5) FA 1994 and s 33(6) FA 2003. Subject to the limitations referred to above (in particular the inability to take account of an insufficiency of funds) the Tribunal has power to quash or vary a decision, and to substitute its own decision for any decision it has quashed.

The disputed events

Summary

21. HMRC's case can be summarised as follows. They say that the appellant was intercepted only once he had entered the "green channel" after leaving the baggage reclaim area, that he became agitated and denied that there was anything in his luggage, that he attempted to interfere with the search and that on questioning he confirmed that he understood the duty free allowances. On examination the luggage was found to contain tobacco products significantly in excess of the allowances, and furthermore the shisha tobacco was concealed inside coffee bags. The quantity found, the concealment and the fact that the appellant had entered the green channel indicated a deliberate act amounting to dishonesty. Penalties were therefore justified, and the limited percentage reductions were attributable to lack of co-operation and failure to make disclosure during the enquiry.

22. The appellant's case, as put at the hearing, was as follows:

(1) The appellant did not enter the green channel voluntarily. Officer Miah and a female colleague started walking on either side of him while he was still in the baggage reclaim area and- as we understood it- effectively steered the appellant into the green channel, where he was intercepted.

(2) The appellant was not agitated and did not try to interfere with the search. He was also asked no questions apart from his name and details and whether the luggage was his. In particular he was not asked whether he had tobacco or about duty free allowances.

(3) The tobacco was not concealed inside coffee bags. It was wrapped in normal plastic bags to protect his clothes and other luggage, because the tobacco contained honey and he was concerned about the effect of a spillage. In the course of the search the officers also mixed the tobacco up with spices and coffee that the appellant was also carrying.

(4) He had not brought any tobacco to the UK before and was not aware of the restrictions. The items were all for his own and family's use or for presents, and were not for sale.

23. In correspondence prior to the hearing the appellant also maintained that he had been given the option either to pay the duty or have the goods seized, but chose the latter because he could not afford to pay. This contention was withdrawn shortly before the hearing when the appellant filed his witness statement. In his witness statement and at the hearing the appellant maintained that he would have paid the duty if he had been given the chance.

HMRC's case- Officer Miah's evidence

24. Officer Miah explained that he had been employed as a Border Force Officer at Heathrow for 15 years. On average he stopped around 50 passengers a day and seized a variety of goods from around half of those.

25. On the day in question Officer Miah was working at Terminal 3. He explained that in Terminal 3 there were two sets of warning signs relating to import restrictions. The first set were in the immigration hall and were clearly displayed in front of the immigration officers' desks. The second set comprised revolving signage over each of the 11 baggage reclaim carousels. Luggage from the appellant's flight was sent to baggage reclaim 1, which had clear signage of that nature.

26. Officer Miah was observing passengers from the appellant's flight collecting baggage and noticed the appellant. He said he saw him collecting his bags and then hastily rushing towards the customs controls. He followed him discreetly and stopped him in the green channel, which the appellant entered freely, without being escorted or led. Officer Miah accepted that the appellant may not have known at exactly what point he entered the green channel, because there were no lines on the floor and the entrance to the channel was funnel shaped. However, there was clear signage on the walls indicating the channels. Officer Miah explained that it was standard practice to wait to see whether passengers suspected of carrying goods in excess of allowances intended to declare them (by entering the "red" rather than green channel) before intercepting them.

27. Once stopped the appellant was escorted to a separate room and was asked to place his baggage on the table. Officer Miah's evidence was that he then asked the standard initial questions, relating to ownership of baggage, whether the appellant packed the luggage himself, whether he was aware of his duty free allowances (200 cigarettes, 1 litre of spirits and 250g of tobacco) and whether he understood that it was illegal to bring prohibited or restricted items to the UK. These standard questions are put in a way which invites a simple yes or no answer, and in this case the appellant answered the questions in the affirmative. In particular, he confirmed that he understood the allowances. This was in response to a standard question which makes specific reference to the cigarette and tobacco allowances. Officer Miah said that his understanding of the answer was that the appellant knew what the allowances were, rather than that he did not know and they were being explained for the first time.

28. Officer Miah said that the appellant appeared agitated and said there was "nothing in my bag". The appellant also interfered with the examination of the luggage, starting to take items out himself, and had to be warned to stop or be arrested for obstruction. The appellant then calmed down.

29. On examination of one of the appellant's bags Officer Miah came across packages labelled as a particular brand of coffee, Alrifai. Officer Miah was familiar with the packaging of the brand which was commonly seen on the flight in question. On inspection the weight was unusually heavy and the texture inconsistent with normal ground coffee. On cutting a pack open another bag was found inside, branded Al Fakher and containing shisha tobacco.

30. In all Officer Miah estimated that there may have been around 30 similar coffee bags. All the bags were opened and the contents weighed in the appellant's presence. Each one had been sealed and each contained Al Fakher tobacco. The coffee bags were otherwise empty, apart from small amounts of coffee residue in some bags.

Officer Miah also noticed that the seals on the coffee bags were unusual. The brand in question was usually tightly vacuum packed. These bags had been tampered with and the openings glued down. No spices or coffee (apart from small amounts of residue) were found.

31. An examination of the second of the appellant's bags revealed 2,600 KSF cigarettes, which Officer Miah counted. He then informed the appellant that he had exceeded his allowances and the goods were liable to forfeiture. The tobacco and cigarettes were seized, along with the appellant's two luggage bags. The appellant was issued with a seizure information notice (BOR156) explaining the forfeiture of the goods, which Officer Miah explained, together with BOR162 which explains the risk of further action. The appellant signed both. Officer Miah thought the appellant had read them and that he had confirmed his understanding of them by signing them. He did not recall the appellant asking for an explanation or indicating that he did not understand. The appellant also received other documents containing additional information, including in relation to appeal rights.

32. Officer Miah's notebook entry, which he confirmed was written up at the time of the events, also indicates that the appellant was intercepted in the green channel, that he was asked the "initial questions", and otherwise summarises the events in a way consistent with Officer Miah's oral evidence. Officer Miah accepted that the notes were in summary form and explained that he would have made a fuller, verbatim, note if he had appreciated at the time that there would be further proceedings.

33. It is worth observing at this point that it is clear from the evidence that at the time Officer Miah thought that no further action would be taken since this was a "first offence". We also think that he may have also given that impression to the appellant, albeit that Officer Miah probably had in mind that no criminal prosecution would follow rather than considering proceedings by HMRC.

The appellant's evidence

34. The appellant did not dispute that his luggage contained the quantities of tobacco and cigarettes claimed by HMRC but explained that they were for his own use and that of his brother and sister and their respective spouses. All of them smoked shisha every day, as well as cigarettes, and some of the tobacco was also intended as gifts for friends. Shisha tobacco was very expensive if bought in the UK and they got through a lot of it. He said that, although he had lived in the UK for 11 years and had made a number of prior trips from Lebanon, he had not brought tobacco back before. His thyroid problems had prevented him smoking for a while and he had only restarted recently.

35. The appellant said that when he collected his luggage he had started walking normally while pushing his luggage trolley. He was not rushing. From his starting point by baggage reclaim 1 he could not see either Customs channel: he would need to make a right turn out of the baggage reclaim hall to do so. He saw Officer Miah standing on a corner with another lady officer, and they started walking on either side

of him. The appellant's evidence was that although neither of the officers had touched him or spoken to him (apart from asking him why he was running, which he denied) he was not given a chance to choose which customs channel to enter. He could not see which channel he was going into and saw no line on the floor to indicate it. During the first part of his oral evidence the appellant maintained that he had been stopped outside the green channel, but by the end of the hearing did not dispute that he was only intercepted once he was in the green channel.

36. In reply to questions from the Tribunal we understood the appellant to accept that he did understand the difference between the red and green channels, but that at the time he did not appreciate that there were any restrictions on bringing tobacco products into the UK. He had also not sought any advice before bringing tobacco to the UK.

37. The appellant was told to come to a separate room. He said that he was asked no questions apart from whether the luggage belonged to him. He was sure that he was not asked whether he had tobacco. He offered to help Officer Miah but was told not to interfere or he would be cut by the knife the officer was using. The appellant did not say that there was nothing in his bags. He did not know what the officer was looking for.

38. As well as carrying tobacco the appellant also had spices, coffee, dried fruit, nuts and sweets for children. The tobacco was wrapped in normal plastic bags because it contained honey and the appellant wanted to avoid problems with spillages, not because the appellant wanted to conceal the contents. The bags could have been of any kind and were not specifically coffee bags.

39. The appellant's evidence at the hearing and in his witness statement was that he not given any opportunity to pay the duty on the goods. If he had been he would have done so. He accepted that this differed from what was said in his letter of 3 May 2015 (see [12] above) which he said was written by his solicitor. He also received no explanation of the documents he was asked to sign at the airport. He believed that there would be no further action and he had just received a warning not to do it again. Although he accepted that he can read and write in English he denied that he understood that there was any warning of future action against him. He signed the documents quickly without asking for an explanation because he had a minicab waiting and was worried about additional charges.

40. The appellant said he that had not seen the posters with information about restricted goods and allowances. Although he had made previous trips from Lebanon to the UK those posters had not been important then because he was not smoking at the time and was not carrying tobacco. This was the first occasion he was carrying it, and he had waited only three or four minutes at the baggage carousel.

41. The appellant did not dispute the amount of tobacco and cigarettes or the calculation of the penalty amounts, but did consider the penalties unfair. The appellant was not currently working or claiming benefits. His wife was the sole breadwinner. He could not afford to pay the penalties.

Officer Miah- further evidence

42. Officer Miah was recalled to give further evidence in relation to the new allegation made by the appellant that he had been threatened with being cut by the officer's knife. Officer Miah strongly denied the allegation. He did have a multi-purpose tool which includes a blade used to open bags, but he had not taken the tool from his belt at the time the appellant was interfering with his search and was told to stop doing so. Other officers were also present and would have heard any such threat, which would have amounted to gross misconduct.

Discussion of the evidence

43. We have concluded that, where there is a conflict, Officer Miah's evidence about what occurred is to be preferred to the appellant's, and we accept Officer Miah's version of events. His evidence was clear and straightforward. It was consistent with his contemporaneous notes but went beyond them, in particular as regards his description of the events leading up to the interception, the appellant's behaviour, the nature of the packaging around the shisha tobacco and the way in which that packaging had been sealed.

44. In contrast, the appellant's evidence was in places inconsistent or otherwise difficult to accept. In particular, the appellant had alleged in his letter of 3 May 2015 and notice of appeal that he was given a choice whether to pay the duty and keep the items or have them seized and chose the latter because he could not pay, but now accepts that that did not occur and says he would have paid if offered the opportunity. Whilst we accept that the 3 May letter and notice of appeal were prepared by a solicitor there is no suggestion that the solicitor was acting without instructions, and the appellant signed both documents. The indication that the appellant would have paid the duty is also at odds with the appellant's argument that he cannot afford the penalty.

45. In addition, neither that letter nor the notice of appeal make any mention of the appellant's claim that he was unaware of any restrictions on importing tobacco, even though this was mentioned to Mrs White in the telephone call on 23 March 2015 and was raised in both the witness statement and in oral evidence. It is hard to understand why such a key fact would have been omitted from the correspondence and notice of appeal had it been believed to be the case. Instead, both the letter and notice of appeal concentrate on the alleged unfairness of the penalties in circumstances where the appellant thought that the matter had been concluded with a warning.

46. There was also no indication prior to the appellant's witness statement (served shortly before the hearing) that the appellant was alleging that he did not enter the green channel voluntarily. Again, this was an important point and, if true, might have been expected to have been raised earlier, either in the 3 May letter or the notice of appeal. The same certainly applies to the knife related allegation, which was first raised at the hearing.

47. We also cannot accept that the appellant was somehow steered into the green channel by customs officers who neither touched him not spoke to him during that

process. The appellant accepted that he needed to make a right turn to enter Customs, and if he was not touched or spoken to it is hard to see how he can have been forced to do so at a particular point. We also accept that there are clear signs on the walls around the entrances to Customs channels indicating what they are.

Findings of facts in dispute

48. We find that:

(1) The appellant was hurrying when he left the baggage reclaim carousel.

(2) The appellant chose to turn into the green channel and was only intercepted once in the green channel.

(3) The appellant understood the difference between the green channel and red channel, in the sense that the former was for use if there was nothing to declare and the latter was for use if there was duty to be paid.

(4) The appellant was asked the standard initial questions and answered them as described at [27] above, appeared agitated and volunteered that there was nothing in his bag ([28] above).

(5) The shisha tobacco was wrapped in sealed coffee bags as described by Officer Miah (see [29] and [30] above), and there were no other goods such as spices or (apart from some residue) coffee in the appellant's luggage.

(6) Officer Miah did not threaten the appellant that he could be cut with a knife.

49. We accept that the appellant may not have appreciated when he signed the BOR162 that it was warning him of possible future action by HMRC. However, we do not think that that is material to the decision we need to make.

Discussion

50. It is not disputed that when the appellant was intercepted he was carrying tobacco products in the amounts alleged by HMRC. The calculation of the unpaid duty and tax is also not in dispute. The questions we need to decide under both s 8(1) FA 1994 and s 25(1) FA 2003 are whether the appellant engaged in conduct for the purpose of evading duty and tax, and whether that conduct involved dishonesty.

51. It is clear to us that the appellant had no intention of declaring the goods on arrival and paying the duty. We have also found that he did understand the difference between the red and green channels and entered the green channel voluntarily. He also did nothing to volunteer the fact that he was carrying tobacco before it was discovered during the search of his luggage, despite being asked the standard initial questions which included a summary of the tobacco related allowances, and despite confirming that he understood the allowances. We consider that the appellant did engage in conduct for the purpose of evading duty and tax.

52. The correct test to apply to determine whether conduct involved dishonesty for these purposes was considered by the First-tier Tribunal in the *N'Diaye* case referred to at [16] above, and see also *Ganjo Rasull v HMRC* [2015] UFKTT 193 (TC). As explained in *N'Diaye*, the criminal law test for dishonesty described by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053 involves a two-step approach, first whether the conduct was dishonest according to the ordinary standards of reasonable and honest people and secondly whether the defendant himself must have realised that what he was doing was by those standards dishonest.

53. For civil law purposes the test is slightly different, as discussed in 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 and the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] 2 AC 164. In *Barlow Clowes*, the Privy Council clarified comments made in *Twinsectra* by making it clear that it was not necessary to show subjective dishonesty in the sense of consciousness that the transaction was dishonest (the second limb of the test on *Ghosh*). It was sufficient if the defendant knew of the elements of the transaction which made it dishonest according to normally accepted standards of behaviour. This does not mean that the test is wholly objective. As explained by Lord Nicholls in the *Royal Brunei* case at page 389C, 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". See also the explanation given by Arden LJ in the Court of Appeal in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492.

54. The test we need to apply is therefore to decide whether the appellant's behaviour was dishonest according to normally accepted standards of behaviour, and whether he knew about the elements that made it dishonest according to those standards. In our view the first limb of this test is clearly met: the appellant's behaviour was clearly dishonest by normally accepted standards.

55. As to the second limb, the critical elements here were whether the appellant was aware that there were restrictions on his freedom to import tobacco products and whether he knew that these restrictions meant that he should have declared and paid duty on the goods. If necessary to our decision we would have found that it was not necessary for the appellant to have been aware of the precise allowances. As Lord Nicholls explained in *Royal Brunei* at page 389G an honest person does not "deliberately close his eyes or ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless". However, we have found on the facts that the appellant did understand the allowances.

56. We have concluded that the appellant knew about the elements that made his behaviour dishonest. In reaching this conclusion we have relied in particular on the following:

> (1) The fact that the appellant had lived in the UK for 11 years and had made trips to and from Beirut every 12 to 18 months. We do not accept that warnings about restrictions would have escaped his notice on all of those trips or that he

had no interest prior to the trip in taking notice of tobacco related restrictions because he was not smoking for health reasons, bearing in mind the appellant's comments about how expensive tobacco was in the UK compared to Lebanon and that it was part of the appellant's case that the tobacco was also intended for other family members and friends.

(2) The fact that the appellant understood the difference between the green and red channels and decided to enter the green channel.

(3) The fact that the appellant was agitated when intercepted and volunteered that there was nothing in his bags. That comment does not seem to us to be consistent with being unaware that there were any relevant restrictions, rather it suggests a wish to avoid a search and discovery of the goods he was carrying.

(4) The fact that the appellant confirmed that he understood the allowances.

(5) The fact that the shisha tobacco was inside coffee bags which had been sealed as described by Officer Miah. We have concluded that this was done in an attempt to conceal the contents rather than to protect the rest of the luggage from spillages.

(6) The quantity of tobacco in question: 20.7 kg of tobacco and 2,600 cigarettes is a significant amount such that, even if the appellant was not aware of the precise allowances, it is more likely than not that he was aware that he must have exceeded them.

57. Accordingly, we conclude that HMRC has established that the conditions for penalties under s 8(1) FA 1994 and s 25(1) FA 2003 are met. The remaining matter we need to decide is whether the 10% reduction to the penalty amount made by HMRC is appropriate.

58. The appellant made no submissions about the appropriate percentage. We understand that HMRC's practice, as explained in their statement of case, is to allow up to a 40% reduction for an early and truthful disclosure of the extent of the arrears and why they arose, and up to another 40% for co-operation, including providing information promptly, giving all relevant facts and answering questions truthfully. In this case HMRC had allowed 5% under each category, so a total of 10%. In doing so HMRC only considered the appellant's conduct during the enquiry.

59. We note that we are not permitted to take account of any insufficiency of funds and so we have paid no regard to that. We are also not permitted to have regard to the absence of any significant loss of duty, although we do not think that is relevant here in any event. In other respects the legislation is silent on the criteria to take account.

60. We are not minded to make any further reduction to reflect the fact that the appellant may not have appreciated when he left the airport that further action could be taken, or the fact that it was some months before the appellant heard from HMRC. We do not think that either of these points are material to the penalty.

61. We do however think it is relevant to consider the appellant's behaviour during his interception at the airport as well as once HMRC's enquiry has started. The

appellant did not co-operate at the airport until threatened with arrest, and did not disclose the goods he was carrying before they were discovered on a search. We certainly do not think that there is anything in that behaviour that could justify a reduction in the penalties, and we have considered whether that conduct should have resulted in part or all of the penalty reduction being cancelled.

62. We have however also considered the appellant's evidence, which was not challenged, that the tobacco was not intended for sale.

63. In relation to the enquiry we think HMRC's approach was reasonable insofar as it adequately reflects the very limited co-operation and disclosure made. Once the enquiry started the appellant did not respond to any of the questions raised in the enquiry beyond the phone call described at [9] above. He also made statements in the letter dated 3 May 2015 which he now accepts are incorrect.

64. Overall, taking account of the appellant's behaviour at the airport, the appellant's unchallenged evidence that the tobacco was not intended for commercial use and the appellant's conduct during the enquiry, we have decided to make no adjustment to the penalty reduction of 10%.

Decision

65. We find that the appellant was liable to a penalty under s 8(1) FA 1994 and s 25(1) FA 2003, and we confirm the amount charged of £3,117. We therefore dismiss the appeal.

66. 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.

SARAH FALK
TRIBUNAL JUDGE

RELEASE DATE: 6 MAY 2016