[2016] UKFTT 0341 (TC)

TC05099

Appeal number: TC/2015/03542

EXCISE DUTY – penalty for dishonest evasion – appellant attempting to take through green channel 15,000 cigarettes from outside EU – test of dishonesty to be applied – whether appellant's conduct dishonest: yes — reduction for disclosure and cooperation increased – whether penalty correctly calculated: penalty reduced by reference to evidence of UK selling price.

CUSTOMS DUTY & IMPORT VAT - penalty for dishonest evasion – as above.

FIRST-TIER TRIBUNAL
TAX CHAMBER

JABBAR RABBANI **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
CHRISTINE OWEN

Sitting in public at City Exchange, Leeds on 18 March 2016

The Appellant appeared in person, assisted by Mrs Rabbani

Niall Carlin, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This was an appeal against two penalties, one of £333 for evasion of Customs Duty and VAT and one of £1,347 for evasion of Excise Duty (Tobacco Products Duty). On review these penalties had been reduced to £328 and £1,329 respectively.

Evidence

2. We had a bundle prepared by HMRC of documents including the Notebook of a Border Force officer, Notices given to the appellant and correspondence between the appellant and HMRC. We also had witness statements from Officer Brennan of the Border Force and Ms Easton and Mr Scopelliti of HMRC, and Officer Brennan gave oral evidence.

3. Officer Brennan's evidence about what happened at Stansted Airport was questioned by Mr Rabbani and as a result Officer Brennan qualified his evidence. We comment further on this below.

4. HMRC had included in our bundle the appellant's list of 10 documents all but one of which was also included in HMRC's list of documents and the bundle. The tenth document, a letter to the appellant from relatives in Iran, was separately shown.

5. Mr Rabbani, the appellant, and his wife, Patricia Rabbani, both gave oral evidence in the course of Mr Rabbani's submissions, in making which he was assisted by his wife. Both Mr and Mrs Rabbani were clearly doing their best to assist the Tribunal, but we found some of Mr Rabbani's evidence contradictory.

Facts

Undisputed facts

6. We set out below the facts which are not in dispute which we have taken mostly from HMRC's statement of case or from Mr and Mrs Rabbani's unchallenged evidence.

(1) The appellant is a British citizen of Iranian origin who is a self-employed market trader in Wakefield selling sports equipment. He has both a British and Iranian passport (this is our inference from entries in Officer Brennan's notebook).

(2) In January 2014 he and his wife went to Turkey on holiday. While they were there some of Mr Rabbani's family came from Iran to meet him and his wife. During their time there they introduced Mrs Rabbani to Bahman cigarettes, which she developed a liking for.

(3) On 28 February 2014 the appellant (not accompanied by Mrs Rabbani) arrived at Stansted Airport on flight PC501 from Teheran, Iran via Istanbul, Turkey.

(4) The appellant entered the green channel and was stopped and questioned by the Border Force. We put it this way because there was a dispute about which officer initially stopped the appellant and we deal with this later.

(5) The appellant said that he was a market trader and that he had goods which were a present for his wife. The document which Mr Rabbani exhibited (see §4) was a letter signed by a number of Mr Rabbani's siblings confirming that they gave him the cigarettes in Iran as a gift for Mrs Rabbani.

(6) The appellant's luggage was searched and 15,000 cigarettes were found. They were of the Bahman type (smaller than ordinary cigarettes).

(7) The goods were seized and the appellant served with Public Notices 1 and 12A, Seizure Information Notice BOR156 and Warning Letter BOR162.

(8) On 10 October 2014 Officer Scopelliti of HMRC wrote to the appellant informing him that he was liable to penalties for attempted evasion of Customs Duty and Import VAT and of Excise Duty. He was issued with Public Notices 300 and 160.

(9) On 27 October 2014 the appellant wrote to HMRC confirming that he had 15,000 cigarettes in his luggage, that he had not paid for them but had received them as a gift from his family for his wife. The appellant further stated that he had never brought goods of a similar nature into the UK and that he was unaware of the limits and did not think he was breaking any laws.

(10) On 6 November 2014 HMRC issued a notice of assessment to a penalty totalling £2,345. In calculating the penalty HMRC had allowed a 60% reduction for disclosure and cooperation.

(11) On 19 November 2014 the appellant wrote to HMRC requesting a review as he did not believe a fair decision had been made. He mentioned that the cigarettes were one third the size of ordinary cigarettes and that the price of the cigarettes was about 30% of the penalty charged.

(12) On 25 November 2014 HMRC issued a revised and reduced penalty of £1,680, with the same reduction of 60%. On 27 November HMRC informed the appellant that the original assessment had been wrongly calculated and that he was entitled to another review.

(13) On 12 December 2014 the appellant asked for another review reiterating his previous points though stating now that the price of the cigarettes was half of the penalty. We note here that we do not regard this as a contradiction as the penalty had been reduced by about one third.

(14) The review upheld the decision to assess the penalty and the level of it, and consequently the appellant notified the Tribunal of his appeal.

Officer Brennan's evidence

7. In relation to what we say in §6(4), in Officer Brennan's witness statement he says:

> "2. On 28 February 2014 I was on duty in the Green Channel at Stansted Airport, when and [*sic*] at approximately 13.15 I intercepted a passenger, from Pegasus Airlines flight PC501 … who I now know to be Mr Jabbar Rabbani. …
>
> 3. I asked Mr Rabbani the initial questions relating to his luggage, …."

8. When Mr Brennan gave oral evidence and his account of what happened in accordance with his statement, Mr Rabbani stated that it was a female officer who had approached him and asked him questions in the Green channel. He asked Mr Brennan if that was correct.

9. Mr Brennan's reaction was to say that Mr Rabbani may be correct. We therefore asked Mr Brennan why he had said in his statement that it was he who intercepted Mr Rabbani. Mr Brennan said that it was a long time ago and he had been involved in many similar incidents since then, and he could not now be certain that he had made the initial approach to Mr Jabbani.

10. He added that even if another officer had intercepted Mr Jabbani he was called in to conduct the interview and that it was his invariable practice to ask the questions etc that are referred to in paragraph 3 of his statement.

11. Mr Brennan's Notebook was in evidence and in that the first reference to interception says:

> "Stopped in Nothing to declare channel".

12. This, being in the passive mood and not indicating the agent, does not show one way or the other whether it was Officer Brennan who did the stopping. It seems to us that when preparing his witness statement, Officer Brennan was properly refreshing his memory by reference to his Notebook, but he assumed from the entry we have quoted that *he* did the stopping. The Notebook entry is also consistent with some other officer doing the stopping and Officer Brennan then coming on to the scene to question Mr Rabbani.

13. Since Mr Rabbani does not deny that he was questioned by an officer and was given the documents referred to by Officer Brennan (Mr Rabbani agreed it was his signature in Officer Brennan's Notebook) the dispute about who had intercepted Mr Rabbani does not make any difference to the outcome of the case.

14. Mindful of Officer Brennan's admission in §9 we have since the hearing noted that in paragraph 3 of Mr Brennan's witness statement he says:

> "3. I asked Mr Rabbani the initial questions relating to his luggage, his awareness of his personal allowances and the prohibitions and restrictions when entering the United Kingdom.."

15. Officer Brennan's notebook does not show that the questions about allowances were asked and we have no other evidence that they were. And we do not have any evidence from Officer Brennan, either in his Notebook or orally, or from Mr Rabbani about what answers Mr Rabbani gave.

16. While we do find as a fact that Officer Brennan did ask questions of Mr Rabbani about allowances, we cannot draw any inferences about Mr Rabbani's knowledge of them before he entered the Green channel.

17. None of the other matters in Mr Brennan's statement (paragraphs 4 to 10) are challenged and we accept them as a correct account of what he did.

18. However Officer Brennan is a very experienced officer (28 years as a Border Force or Customs officer) and even though he told us that this was his first witness statement, he should not have made statements in a document which he has signed as believing the facts to be true if he could not in fact recall whether he had done what he said he had done.

The notices at Stansted

19. In HMRC's statement of case it is stated that:

> "From disembarkation to clearing Customs there were displayed a number of notices advising which countries fall inside/outside the European Union (EU) and also the duty free allowances for excise dutiable products acquired outside the EU. Despite these notices in the baggage reclaim area and just before the Customs channel entrances Mr Rabbani …."

20. We had no evidence that there were such signs in the baggage reclaim area (ie at each carousel) or before the green channel at Stansted. We would probably have accepted as a matter of common and personal knowledge that there were such signs in those areas, had it not been for Judge Thomas's experience at Terminal 2 in Heathrow on arriving from Singapore on 20th April. Above each baggage carousel was a notice which merely said that information about allowances could be found at the customs information site near the exit. That information site did indeed show the allowances, but it was not in a particularly conspicuous place especially for travellers collecting their baggage from most of the carousels. And the member of the Tribunal, Mrs Owen, has also very recently noticed the same arrangement at Manchester Airport.

21. On the balance of probabilities we find as a fact that there are such notices at Stansted but we are unable to find that there were notices listing the allowances above each baggage carousel.

The Rabbanis' oral evidence

22. In cross-examination Mr Rabbani was asked about his business. He said that he acquired his stock from Sports Direct and did not import.

23. He was asked how much he travelled abroad. His answer was "Three or four times since 2000". When asked to say where, he said that he had been to Tunisia on holiday, three times to Turkey and two or three times to Iran.

24. Mr Rabbani said that he did not smoke or drink alcohol. He had never taken any notice of any signs in airports about limits on cigarettes. He never realised that there were limits.

25. He also asked Mr Carlin a question about what would happen for duty purposes if a person acquired goods in China and landed in Frankfurt or Hamburg and then flew to the UK and he added that he regarded Turkey as part of the EU as part of it was in Europe.

26. When Mrs Rabbani was cross-examined she said that she had holidayed in France, twice in Tunisia, three times in Turkey and once in Amsterdam. Mrs Rabbani did smoke and drink but said she had never brought any alcohol or tobacco or any gifts back from abroad. She was not aware of any limits on goods from outside the EU.

27. Mrs Rabbani also gave evidence that she could buy Bahman cigarettes in the UK and that at the time of this incident they would cost her £30 a sleeve. Mrs Rabbani showed the Tribunal and Mr Carlin a packet of Bahman cigarettes. It appeared to us to be of a size consistent with Mr Rabbani's claim that they were about 40% the size of normal cigarettes.

28. From this evidence and questioning we find that Mr Rabbani is by no means the novice traveller that he made out. He admitted to six or seven trips abroad and assuming he was with Mrs Rabbani on those she mentioned there may have been eight or nine.

29. Nor do we think that Mr Rabbani is as ignorant of the allowances on entry from a non-EU territory as he made out.

30. His questions to HMRC's counsel about the position where a person imports goods from China but lands first in the EU in Frankfurt or Hamburg (both were mentioned by him) suggested someone who was not unfamiliar with the rules about imports from non-EU countries.

31. But most telling of all was his remark that he had considered that Turkey was practically in the EU. We note that the flight from which the appellant disembarked at Stansted had started its journey in Teheran where the appellant had boarded it but had stopped in Istanbul. We think that by his remarks Mr Rabbani was showing that he was aware of the fact that there are different rules as between EU and non-EU arrivals in the UK and that the only way he might legitimately import 15000 cigarettes into the UK would be if they were acquired in the EU.

32. These statements and admissions by the appellant that he had made many more journeys abroad than he at first admitted lead us to find as fact that Mr Rabbani knew that he had very substantially more cigarettes than whatever his allowance might be and that it was not legal for him to go through the green channel with that many.

Law

33. Article 2 of the Traveller's Allowance Order 1994 provides:

> "(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 … contained in his personal luggage."

The relevant part of the Schedule to the Order is:

Tobacco products	200 cigarettes …

34. The law on the evasion of excise duty that HMRC included in their Statement of Case and bundle and on which they rely is s 8 FA 1994:

> "**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."

35. But they did not point out that s 8 was repealed by paragraph 21(d)(i) Schedule 40 FA 2008, something that appears in the list of changes to FA 1994 appended to the copy of s 8 in the bundle. That list also shows that there are savings for the effects of paragraph 21 in the Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 SI 2009/511.

36. Article 4 of the Order provides:

> "… paragraph 21 of Schedule 40 to the Finance Act 2008 repeal[*s*] the following 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—
>
> …
>
> (b) in the Finance Act 1994—
>
> (i) section 8 (penalty for evasion of excise duty), …
>
> …
>
> …"

37. An examination of Schedule 41 FA 2008 shows that a failure to notify in relation to excise duties does not include the exact circumstances here. The only feasible candidate for a provision of Schedule 41 that applies in this case is paragraph 4 "Handling goods subject to excise duty". An example of conduct that gives rise to a paragraph 4 penalty is given in HMRC's Compliance Handbook at CH91600. This involves a person bringing in 3,200 duty paid cigarettes from France

to sell to workmates. That description seems to be relevant to this case but from CH91200 we can see that it is HMRC's view that:

> "[t]here is no liability to a wrongdoing penalty where goods have been seized at importation from outside the EU. This is a consequence of the ECJ judgement in Dansk. In these cases the person may be liable to a civil evasion penalty, under section 8 of the Finance Act 1994."

"Dansk" simply means "Danish" in Danish but it appears that the case being referred to is Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ("*DTL*"). The second paragraph of the *dispositif* in that case says:

> "The third subparagraph of Article 5(1) and Article 6(1) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, as amended by Council Directive 96/99/EC of 30 December 1996, must be interpreted as meaning that goods seized by the local customs and tax authorities on their introduction into the territory of the Community and simultaneously or subsequently destroyed by those authorities, without having left their possession, must be regarded as not having been imported into the Community, with the result that the chargeable event for excise duty on them does not occur."

38. *DTL* is authority for the proposition that excise duty cannot be charged where goods are confiscated and destroyed on entry to the EU. This is because they are deemed not to have been imported. The answer then is it seems that paragraph 4 Schedule 41 FA 2008 does not apply in these circumstances because the goods have not been imported, and so are not handled after an excise duty point as required by paragraph 4. Thus s 8 FA 1994 does apply to a case such as this.

39. The law relating to evasion of customs duty and import VAT is in s 25 FA 2003:

> **"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
>
> (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."

This differs from s 8 FA 1994 only in immaterial particulars.

40. In relation to excise duty penalties, ss 8(4) and (5) and 16 FA 1994 provide for the powers of the tribunal on an appeal and for the burden of proof. Section 8(4) and (5) says:

> "(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.

41. This is familiar under the guise of a special reduction in relation to other taxes and duties. Section 16(5), (6) and (7) says:

"**Appeals to a tribunal**

…

(5) In relation to other decisions [*of which charging penalties under s 8 FA 1994 is one*], the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(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,

…

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."

42. In relation to customs duty and import VAT sections 29 and 33 provide for the powers of the Tribunal and the burden of proof:

"**29 Reduction of penalty under section 25 […]**

(1) Where a person is liable to a penalty under section 25 […]—

(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.

Subsection (3)(c) is not reproduced in Part 2 FA 1994 (excise duty), and seems an odd provision to apply to a dishonesty penalty, as, in civil proceedings at least, conduct that is dishonest but done in good faith seems to be a logical impossibility. We think the answer is probably that s 29 FA 2003 applies to penalties under s 26 as well as under s 25, and s 26 penalties do not require dishonesty to be proved by HMRC.

"**33 Right to appeal against certain decisions**

(2) Where HMRC give a demand notice [*in relation to a penalty*] 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

(b) their decision as to the amount of the liability.

…

(6) 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.

(7) On an appeal under this section—

(a) the burden of proof as to the matters mentioned in section 25(1) […] lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established."

43. The law relating to the imposition and calculation of excise duty on cigarettes (the calculation on the basis of which the penalty has to be computed) was not before us. We have found that s 2 of the Tobacco Products Duty Act 1979 ("TPDA") provides that:

> "(1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown ... in the Table in Schedule 1 to this Act."

The version of the Schedule in force on 28 February 2014 was that substituted by s 181(1) FA 2013:

TABLE

1. Cigarettes	An amount equal to 16.5 per cent of the retail price plus £176.22 per thousand cigarettes

44. We were also not informed where the law relating to the imposition and calculation of customs duty and import VAT is to be found. We would expect however from our experience of these duties that they were simpler than tobacco products duty and calculated by applying the appropriate percentage to a value for the cigarettes.

Submissions

45. Mr Rabbani's submissions as set out in his Notice of Appeal and Review application are:

(1) The cigarettes were given to him in Iran by his family as a gift for his wife.

(2) He was unaware of the limit on cigarettes for a traveller from outside the EU.

(3) It was the first (and last) time that he had or would bring cigarettes into the country.

(4) The size of the cigarettes is about 1/3 that of normal cigarettes, so that a sleeve of 500 Bahman cigarettes is about the size of 200 normal ones.

(5) The price of the cigarettes taken from him is about 30% of the penalty originally charged (and is 50% of the revised penalty).

46. For HMRC Mr Carlin submitted that the appellant acted dishonestly as demonstrated by:

(1) The evidence that the appellant is a seasoned traveller who had travelled internationally one month before the incident, and so would be aware of the duty-free allowances and restrictions.

(2) The fact that there is considerable signage within airports outlining the baggage restrictions and at Stansted such signage is in the baggage reclaim area and the entrance to the Green channel.

(3) The fact that the appellant took a conscious decision to enter the green channel, indicating that he had no goods in excess of his allowances, in full knowledge of the 15000 cigarettes in his possession. He must have known and it can properly inferred that he did know that that this was in excess of his allowances

(4) The goods seized were 75 times his allowance.

47. In support of this submission Mr Carlin cited *R v Ghosh* [1982] 1 QB 1053 and on the basis of that decision he submitted that:

(1) Reasonable honest people would consider the appellant's actions to be dishonest.

(2) The appellant must have realised that what he was doing was dishonest.

48. As to the penalty, Mr Carlin submitted that:

(1) it was imposed by reference to standardised calculations and that the penalty has been reduced by 60% for disclosure and cooperation. The disclosure was not unprompted.

(2) ability to pay is not a factor that can be taken into account in determining liability to a penalty

(3) but because of an error in the calculation, in that no reduction had been made in the penalty calculation on account of the appellant's duty free allowance of 200 cigarette, he was asking for the penalties to be those in the review decision ie a total of £1,657, made up of excise duty £3,323 and customs and VAT of £822.

Discussion

Burden of proof

49. Mr Carlin accepted that he had the burden of proof (to the civil standard, the balance of probabilities) of showing that the appellant's conduct was dishonest and for the purpose of evading the taxes and duties concerned. He also had the burden of showing that the penalties were properly calculated. The appellant however has the burden of showing that the amount of the penalty should be less than that charged.

Was the appellant's conduct dishonest?

50. We consider first the question whether the appellant acted dishonestly. Mr Carlin's sole authority on this question is *R v Ghosh*. Recent decisions of this Tribunal have questioned whether that case, involving a criminal matter, is as appropriate as civil cases which consider the meaning of dishonesty and have concluded that it is not. We will mention in this context *Rasull v HMRC* [2015] UKFTT 0193 (TC) (a case where dishonesty was found not proved), *Krubally N'Diaye v HMRC* [2015] UKFTT 0380 (TC) and *Birgani v HMRC* [2016] UKFTT 0213 (TC) (which involved Bahman cigarettes).

51. These cases have held that the test for dishonesty in civil proceedings is that to be found in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, a decision of the Privy Council, ("*Barlow Clowes*").

52. In *Krubally N'Diaye*, Judge Redston said:

> 45. At [59] [Arden LJ] 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.'"

53. In *Rasull, R v Ghosh* was not mentioned and Judge Richards followed *Barlow Clowes.* In *Birgani* Judge Poon also carried out a careful examination of the authorities and also came to the conclusion that *Barlow Clowes* sets out the correct test for civil proceedings. We respectfully agree with these decisions and we apply the tests required by *Barlow Clowes.*

54. After the previous paragraphs of this section of the decision were drafted, we became aware of the Upper Tribunal ("UT") decision in *Brookes v HMRC* [2016] UKUT 0214 (UT). In this case the UT (Newey J) noted that at First-tier Tribunal level two cases had been discussed, *Ghosh* and *Barlow Clowes* and that the tribunal had said that they said the same thing about the test for dishonesty but found *Ghosh* more helpful. The UT said that it was a misconception that they set out the same test, and counsel for HMRC added that it was HMRC's view that the correct test was in

Barlow Clowes. This case reinforces our view that we should, as we have done, apply the *Barlow Clowes* test.

55. In the light of this statement by counsel in *Brookes*, we find it a little odd that although *Barlow Clowes* was included in the bundle of authorities along with *Krubally N'Diaye*, Mr Carlin cited only *Ghosh* in his skeleton and in his oral presentation. As Newey J pointed out in *Brookes*, the *Ghosh* test is one that favours the appellant, so Mr Carlin was therefore setting himself a higher hurdle than he needed to.

56. But on the question that applies in both criminal and civil cases, we have no hesitation in finding that the appellant's conduct in attempting to take 15,000 cigarettes through the green channel would be regarded as dishonest according to normally accepted standards of behaviour.

57. But as *Krubally N'Diaye* shows, we should still consider what Mr Rabbani actually knew at the time, not what a reasonable person in his position would have known or appreciated.

58. We have found as a fact that Mr Rabbani did know that the number of cigarettes he had was vastly in excess of what he was allowed to being in. As a reasonably experienced traveller to destinations within and outside the EU (as we have found him to be) he would have known that there are very limited allowances for tobacco in most countries of the world and that for cigarettes they are usually in the low hundreds not the tens of thousands.

59. We therefore hold that his conduct was dishonest within the meaning in s 8 FA 1994 and s 25 FA 2003.

Was the conduct entered into for the purposes of evading duty and tax?

60. That is not quite enough as the dishonest conduct must have been entered into for the purpose of evading the tax or duty concerned. We find that the appellant's only purpose in attempting to go through the green channel was to get away with bringing in, without paying duty, a very large number of cigarettes, a number which he knew was vastly in excess of his allowance. He was therefore attempting to evade tax and duties.

61. We therefore hold that HMRC have met the burden of showing that the penalty for dishonest evasion had been rightly imposed.

Are there any validity or procedural issues relating to the penalties?

62. No question was raised about the validity of the penalty assessments and demands, for example whether they had been made in time. In fact there seems to be no time limit within which an assessment of a penalty for evading excise duty may be made, and for customs duty and VAT the demand for payment was within the 2 year

time limit in s 30(2) FA 2003. Mr Rabbani had clearly received the assessment and demand so there was no issue as to service.

63. We have some misgivings about the sequence of events once HMRC had decided to charge penalties, and HMRC's approach to the appellant's rights. The first decision to assess and demand was made in a letter of 6 November 2014. It informed the appellant that if he disagreed with the decision to charge him a penalty he could either ask for a review or appeal to the Tribunal. It went on to refer to opting and wanting a review.

64. We note that the appellant was not told in that letter he could appeal against the amount of the penalty as distinct from the decision to charge him. We also note that s 16A FA 1994 and s 33A FA 2003 both provide that when HMRC notify a person of an appealable decision, they *must offer* a review. Informing a person that they may ask, or opt, for a review is not the same thing.

65. We further note that the only information about the duty and tax sought to be evaded (confusingly shown in the letter as the "duty liable to a penalty") was that the total was £5,866 split £1,429 for customs and £4,437 for excise. No calculations were included or referred to in the letter to show how those figures had been arrived at by reference to what price or value and what rates of duty and tax.

66. But as we indicate in §6, the appellant's response was to ask for a review, and to complain that the cost of the cigarettes was 30% of the penalty.

67. The response from HMRC was to write on 25 November 2014 to the appellant in terms that were identical to the letter of 6 November 2014, except for the figure of total tax and duty evaded and the consequential calculations arising from that. The total figure was now £4,201. The appeal and review rights were reproduced. No explanation was given in the letter about the reason for the substantial reduction.

68. On 27 November, ie two days after the second assessment and demand, HMRC wrote to the appellant saying:

> "the previous Civil Evasion Penalty had been calculated incorrectly. Please disregard your CEP 14/1646 dated 06 November 2014 for £2345. … If you still wish to request a review please respond …."

69. CEP 14/1646 is only referred to on the 6 November letter as the reference the appellant must use when paying the penalty. We assume that HMRC meant for the appellant to disregard the civil evasion penalty assessment and demand dated 6 November and we consider it would have been less confusing had this been said explicitly. We assume that what HMRC have done here is to withdraw the first assessment and demand, and to issue a new one, so that the appellant had to renew his request for a review (which should have been an offer to review).

70. Again as we indicate in §6, the appellant's response on 12 December 2014 was to ask again for a review, and to complain that now the cost of the cigarettes was 50% of the penalty. The appellant's request was within the statutory deadline for accepting

an offer from HMRC. However it was not until 3 March 2015 that HMRC seem to have responded (at least there is nothing between the dates in the bundle or in the statement of case). HMRC asked the appellant to agree an extension of the target date to 31 March 2015. It explained that if he did not agree to an extension the decision to assess and demand will be taken to be upheld.

71. Sections 15F FA 1994 and s 33E FA 2003 give HMRC a deadline of 45 days from the receipt by them of the review offer or "such other period as HMRC and P may agree". It seems to us that this other period must be agreed before the 45 days are up. This is because those sections provide that if the 45 days or the agreed other period expire without there being a notice of conclusions, the review "is to be treated as upheld". This is not dependent on HMRC informing the person that the review is upheld. This mandatory rule only makes sense on the basis that a period displacing the 45 day limit is in place or a breach of the 45 day limit has the automatic effect of upholding the decision.

72. It is not appropriate for HMRC to effectively coerce the person into agreeing an extension, especially when it seem likely that HMRC were going to uphold the decision, as they purported to do on 18 March. As the so-called conclusion was to uphold the decision and the breach of the 45 day limit would have had the same effect nothing is lost and the appellant is not deprived of a remedy, although the process took longer than it should.

73. Despite these errors and infelicities in the way HMRC have dealt with the case we do not think any of them can cause the assessment and demand of 25 November to be invalid and to be quashed for that reason. The matter that has given us the greatest concern is the failure to indicate how the two very different figures of duty and tax given in the letters were calculated. We did consider whether to seek submissions from HMRC on their view of what the requirements of an assessment and demand are in relation to the calculation of duty and tax and whether there is any case law on these type of assessments or any others that might explain why the information is not given. But we have to some extent taken into account the lack of information about the calculation in coming to our decision, so we decided not to seek further submissions.

Reductions of the penalties

74. HMRC are permitted under s 8(4) FA 1994 and s 29(1) FA 2003 to reduce the penalties as they think proper. HMRC's policy on this is set out in the Notices 160 and 300 given to the appellant. An early and truthful admission of the extent of "the arrears" and why they arose will attract a reduction of up to 40% of the penalty. A further reduction of up to 40% is possible for co-operation. The maximum is 80% on this basis but a yet further reduction may be given where the disclosure is unprompted.

75. In this case HMRC have given a reduction of 30% for each of disclosure and co-operation. No explanation of their thinking is given in the November letters. The review letter disclosed that only 30% was given because "you have not responded to several of the questions outlined in the letter of 10 November 2014".

76. While it is correct to say that Mr Rabbani has not in terms answered some of the questions, these are in effect asking him to confess to smuggling and to explain who else was involved and how and what other offences he may have committed in relation to smuggling. It is clear to us that Mr Rabbani has explained the circumstances of his importing the cigarettes, and that he alone was involved. He also explained that this was the first time he had brought in dutiable goods. We have therefore decided, as we are entitled to do under s 8(4) FA 1994 and s 29(1) FA 2003, to reduce the penalties by 80%.

The basis of calculation of the penalties

77. In his grounds of appeal and before us, the appellant (and his wife) made much of the fact that the penalty was about twice the price of the Bahman cigarettes in Iran, and that they cost much less than normal cigarettes. We consider that where an appellant is unrepresented we can take a liberal view of the grounds of appeal. In this case we consider that the appellant is appealing against the calculation of the penalty, as that is based on the amount of duty that would be charged on the cigarettes had they been legally imported.

78. In Mr Carlin's skeleton he stated that:

> "Where HMRC does not have details of a particular brands, from the manufacturer, they use the lowest possible rate available per 20 cigarettes when assessing the levels of duty avoided/sought to be avoided."

We were not clear what this statement meant but in oral submissions he said that in the absence of a known retail price for these cigarettes in the UK, HMRC have applied the lowest retail price shown on their list of retail prices of cigarettes.

79. From researches we have carried out this approach appears to be based on s 5 TPDA which relevantly provides:

> "(1) For the purposes of the duty chargeable at any time under section 2 above in respect of cigarettes of any description, the retail price of the cigarettes shall be taken to be—
>
> (a) the higher of—
>
> (i) the recommended price for the sale by retail at that time in the United Kingdom of cigarettes of that description, and
>
> (ii) any (or, if more than one, the highest) retail price shown at that time on the packaging of the cigarettes in question,
>
> or
>
> (b) if there is no such price recommended or shown, the highest price at which cigarettes of that description are normally sold by retail at that time in the United Kingdom.
>
> …
>
> (3) In any case in which duty is chargeable in accordance with paragraph (b) of subsection (1) above—

> (a) the question as to what price is applicable under that paragraph shall, subject to subsection (4) below, be determined by the Commissioners; …
>
> … ."

80. This appears then to be a paragraph (b) case and the determination of HMRC is that they should use the lowest price they know of officially (we assume from a list that is used where s 5(1)(a) applies). We had no evidence to show why the relevant officer decided to take the lowest price on the official list as that s 5(1)(b) price or whether that lowest price applied to cigarettes that are of the same or similar description as the Bahman cigarettes in this case. (We note in this context that s 5(1)(a) requires the use of the recommended sale price of "cigarettes of that description" (ie of the description of the seized cigarettes) and s 5(1)(b) the highest price at which "cigarettes of that description" are sold in the UK).

81. Nor do we know whether the decision on retail price was influenced by what Mr Rabbani had said about the cost of the cigarettes in Iran, or whether the decision finally taken was the cause of the substantial reduction in the penalty in the second letter from Mr Scopelliti.

82. And we have experienced a great deal of difficulty in seeing how the amount of duties and tax on which the penalty is based have actually been calculated. We have noted already that the letter of 6 November from Mr Scopelliti simply states without elaboration that the total duty evaded is £5,866 (this is broken down later in the letter to show that the Customs duty and VAT evaded is £1,429 and excise duty is £4,437) and that the letter of 25 November the total duty evaded is £4,201 (the breakdown given is Customs duty and VAT £833 and excise duty £3,368). And we were told by Mr Carlin that the final correct figure of penalty was £1,657 which amounts to duty sought to be evaded of £4,142.

83. We also note that Officer Brennan's notebook shows figures of Excise Duty of £3,124.69, VAT of £778.60 and Customs Duty of £280.80 but we do not know on what basis they were calculated (or why).

84. From the figures for excise duty we can see that by reverse engineering the penalty taking into account Schedule 1 to TPDA (as amended by FA 2013) we arrive at a retail price figure of £5.86 for a pack of 20. (The difference between the pre-review excise duty figure of £3,368 and the review figure of £3,323 is £45 which can be seen is the excise duty on 200 cigarettes of £5.86@ 16.5% x 10 (the *ad valorem* element) which equals £9.70, and 200/1000 x £176.22 (the fixed element) which is £35.24, making a total of £44.94.

85. We have assumed that customs duty and VAT are simply *ad valorem* impositions. We were not given the rates imposed.

86. Mrs Rabbani however gave evidence that at the time (early 2014) she was able to buy Bahman cigarettes in Leeds for £3.00 per pack of 20. She showed us a pack which she had bought in the UK. It was clearly smaller than a normal cigarette

packet. We accept her evidence and find as a fact that this was the retail price of the cigarettes in the UK at the time of importation.

87. As we have said we do not know why HMRC used £5.80 per pack of £20 as the appropriate retail price. But we think that even if HMRC were constrained by s 5 TPDA to use the price they did, we can, when deciding the amount of the penalty on appeal, take into account that this type of cigarette sold in the UK for much less than the figure used.

88. We therefore recalculate the penalty on the basis that the retail price in the UK at the time was £3.00 for 20.

89. The *ad valorem* element of the excise duty is £3.00 x 16.5% x 74 (the number of packs of 20 above the allowance) which is £36.63. The fixed element remains at £176.22 x 14.8 which is £2,609. The total excise duty is therefore £2,645. 20% of that (ie allowing an 80% reduction as we have held) is £529.

90. On those calculations the *ad valorem* element in the excise duty is reduced to 51% of the HMRC figure. We therefore also recalculate the Customs and VAT penalty so that it becomes £822 x 20% x 51% which is £84.

91. We stress again that we do not know if these figures are "correct". If they understate the appellant's potential liability to duty on the basis of a UK retail price of £3 per packet of 20, then HMRC have themselves to blame for not showing the way in which the duty was calculated. If they should have been even lower because of false assumptions on our part then we would expect HMRC to make appropriate amendments.

92. We add that in upholding the penalties to the extent we do, we take no account of the fact that no excise duty, customs duty or import VAT was actually charged on Mr Rabbani, because of the decision of the CJEU in *DTL*, and so no duty was actually evaded. Had Mr Rabbani not been stopped in the green channel then duty would have become chargeable and would have been evaded. This is what Mr Rabbani hoped he would be able to do and so there is duty "sought to be evaded" which is sufficient for the calculation of the penalty (see fullout words in both s 8(1) FA 1994 and s 25(1) FA 2003). We have therefore taken HMRC's references to the appellant's evasion of duty and tax to be shorthand for his attempted evasion.

93. We also add that in coming to our decision to reduce the penalty on the basis of the UK retail price we took into account that the appellant did not have the right to ask for the HMRC determination of the retail price to be referred to a referee for arbitration under s 5(4) TPDA, a right which is only available to someone who has paid the duty chargeable. In a case such as this (seizure on first arrival in the EU of goods from outside the EU) *DTL* makes it clear that no duty is actually payable.

Decision

94. In accordance with s 16(4)(a) FA 1994 we reduce the excise duty penalty to £529.

95. In accordance with s 33(6)(a) FA 2003 we vary HMRC's decision so that the customs and VAT penalty becomes £84.

96. 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.

RICHARD THOMAS

TRIBUNAL JUDGE
RELEASE DATE: 12 MAY 2016