



TC05106

Appeal number: TC/2014/06355

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

SAMIA ZAHEER

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ALBAN HOLDEN**

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

The Appellant in person and her daughter Ms Alesha Chaudhary

Ms Joanna Vicary, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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1. This is an appeal by Mrs Samia Zaheer (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 1 September 2014, to issue Excise and Customs Civil Evasion Penalties in the total sum of £2,090 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 she failed to declare cigarettes which She was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

Background

2. On 9 January 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 Lahore, Pakistan via Dubai on flight EK 107.

3. 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.

4. 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 she had no goods to declare, at which point the Appellant was intercepted by Officer David Betts, a UKBF Officer.

5. Officer Betts’ evidence is that the Appellant confirmed she had travelled from Islamabad in Pakistan. He says that the Appellant did not appear to have any difficulty understanding and speaking English. She was asked if she 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 she understood and that she was not carrying any such items. She was asked if she understood her personal allowance with regard to cigarettes and alcohol. The Appellant replied that she was.

6. The Appellant confirmed when asked that the bags she had with her were hers and that she was aware of the contents of her luggage.

7. When asked if she was travelling with anyone else she replied “my children”. When asked whether she was travelling with a husband she replied “no”. At that point her daughter Ms Chaudhary said that her mother’s husband was travelling with them. When the Officer repeated his question as to whether the Appellant was travelling with her husband she again replied “no”.

8. The Appellant’s husband had also been stopped separately passing through the Green channel. An examination of all the Appellant’s luggage revealed a total of 12,220 John Player Gold Leaf cigarettes.

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 Betts seized the goods as
liable to forfeiture under s 139 of the Customs and Excise Management Act 1979
("CEMA") and issued the Appellant with Public Notices 1 and 12A, being Seizure
10 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 13 August 2014, HMRC's Officer Joseph Scopelliti, a Post Detection Audit
Officer with HMRC's International Trade and Compliance Unit, wrote to the
Appellant at the address she had provided, informing her 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 she
20 could take to reduce any potential penalty. The letter enclosed Public Notice 300 in
respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise
Duty and invited any disclosure by the Appellant. The letter made it clear that any
reduction in the penalty was contingent on the Appellant's response and co-operation
with HMRC's enquires.

25 12. The letter from Officer Scopelliti explained that if the Appellant was willing to
co-operate with the enquiry she should provide the following within 30 days of the
date of her letter:

- 30 • "A copy of this letter, signed and dated by you, as acknowledgement that
you have read and understood Factsheet CC/FS9, Public Notice 160, and
Public Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted
smuggling, exactly what they did and why they did it.
- A full explanation as to how the smuggling or attempted smuggling was carried
out.
- 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.
- 40 • Details of all international travel during the period under enquiry,
including the reasons for travel.
- An explanation of what you did with, or intended to do with, the smuggled
goods.
- Any documentation you think will support the information you are providing.
- 45 • Any other information or explanations you think may be of use to this enquiry."

13. Officer Scopelletti 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 27 August 2014, in the absence of a reply, HMRC sent a reminder letter to the Appellant.

20 15. On 27 August 2014 HMRC received a letter from the Appellant sent to them on 21 August 2014 (dated 15 August 2014). The Appellant provided a signed copy of the Respondents’ letter of 13 August indicating that she understood its contents. She stated that she had been misguided and had not intended to avoid duty. She admitted that friends had asked her to buy tobacco at the Pakistan Airport duty-free shop for which they would pay her “good money”.

25 16. On 16 September 2014, following consideration of the evidence and of the information in the Appellant’s letter, Officer Scopelliti issued a Civil Evasion Penalty - Notice of Assessment in the sum of £2,090, being £412 Customs civil evasion penalty and £1,678 Excise civil evasion penalty. The Officer calculated the Excise and Customs Duty and VAT that would be due on the 12,020 cigarettes seized, a sum 30 of £3,486. He took into account the Appellant’s personal allowance of 200 cigarettes.

17. The Notice of Assessment explained how the penalty had been calculated and advised that a 40% reduction from the maximum penalty had been made which included 20% for disclosure and 20% for co-operation. The penalty therefore 35 amounted to 60% of the total evaded duty of £3,486, reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry.

18. On 16 September 2014 the Appellant wrote to HMRC saying:

40 “From my last statement, which I had sent you on the 15th of August I stated that there was a misunderstanding of the whole situation and it was not my intention to avoid any duty charges and therefore I cannot accept any responsibility. I have not smuggled anything before and I did not intend to or will ever intend to smuggle anything into the UK. I had bought the cigarettes from a duty free shop in Pakistan and I was unaware that

5 you have to pay any tax on them. On 9th January 2014 you had said that I entered the
green channel in Manchester Airport saying that I had nothing to declare, I was unaware
of this green channel or this declaration and I was not aware that I had declared anything.
I don't know anything about this green channel. When someone stopped me at the airport
10 I had said I had told you straight away that I had cigarettes, however it was all a
misunderstanding. I wish to ask for a review by a person not previously involved in the
matter because -

1. The whole case was a misunderstanding; I was unaware of the UK tax laws as well as
this it was my first time. I did not think I had done anything wrong when I purchased the
cigarettes from the duty free shop. I do not know anything about any green or red
15 channels.

2. I have been travelling for the last 20 years and you can check my records and nothing
like this has happened before at the UK border control, it was my first time. And I have
never even gotten a warning before.

3. I apologize for whatever the mistake and for my ignorance of not knowing anything, I
20 am a mother of four children and I would never think to do such an irresponsible act. I
am a house wife and I cannot afford to pay this penalty and I will be more careful of my
actions next time.”

19. Officer Sharon Marshall who had not previously been involved in the decision
carried out a review of the penalty and on 6 November 2014 wrote to the Appellant
25 notifying her that the penalty was to be upheld.

20. Officer Marshall said she had been provided with evidence that the Appellant had
travelled to and from third countries on at least six occasions in the two years leading
up to the seizure and would therefore have experience of the procedures and
allowances when passing through Customs. The volume of cigarettes the Appellant
30 was carrying was substantial, being almost sixty times the Appellant's personal
allowance and it was not credible that she thought she could import such a substantial
quantity of tobacco, into the UK from Pakistan, without making a declaration to
Customs.

21. It had previously been explained to the Appellant that s 29 of the Finance Act
35 2003 and s 8(4) of the Finance Act 1994 allowed HMRC to reduce a penalty as they
think proper. Officer Marshall 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
40 procedure. She considered the information provided by Mrs Zaheer in her earlier
letter. The Appellant had made an attempt to explain what happened but no quantities
or costs were provided. She had refused to accept responsibility for her actions,
claiming she was misled and unaware that duties had to be paid.

22. Officer Marshall therefore explained that the quality of the information supplied
45 was not sufficient for her to allow more than 40% mitigation from the maximum
penalty. In her view, a total penalty reduction of 40%, given the level of disclosure

5 and co-operation, was appropriate. The Appellant had not offered any additional information in her request to have the case reviewed. The Appellant was advised that if she did not agree with the decision she could appeal to the Tribunal within 30 days.

23. By Notice of Appeal dated 22 November 2014, and received by the Tribunal Service on 26 November 2014 the Appellant appealed the penalty to the First-tier
10 Tribunal.

Evidence

24. The combined bundle of documents included the witness statement of UKBA Officer Betts and a copy of his notebook notes, and also the witness statement of Officer Scopelliti. Officer Scopelliti was unable to attend the hearing having been
15 transferred to other duties within HMRC. Officer Samantha Easton therefore attended in place of Officer Scopelliti. Both Officers Betts and Easton 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.

The Law

25. 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 –

25 (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),

30 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

35 (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

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

5 (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

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

29 Reduction of penalty under section 25 or 26.

10 (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

15 (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-

20 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.

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

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

S139 Provisions as to detention, seizure and condemnation of goods

30 (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.

35 (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

(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.

40 (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 proceedings are completed or it is decided that no such proceedings shall be brought.

45 (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—

- 5 (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;
- 10 (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.
- 15 (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.
- 20 (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.
- (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 thereunder; he shall be
liable on summary conviction to a penalty of level 2 on the standard scale.
- 25 (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:

- 30 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

- 35 1. This Order may be cited as the Travellers' Allowances Order 1994 and shall come
into force on 1st April 1994.
- 40 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—
- 45 (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;

5 (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

10 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.

15 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

20 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).
- 25 • 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?

30 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:

- 35 • 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.

40 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?

5 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.

10 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:

- 15 • 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.

20 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

25 26. In the Appellant's Notice of Appeal she does not deny that the amount of tobacco imported was over the permissible limits. She appeals HMRC's decision to assess the penalty at £2,090 on the following grounds:

- she was unaware of the allowances for goods to be brought into the UK duty free;
- she thought that duty had been paid on goods purchased in a duty-free shop;
- 30 • she bought them for a friend and did not intend to make any money;
- she does not understand the meaning of the red and green channels at the airport;
- she has not been involved in anything illegal involving tobacco in 20 years of travelling;
- 35 • her English is poor and she has a poor awareness of British laws;
- she has not received any warning from UKBF;
- it is unfair to punish her for a misunderstanding; she cannot afford to pay the penalty.

5 27. At the hearing, the Appellant gave evidence and was represented by her daughter Ms Chaudhary.

28. Ms Chaudhary said that her mother accepted she had made a mistake but that she genuinely did not know what personal allowance was. Her English was very poor and when asked whether she was travelling with her husband, she did not understand. Ms
10 Chaudhary had immediately corrected that when Officer Betts repeated his question.

29. Ms Chaudhary said that her mother had purchased the cigarettes at the duty free shop in the airport at Lahore, so her mother thought that any duties had been paid. Her mother knows that 12,200 cigarettes seems a lot, but she was going to give or sell them to friends at the same price she paid for them, that is not for profit.

15 30. Ms Chaudhary said that their mother was a housewife with four children. This was her 'first offence'. She accepted that the penalty had to be imposed but asked for it to be reduced.

31. In evidence to the Tribunal the Appellant said that she travelled to Pakistan once every two years or so. She had also travelled to Saudi Arabia, the United Arab
20 Emirates, France and Spain. They had travelled to Pakistan for a wedding. They knew that cigarettes were cheaper there. They had not planned on buying cigarettes, it was a spontaneous purchase. The cigarettes were for an uncle and friends who smoked. The Appellant said she did not smoke. She had not asked for a receipt for the cigarettes.

32. The Appellant said that her husband had previously been stopped and had
25 cigarettes taken from him. She denied that was the reason why she initially said she was not travelling with a husband.

HMRC's Case

33. On 9 January 2014, by entering the Green 'nothing to declare' channel at
30 Manchester Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- a) She entered the Green channel, indicating that she had nothing to declare despite significant signage present.
- b) She does not deny that the amount of cigarettes imported was over the permissible limits.
- 35 c) She confirmed to UKBF Officer Betts that she was aware of her personal allowance relating to cigarettes and tobacco. This knowledge was then subsequently denied by the Appellant in her letter of 16 September 2014.
- 40 d) When questioned by UKBF Officer David Betts, the Appellant stated that she was not carrying any restricted items. This was also untrue. In her letter of 16th September 2014 she asserted that she had told the UKBF "straight away" that she was carrying cigarettes. This was not true.

- 5 e) The Appellant was carrying 12,020 cigarettes - 60 times her personal allowance;
- f) It is well known that Pakistan is outside the EU for excise purposes. The Appellant should have been fully aware that she was bringing more goods into the country than she was entitled to without declaring them.
- 10 g) Checks made subsequent to the seizure of the goods revealed that the Appellant had travelled to the UK from outside the EU on at least three occasions in the preceding two years, confirming that she must have been conversant with duty free allowances and was fully aware that she was bringing more goods into the country than she was entitled to without declaring them.
- 15 h) Not doing so in the belief that the amount was likely over the allowances constitutes dishonest behaviour. A reasonable and honest person would check the allowances before importing a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.
- 20 i) The Appellant states that she has been travelling for the last twenty years, further confirming that she would have been aware of restrictions on the importation of goods.
- 25 j) A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods. The Appellant would have seen these on her previous trips as well as on this occasion, but chose to ignore them despite her claimed lack of knowledge of UK regulations.
- 30 k) Although she may not have been aware of the exact allowance she would have known that 12,020 cigarettes was too much. That knowledge should have prompted an honest traveller to check the allowances before entering the Green channel.
- 35 l) When questioned by the UKBF Officer the Appellant said three times that her husband was not travelling with her, when he was in fact on the same flight.
- 40 m) The Appellant states that friends had asked her to obtain the cigarettes from the duty free shop and would pay her for them. It is not credible to believe that they would ask her to do that unless there was a financial gain to be made either by the Appellant or her friends.

45 34. 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 she acted dishonestly and deliberately took action to positively evade duty and tax.

5 35. 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 she was doing was, by those standards, dishonest.

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

37. 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.’

20 38. 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:

25 ‘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.....’

30 39. ‘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* 120051 UKPC. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* 45 9951 2 AC 378 was the correct test and was summarised as follows:

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

15 41. 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.

42. 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 43. 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 £2,090, being 60% of the culpable arrears.

25 44. HMRC exercised its discretion as to the amount of discount to be allowed. A 20% deduction was allowed for early disclosure and a further 20% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Marshall who undertook the review said that she 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. She believed it was inherently improbable that the Appellant, having previously travelled to the UK from a non-
30 EU country, believed she was entitled to import 12,220 cigarettes, which represented 60 times her allowance.

35 45. The Appellant has submitted in her Notice of Appeal that she 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.

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

40 **Conclusion**

47. 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

- 5 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 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.
- 10 48. It is clear from the Appellant’s own evidence that she knew Customs duty was an issue. She said that was the reason why she had purchased the cigarettes in duty free at Lahore airport. The Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes.
- 15 49. The Appellant had previously travelled to the UK from a non-EU country on several occasions and it is more likely than not that she would have been aware of the allowances. In any event, a reasonable person would check the allowances before importing such a large number of cigarettes.
- 20 50. Any issue as to whether or not the cigarettes were for personal use does in any event 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 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.
- 25 51. The issue in this appeal is therefore whether or not the penalties which have been 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
- 30 dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).
- 35 52. It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods. The Appellant should have been fully aware that she was bringing more goods into the country than she was entitled to without declaring them. We have to conclude that the
- 40 Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.
- 45 53. The Appellant has not offered any grounds on which she 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 funds available to pay when considering reduction of the penalty.

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

10 55. The penalty of £2,090 notified to the Appellant on 29 August 2014 was based on the amount of Customs Duties, Import VAT and Excise duty that was involved in the offence, an amount of £3,486.00. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account and the fact that the Appellant did not provide the information Officer Scopelliti requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 40%. We concur with Officer Marshall's review and assessment of the penalty.

20 56. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld. No challenge has been brought to the calculation of the duties and the Appellant has not in any event shown why the penalty has not been calculated correctly and to best judgment.

57. The appeal is accordingly dismissed and the penalties totalling £2,090 confirmed.

25 58. 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.

MICHAEL CONNELL

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**TRIBUNAL JUDGE
RELEASE DATE: 18 MAY 2016**