



TC05103

Appeal number: TC/2015/03524

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**

IJAZ AHMED

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ANN CHRISTIAN**

Sitting in public at Alexandra House, 14 -22 The Parsonage, Manchester on 6 January 2016

The Appellant in person

Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This is an appeal by Mr Ijaz Ahmed (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 8 December 2014, as revised on 15 January 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £538 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, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.
2. The appeal to the Tribunal was outside the 30 day time limit within which to lodge an appeal following HMRC’s review decision but HMRC have no objection to the late appeal.

Background

3. On 23 February 2014, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Islamabad, Pakistan.
4. From disembarkation to clearing Customs there are 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. Pakistan is not in the EU and therefore, returning travellers, for the purposes of the Travellers Allowances Order 1994, have a personal allowance of 200 cigarettes.
5. Despite the notices, which are also situate in the baggage reclaim area and just before the Customs channel entrances, the Appellant chose to exit through the ‘nothing to declare’ Green channel, indicating that he had no goods to declare, at which point the Appellant was intercepted by Officer Sirfraz Mohammed, a UKBF Officer.
6. Officer Mohammed’s evidence is that the Appellant confirmed he had travelled from Islamabad in Pakistan. He was then asked if he understood that there are certain goods travellers are not allowed to bring into the United Kingdom such as drugs, offensive weapons or indecent/obscene material. The Appellant confirmed that he understood and that he was not carrying any such items. He was asked if he understood his allowances and replied that he did.
7. The Appellant confirmed when asked that the bags he had with him were his and that he had packed them himself. He confirmed that he was aware of the contents of his luggage.
8. On conducting a search of the Appellant’s luggage, 5020 Cigarettes and 1.15kg of hand rolling tobacco were found. His cigarette allowance was 200 and therefore the cigarettes alone were over 25 times more than his personal allowance.

5 9. As the goods had not been declared and were over the allowances as set out in the
Travellers' Allowances Order 1994 (as amended), Officer Mohammed 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
10 Seizure Information Notice C156 and Warning Letter BOR162, both of which the
Appellant signed.

10. 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.

15 11. On 22 September 2014, HMRC's Officer Jane Hall of HMRC's International
Trade and Compliance Unit, wrote to the Appellant at the address he had provided,
informing him that HMRC would be conducting an enquiry into the matter and that
the imposition of a Civil Evasion Penalty, 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 of the action he could take to reduce any potential penalty. The letter enclosed
20 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 the Appellant's response
and co-operation with HMRC's enquires.

25 12. The letter from Officer Hall explained that if the Appellant was willing to co-
operate with the enquiry he should provide the following within 30 days of the date of
her 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.
- 30 • 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.
- 35 • Confirmation of how many times, and when, alcohol or tobacco
products were smuggled into the UK, or attempts made to
smuggle them.
- 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,
40 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".

45 13. Officer Hall referred the Appellant to Public Notice 300, s 3 where it states that a
reduction in penalty may be given as follows:

5 “Disclosure

During the investigation an early and truthful admission of the extent of the arrears and why they arose will attract a considerable reduction (up to 40 per cent). By the extent of the arrears we mean what has happened and over what period of time, along with any information about the value involved, rather than the precise quantification.

10 Co-operation

You will receive further mitigation (up to 40 per cent) if you:

- attend all the interviews (where necessary);
- provide all information promptly;
- answer all questions truthfully;
- 15 • give the relevant information to establish your true liability;
- co-operate until the end of the investigation.”

14. On 7 October 2014, in the absence of any response from the Appellant, HMRC sent a reminder letter to him asking for a response by 24 October 2014.

20 15. On 27 October 2014, again in the absence of a response Officer Fox invited the Appellant to an interview on 12 November 2014, to allow him the opportunity of making a full honest disclosure of any irregularities.

25 16. On 12 November 2014 the Appellant attended for interview. It was explained that his attendance was on a voluntary basis. He was free to leave at any time or to ask for an adjournment to seek advice if he wished. He was not obliged to co-operate in HMRC’s enquiries. However his level of co-operation would be taken into account in considering the mitigation of any penalties that may be due.

17. The Appellant was invited to provide some background as to why he had imported into the UK tobacco products above his allowance. He said:

30 ‘I went to Pakistan as my mother was very ill. While I was there she passed away. I started smoking at this time. I have had a few people close to me pass away over the last few months. I stayed in Pakistan for a few weeks. I am working and also studying for my degree so I am very stressed. I knew that I would not be able to go back to Pakistan for a few years, so I brought the cigarettes and tobacco back. They are for myself and I was asked to bring some back for family members. As I won’t be going back to Pakistan for a while I brought a lot back for myself as they are cheaper there. I didn’t know I had an allowance and don’t want to risk my career by having a criminal record.’

40 18. He was asked whether it was the first time he had brought back more than his allowance. He replied:

5 ‘Yes. I did not know that there were allowances. I only started smoking at this time so I didn't know there was an allowance. I would not have brought them back if I knew there was an allowance. I haven't brought any back before’.

He was asked whether he had seen any signs or had anyone made reference to allowances in the airport in Pakistan. He replied:

10 ‘In Islamabad you can buy as many as you want in the shops and the airport shop. I didn't ask anyone if it was allowed. I was still in shock after my mother's death so I was not thinking clearly.’

19. Asked whether he had seen any signs in Manchester airport he replied:

15 ‘I was tired after the long flight so I didn't notice any signs...The letter refers to smuggling. I was not smuggling. It was an honest mistake. I only brought them back for myself as they are expensive in the UK so I brought them back to last me a while. I have learnt from my mistake and I will not do it again.’

20. On 8 December 2014 Officer Hall issued a Civil Evasion Penalty - Notice of Assessment in the sum of £561.00, being £111 Customs civil evasion penalty and
20 £450 Excise civil evasion penalty which was calculated on the combined total of tobacco goods seized less the Appellant's personal allowance of 200. The Notice of assessment explained how the penalty had been calculated and advised that a 60% reduction from the maximum penalty had been made (30% for disclosure and 30% for co-operation) reflecting the degree of disclosure and co-operation given by the
25 Appellant in the course of the enquiry. Officer Hall observed in her witness statement that Mr Ahmed, at the interview, admitted bringing the cigarettes into the country for himself and for family members but said it was his first time and that he didn't know his allowances, which contradicts the UKBF Officer's notes that he said he knew his personal allowance. She further observed that the Appellant had not, as requested in
30 her letter of 22 September 2014, provided any travel details or other information requested.

21. On 6 January 2015 the Appellant requested an independent review, saying:

35 ‘I had no intention of purposefully evading customs duty. Upon my arrival at the airport, I legitimately believed there existed only one gate, the green coloured one, and was completely unaware that there existed another gate coloured red meaning I believed there was only one exit which existed. I answered all of the questions given to me in my interview truthfully and honestly but bizarrely, you still insist on penalising me for a mistake I committed which was accidental and unintentional. I am already in a quagmire suffering critical financial hardship and now this particular episode just further
40 compounds the current situation I am in, much to my detriment.

Your decision is beyond my comprehension and I consider it to be unjust. Furthermore I believe your decision is preconceived based on the facts you already have without taking into account my side of the story or the dilemma I am in — it was quite clearly an
45 accidental error and one which I am being unfairly financially penalised with. I am a clean, upright, modest and responsible citizen with no prior history of defrauding or even

5 attempting to defraud customs so I would like an independent body to review my case. I would like to request..an independent review.'

22. On 15 January 2015, prior to the review, Officer Hall realised that there had been an administrative error and that the penalty assessment for £561 was incorrect. The penalty was revised to £538 made up of £106 Customs civil evasion penalty and £432
10 Excise civil evasion penalty.

23. Officer Dakers who had not previously been involved in the decision carried out a review of the penalty and on 9 February 2015 wrote to the Appellant notifying him that the penalty was to be upheld.

24. Officer Dakers said that the Appellant's travel history indicated that he was an experienced traveller, having travelled to and from third countries before, including
15 Pakistan. He had also travelled within a year prior to the seizure and frequently enough to be aware of the restrictions, import allowances and procedures when passing through customs. The volume of tobacco products he was carrying was substantial and it was not credible that he thought he could import such a high
20 quantity of tobacco into the United Kingdom, without making a declaration to customs.

25. Officer Dakers said that the quantity of goods carried was significantly higher than the personal allowance. There is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK. It would have
25 been prudent to have questioned this when returning to the UK, especially upon noting the signs at both the baggage reclaim area and upon entering the 'green' channel. These signs are visual aids which include pictures of dutiable goods, including tobacco products and it would have been sensible for the Appellant to seek assistance from Border Force officials if there was any confusion over the signage.

30 26. The Officer also explained that it is specifically stated in legislation that the ability to pay a civil penalty cannot be considered in determining the liability to such penalties. The Appellant's representation with regards to his financial position can therefore not be considered.

35 27. Officer Dakers further explained that s 29 of the Finance Act 2003 and s 8(4) of the Finance Act 1994 allowed HMRC to reduce a penalty as they think proper. He explained that there are two factors, disclosure and co-operation, which determine 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.

40 28. The Officer said that whilst the Appellant had partly responded to Officer Hall's enquires within the appropriate timescales and attended a meeting in order to provide a disclosure, there had been inconsistencies in his representations in comparison to information received from Border Force at the time of seizure. For that reason Officer Hall had allowed a 30% reduction for disclosure and a 30% reduction for cooperation.
45 Officer Dakers considered that the mitigation offered was reasonable. The Appellant

5 was advised that if he did not agree with the decision he could appeal to the Tribunal within 30 days.

29. By Notice of Appeal dated 26 March 2015, received by the Tribunal Service on 30 March 2015 the Appellant appealed the penalty to the First-tier Tribunal.

Evidence

10 30. The combined bundle of documents included the witness statement of Officer Sirfraz Mohammed, and a copy of his notebook notes, and also the witness statement of Officer Jane Hall, Both gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence to the Tribunal under oath. We were also provided with copy correspondence, copy relevant legislation and case law authority.

15 The Law

31. 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 –

20 (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),

25 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

30 (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)

s25 Penalty for evasion.

(1) in any case where

35 (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),

40 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. (...)

5 29 Reduction of penalty under section 25 or 26.

(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

10 (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. (...)

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

49(1) Where-

15 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, without payment of that duty-

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

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. (...)

25 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.

30 (2) Where anything 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

35 (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.

(3) Where the person seizing or detaining anything 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

40 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—

45 (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;

5 (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;

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

10 (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.

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

20 (7) If any person, not being an officer, by whom anything 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 there under; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

(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:

25 If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything 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' Allowances Order 1994

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

35 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—

40 (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;

45 (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

5 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.

10 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.

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

15 A penalty may be imposed in any case where:

- 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).
- 20 • The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

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?

25 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:

- 30 • 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.

35 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

2.3 How can penalties be reduced?

40 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.

5 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:

- 10
- 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.

15 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

20 32. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £538 on the following grounds:

- the penalty does not take his position and circumstances into account and is unjust and unfair, based on pre-conceived ideas;
- 25 • he did not intend to purposefully evade duty and has been truthful in providing information;
- when travelling in the past he has not imported dutiable items.

30 33. At the hearing, the Appellant repeated the above grounds of appeal and also challenged the discount he had been given of 60% on the basis that he had provided full disclosure and cooperation.

35 34. In answer to questions he said that he had travelled to Pakistan in 2007, 2010, 2012, 2013 and 2014, mainly when his mother was receiving medical treatment. He conceded that over 5000 cigarettes was a substantial number but said that he had purchased the cigarettes to last him two or three years. He had not bought them to sell. The hand rolling tobacco was for his uncle.

40 35. He repeated that he was very tired when answering the questions of the UK border officer and erroneously said that he was aware of his personal allowance. He said that he had not seen the signs and notices, in the baggage reclaim area and just before the Customs channel entrances advising which countries fall inside/outside the European Union (EU) and also the duty free allowances for excise dutiable products acquired outside the EU. He said that, in fact, at the time he was not aware that there was a red channel.

45 36. The Appellant said he could not remember whether he had been asked about previous international travel at the interview on 12 November 2014.

HMRC's Case

37. Mr. Davies for HMRC said that on 23 February 2014, by entering the Green 'nothing to declare' channel at Manchester Airport, It was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- a) The Appellant entered the Green Channel which is only for persons entering the UK with goods not exceeding their personal 'duty free' allowances.
- b) The Appellant was carrying 5,020 cigarettes and 1.15 kg of raw tobacco which was over 25 times and over 4 times the respective (and mutually exclusive) personal 'duty free' allowances.
- c) 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 notices also explain that passengers should speak to an Officer in the Red Channel or on the Red Point if they have over their allowance.
- d) The Appellant had travelled prior to the event to which the penalty relates and could reasonably be expected to be fully conversant with the regulations relating to duty-free allowances for goods imported into the UK.
- e) It is well known that Pakistan is outside the EU for excise purposes. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them. Not doing so constitutes dishonest behaviour. Failing to declare under those circumstances constitutes dishonest behaviour.

38. Officer Hall gave evidence for HMRC and said that she had not been able to give the Appellant full discount for disclosure and cooperation because at the interview he maintained that he was unaware of his personal allowance, which she did not find credible and also because he had not volunteered any information with regard to previous international travel. She agreed however that she was not at the interview which had been undertaken by officers Mohammed, Rigby and Fox, and therefore could not be sure that the Appellant had been asked about travel. There was nothing in the record of the interview to indicate that he had been.

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

5 40. A finding of dishonesty requires that act undertaken (entering the green channel with an amount of excise goods 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.

10 41. The appropriate standard of proof is the balance of probabilities: *Re B (Children)* [2008] UKHL 35.

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

15 ‘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 that what he was doing would be regarded as dishonest.’

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25 43. 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:

30 ‘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 dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.....’

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40 44. ‘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 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* 9951 2 AC 378 was the correct test and was summarised as follows:

45

‘...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

5 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.'

10 45. The Appellant's actions as set out above demonstrate that he acted dishonestly and deliberately took the action to positively evade duty and tax. His attempt to clear import controls without paying any duties by walking through the Green Channel "nothing to declare" with the concealed cigarettes demonstrates his intent to positively evade duty and tax.

15 46. Because the Appellant acted dishonestly and deliberately took the action to positively evade duty and tax 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.

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

20 48. The penalty is based on the amount of Customs Duties, Import VAT and assessed excise duty that was involved in the offence. In this case the penalty is £538, being 40% of the culpable arrears.

25 49. HMRC exercised its discretion as to the amount of discount to be allowed. A 30% deduction was allowed for early disclosure and a further 30% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Dakers who undertook the review said that he had not been able to give the full 40% allowance for either disclosure or co-operation because the Appellant had failed to provide the information requested. He believed it was inherently improbable that the Appellant, having previously travelled to the UK from a non
30 EU country, believed he was entitled to import 5020 cigarettes, and 1.15kg of tobacco.

35 50. The Appellant has submitted in correspondence and in his Notice of Appeal that he cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

51. The Appellant has not shown grounds to successfully appeal the decision to issue the penalty.

Conclusion

40 52. The Appellant imported the cigarettes from Pakistan. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. The airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of

5 importation restrictions. Pakistan is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable when importing from EU countries.

53. The Appellant had previously travelled to the UK from a non EU country on at least one occasion and it is more likely than not that he would have been aware of the allowances. In any event, a reasonable person would check the allowances before
10 importing such a large number of cigarettes.

54. Any issue as to whether or not the cigarettes were for personal use does not arise. 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
15 timely 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.

55. The issue in this appeal is therefore whether or not the penalties which have been
20 imposed were properly imposed. 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
25 balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

56. 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
30 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 country than he was entitled to without declaring them. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.
35

57. 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, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from taking into account the insufficiency of the
40 funds available to pay when considering reduction of the penalty.

58. 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.

59. HMRC can reduce a penalty on the basis of the taxpayer's co-operation. There
45 are two factors determining the level of any reduction. Firstly, there can be a

5 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. The Appellant did not provide the information Officer Hall
requested in her letter of 22 September 2014, which was one of the reasons why
Officer Hall determined that a discount for cooperation should be limited to 30%. She
10 said that in particular the Appellant had not provided information relating to previous
international travel as she had requested. However, that question was not put to the
Appellant at the interview, as perhaps it should have been, and therefore too much
emphasis appears to have attributed to that particular fact. In our view the penalty has
been calculated correctly and reduced appropriately for disclosure, but with regard to
15 co-operation a 35% reduction should have been given, thus increasing the total
reduction to 65% and the penalty to 35%. Otherwise we concur with Officer Hall's
assessment of the penalty as confirmed by Officer Dakers.

The penalty due is therefore reduced to £491.75 (being 35% of £1405).

20 60. The appeal is accordingly dismissed and the penalties confirmed subject to the
reduction referred to.

61. 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
25 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.

30 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 17 MAY 2016