



TC05412

Appeal number: TC/2014/04875

EXCISE DUTY and CUSTOMS DUTY and IMPORT VAT– civil evasion penalties – s 8 of FA 1994 and s 25 of FA 2003 – the test of dishonesty – the burden of proof – the standard of proof – the status of Tenerife for customs clearance purposes – whether appellant ‘dishonest’; no – appeal allowed – penalty discharged

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LYNNE EVANS

Appellant

- and -

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

**TRIBUNAL: JUDGE HEIDI POON
LIZ POLLARD**

**Sitting in public at the Tribunal Centre, City Exchange, 11 Albion Street, Leeds
on 25 January 2016**

Miss Lynne Evans in person for the Appellant

**Mr A Scott, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

1. The appellant, Miss Evans, appeals against civil evasion penalties of £883
5 imposed by notice of assessment issued on 6 March 2014. Of the total penalties charged, £867 relates to excise duty evasion, and £16 relates to customs duty and import VAT evasion.

2. The principal issue in this appeal is to determine whether the penalties have been correctly imposed for dishonest evasion of:

- 10 (a) excise duty under section 8 of Finance Act 1994, and
(b) customs duty under section 25 of Finance Act 2003.

3. The secondary issue for determination is whether the overall reduction of 20% applied against the full penalties chargeable is sufficient.

Evidence at the hearing

15 4. The Tribunal was provided with the witness statements from three officers: (1) Officer Amy Kowalczuk of HMRC who raised the penalty assessment; (2) Officer Melissa Hatcher of HMRC, who took over the appellant's case from Officer Kowalczuk; and (3) Officer Lisa Carter of UK Border Force.

20 5. Mr Scott led the evidence of the three witnesses, who were cross-examined by the appellant, and also answered questions from the Tribunal. We accepted the evidence of all three officers without qualification.

6. The appellant also gave evidence and was cross-examined by Mr Scott. We found Miss Evans to be a straightforward and convincing witness, not least since her candour led her to provide facts which were not necessarily helpful to her case.

25 The facts

7. From the oral evidence of the witnesses and from the documents produced by the parties, the Tribunal makes the following findings of fact.

Background

30 8. Miss Evans has been a care worker for over 10 years, and works for a private agency which provides community care for vulnerable adults. She normally works four shifts a week, and each night shift lasts for 11 hours from 9pm to 8am.

9. The allegation of dishonesty related to her civil evasion penalties is clearly a matter of great concern to Miss Evans. She stated in evidence that she brought her appeal because '[her] character of honesty is paramount to [her]', especially because
35 of her work with vulnerable people. She also thought that the allegation of dishonesty

would leave her with a criminal record. (It was clarified to Miss Evans at the hearing that she had not been charged with a criminal offence; that the penalties are civil penalties; that her appeal to this Tribunal comes under civil proceedings.)

5 10. The background period of relevance to this appeal concerns the events in December 2012, which can be summarised as follows:

(1) Miss Evans's sister was admitted to hospital following complications of a life-limiting condition, and died shortly after on 11 December 2012; (the date of death as on the tombstone photograph provided).

10 (2) Due to sickness within the workforce, Miss Evans was working overtime in December 2012 to cover for shortage of staff.

(3) Miss Evans resumed smoking in December 2012, after a break of some eight years.

15 11. In evidence, Miss Evans related that she gave up smoking after being diagnosed of a lung condition in 2002. (The medical report dated 16 August 2002 certifying the diagnosis is produced.) The bereavement of her sister badly affected Miss Evans, as she was very close to her late sister, who was some 15 years her senior and had been a central figure in her life. The overtime work, together with the bereavement, brought Miss Evans to a very low point. During the Christmas holiday period of December 2012, Miss Evans's newly widowed brother-in-law was staying with her. It was under those circumstances that Miss Evans asked for a cigarette from her brother-in-law one night when he was smoking, and that was the first cigarette she had after a break of some eight years.

The trip to Tenerife in March 2013

25 12. In evidence, Miss Evans stated that she can take holidays only at certain times. (By that, the Tribunal understands as meaning that the timing of when she can take holiday is not entirely up to her.) She related seeing a late deal for a two-week package holiday in Tenerife for March 2013 and put in a holiday request. The flight was direct from Manchester and Miss Evans went with her partner.

30 13. Miss Evans was by then smoking about two packs a day; i.e. 40 cigarettes a day, though not every cigarette was smoked to its end. She smoked only the brand called JPS Black, which costs about £8 a pack, and is not a popular brand that is sold in an average outlet. For the trip to Tenerife, she took 400 cigarettes with her.

35 14. Miss Evans's partner became sick half way through their holiday in Tenerife. His sickness with diarrhoea meant that they were not going out for much of their holiday, and there was excess cash left from their spending money as a result. Miss Evans said because of the good rate of exchange at the beginning of the holiday, they had changed £750 for €900 as spending money and for 'doing trips'.

40 15. On the last day of her holiday, Miss Evans met a holiday-maker who was first time in Tenerife and smoking a JPS Black by the pool side. They got into conversation and the fellow holiday-maker confirmed that she too had brought the

JPS Black with her as she could not find them being sold in most shops either. The fellow holiday-maker then produced a packet of Red West and told Miss Evans that she had found them to be of the same quality as JPS Black, and showed her the 0.9mg nicotine content printed on the packet of Red West, which is the same calibration as
5 JPS Black. Miss Evans was offered a Red West to try, and she could not tell the difference in the quality between the two brands. The fellow holiday-maker told Miss Evans that she bought the Red West from a shop close to the hotel they were staying.

16. As it was the end of the holiday, Miss Evans decided to use the excess euro left to purchase some Red West cigarettes. Miss Evans recalled that the shop sells nothing
10 but cigarettes. Miss Evans tried to ascertain from the shopkeeper her allowance of cigarettes for entry into the UK. In Miss Evans's words, the shopkeeper told her – 'I could take back to the UK as many as I wanted if for personal use because Tenerife was in the EU and that is why they use euros.'

17. Miss Evans remembered 'feeling stupid' for having asked the question. She
15 reasoned: 'it did make sense – why would they use euros if they were not in the EU?' She had used the peseta in Tenerife on one occasion, and thought the change of currency to the euro must be a confirmation that Tenerife is in the European Union.

18. In deciding the quantity of cigarettes to buy, Miss Evans worked out that it cost
20 the equivalent of £25 for 200 Red West, compared to £50 for 200 JPS Black in the UK. She decided to use up most of her euro and bought 21 boxes of Red West (i.e. 4,200), and one box of 200 Superkings (menthol), which was intended as a present. The quantity of cigarettes purchased was able to fit into the suitcases, as both Miss Evans and her partner had only light clothing to pack.

19. In cross-examination, Miss Evans confirmed from the occasion when she used
25 the peseta as the currency in Tenerife, she was aware of the limit for cigarettes was 200 to 400, but she thought everything must have changed since joining the EU; that she did not keep up with details about allowances because she had not been a smoker for a long time; that she did not check the allowances before leaving the UK as she had not intended to purchase cigarettes abroad; that it was a last-minute decision on
30 the last day of her holiday; that she did not have internet access to check allowances before her purchase and she had relied on the information given by the shopkeeper.

The return trip from Tenerife on 20 March 2013

20. On the day of return to the UK, Miss Evans started the journey by coach from
35 the hotel to the airport to board a direct flight to Manchester from Tenerife. Miss Evans suffers from travel sickness, and she had taken medication for the day's travel.

21. The Tribunal asked if the medication was prescribed. Miss Evans confirmed
40 that she bought the medication over the counter. The medication is an antihistamine to prevent nausea and dizziness caused by motion sickness, with side effects including drowsiness and blurred vision. Miss Evans described the medication as 'blocking some senses' in her to reduce the motion feeling; it also made her 'sleepy' and 'slow down [her] thinking process'.

Customs clearance at Manchester airport

22. Officer Carter gave evidence on the layout of the airport for passengers on approach to Customs.

23. From disembarkation to customs clearance, there are a number of notices on display advising which countries are within the European Union (EU) and which are outside the EU. Double-sized notices stating the duty free allowances for excise dutiable goods acquired within the EU (Notice 1) and outside the EU (Notice 2) are also displayed in the baggage reclaim area and just before the Customs Control entrances at the airport.

24. For reference as to what those notices would have stated, the leaflet by UK Border Force on going through Customs and with the front-page headings as: ‘*Travelling to the UK: What you **can** bring in; What you **can’t** bring in; What you **must** declare*’ (emphasis original) was produced.

25. Notices on duty free allowances for travelling within the EU would have stated the following:

‘You can bring an unlimited amount of most goods into the UK, for example, you can bring in any alcohol, tobacco, meat and diary products – as long as they are for your own use and transported by you. “Own use” means for your own consumption or gifts. ...’

26. The notices would also have listed the ‘EU countries’ as follows:

‘EU countries:

Austria, Belgium, Bulgaria, Croatia, Cyprus*, ...
... Spain (but not the Canary Islands), Sweden,
the UK (but not the Channel Islands).

Although Gibraltar is part of the EU, it is outside the Community Customs territory. The customs allowances for outside the EU therefore apply.

*Though the whole of Cyprus is part of the EU, goods from any area of Cyprus not under effective control of the Government of the Republic of Cyprus are treated as non-EU imports.’

27. In 2013, there were three channels for customs clearance at Terminal One in the sequence of – RED, GREEN and BLUE – on approach by the passengers. The signage would have indicated as follows:

‘Blue Channel – Use the blue channel if you are travelling from a country **within the European Union (EU)** with no banned or restricted goods.

Green Channel – Use the green channel if you are travelling from a country **outside the European Union (EU)** with good that: do not go over your allowances are not banned or restricted

Red Channel or Red Point Phone – You must use the red channel or the red point phone if you: have goods or cash to declare; have commercial goods, “Notice 6 - Merchandise in baggage” available from the advice service for more information; are not sure about what you need to declare.’

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28. According to Officer Carter, there was a barrier of metal poles to waist height for controlling entry to customs clearance. By the time the passengers entered customs clearance, there would no longer be any ‘bill boards with information on’. Red channel would say ‘Customs Declaration’ and there would always be a counter-officer on duty; Green channel would say ‘Nothing to Declare’; and Blue channel would say ‘EU’.

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29. From disembarkation to customs clearance at Manchester airport, Miss Evans related the following sequence of events that caused her to be so preoccupied that she did not ‘see the signs’ regarding customs clearance:

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(1) Her taxi was booked for pick up from Terminal 3;

(2) There was a strike which caused a change of terminal for the arrival of her flight to Terminal 1 at the last minute;

(3) She had difficulty getting mobile phone signal to contact the taxi company to notify the change of terminal for pick up;

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(4) Her partner was in need of the toilet due to his stomach sickness;

(5) She had difficulty releasing the luggage trolley after inserting the requisite coin; an attendant was unable to help and gave her a number to phone up instead; the number was of little assistance, and she had to find more change for a different trolley.

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30. Miss Evans and her partner entered the Green ‘Nothing to Declare’ channel for customs clearance, and were intercepted by Officer Carter when they were ‘well into the Green channel’. While they were escorted to the baggage search area, Officer Carter asked Miss Evans a standard set of questions regarding duty free allowances and whether she understood the prohibitions and restrictions.

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31. Miss Evans said that when asked whether she had cigarettes with her, she immediately said yes, but she thought she was within the allowance because Tenerife was in the EU. That was why she chose ‘Nothing to Declare’ channel. Though half of the cigarettes were packed into her partner’s suitcase, Miss Evans admitted that all the cigarettes were hers. Accordingly, there was only one personal allowance given.

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32. A search of the luggage revealed the following items:

(a) 4,200 Red West (KSF)

(b) 200 Superkings (KSF)

The overall quantity of 4,400 cigarettes was 22 times the personal allowance of 200 cigarettes for a traveller entering the UK from a third country (i.e. outside the EU).

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The goods were seized, and Public Notices 1 and 12A were issued. The Seizure

Information Notice ENF 156 and Warning Letter BOR162 were also issued; both were signed by Miss Evans.

33. Officer Carter's notebook pages relating to the seizure are produced. The pages record factual information such as the flight and passport numbers, Miss Evans's address and the quantity of goods seized, and the time being 17.01 as the last entry. There is no record of the exchanges that would have taken place between Officer Carter and Miss Evans, other than the fact that Miss Evans (as passenger 1 in the record) 'stated goods were for her use'.

The civil evasion penalty assessment

34. On 29 January 2014, Officer Kowalczyk wrote to Miss Evans informing her that she was investigating whether civil evasion penalties were to be imposed following the seizure of the cigarettes 'if there is sufficient evidence of dishonest conduct'. Public Notice 300 on Customs Duty and Import VAT, and Public Notice 160 on Excise Duty were enclosed with the letter. Miss Evans was invited to make disclosure; it was explained that any reduction in the penalty was contingent on the response and co-operation with HMRC's investigation.

35. By letter dated 6 February 2014, Miss Evans replied, stating that:

(a) 'I was told when purchasing the cigarettes in Tenerife (Spain) that I was within my allowances as it was Spain and paying in euros ...'

(b) '... having looked into it since, Tenerife does not fall into the category although I can not [sic] find any explanation to why which adds to the confusion.'

(c) 'On traveling [sic] to Mexico recently we experienced the same confusion at Manchester Airport they were selling 3x200 pks of cigarettes and we were told these by the salesman who encouraged us to buy them that it was fine to buy & take them into Mexico but on board the plane were told we could only take in 200 each & that the law had just been changed to [sic] late to tell us then already purchased them told the airport when we landed but still had to pay a fine so now we will not be using or buying anything whiles [sic] on holiday.'

36. On 6 March 2014, Officer Kowalczyk issued a notice of assessment for civil evasion penalty of £883, after a 10% reduction for disclosure of information, and a further 10% reduction, for co-operation. It states Miss Evan's offence in relation to the penalty as follows: 'On 20 March 2013 you entered the green channel at Manchester Airport, falsely indicating that you had nothing to declare. You were found to be carrying in excess of your allowances of tobacco goods. We consider your actions were dishonest.'

37. On 11 March 2014, Miss Evans wrote to appeal against the assessment, stating that '[i]t was an honest mistake which I am deeply sorry for this was the first time I have brought any cigarettes back as it was the first time I had any currency left over

from my holidays so I had not enquired into regulations beforehand and unwisely trusted in the information of the seller in Tenerife telling me it was OK to do so.’

38. On 21 May 2014, HMRC’s review conclusion upheld the penalty assessment and advised Miss Evans of her right to appeal to the Tribunal within 30 days.

5 39. On 30 May 2014, Miss Evans wrote to provide some more background information (already detailed above under background) for consideration by HMRC. The case was transferred to Officer Hatcher after the review officer’s decision of 21 May 2014.

10 40. Officer Hatcher’s reply dated 25 June 2014 refers to the fact that Miss Evans ‘had previously travelled to Tenerife on four occasions prior to [the March 2013] trip’. HMRC therefore consider that ‘it is not credible that [she] would not be aware of [her] personal allowances for bringing goods into the UK’.

15 41. In her reply of 1 July 2014 to Officer Hatcher, Miss Evans requested a more detailed explanation from Officer Hatcher how she reached her decision by assuming that Miss Evans should have known her allowances because she had travelled to Tenerife before. She continued by stating that she had travelled to many places other than Tenerife: ‘America Egypt [the] Caribbean Amsterdam Germany ect [sic] ... so if I had knowingly broke [sic] my allowances on this occasion why would I not have done it in the past?’ Miss Evans also asked why it had taken ‘1 year after the event’
20 for HRMC to get in touch about the matter.

25 42. By letter dated 18 July 2014, Officer Hatcher confirmed that she had considered all the information provided but there was nothing to merit further mitigation. As regards the time taken for HMRC to contact Miss Evans after the seizure of goods by Border Force, Officer Hatcher related that ‘the law allows HMRC two years to process a civil evasion penalty after a seizure of tobacco goods has taken place’.

30 43. After Office Hatcher’s (first) letter of 18 July 2014, Miss Evans tried several times to contact Officer Hatcher by phone but got no response; the last attempt being on 24 July 2014. She wrote again on 28 July 2014, saying ‘yes on [sic] hindsight I agree with you I should have sort [sic] more reliable source of information but this is due to my human error of last minute buying’, and continued by relating the specific circumstances leading up to clearance at Customs at Manchester airport, which are covered earlier in our findings of fact.

35 44. By another letter, (also dated 18 July 2014), Officer Hatcher reiterated the fact that she had considered all information provided and that the review conclusion decision should be upheld. (It would seem that Officer Hatcher had forgotten to change the date on this letter but in the copy of the letter produced, ‘actual date 14 August 2014’ is inserted in square brackets after the date of 18 July 2014.)

HMRC's case

45. In the Statement of Case lodged on 27 January 2015, HMRC refer to Miss Evans's letter of 6 February 2014, and in particular, to her trip to Mexico as follows:

5 ‘The Appellant also states that whilst travelling to Mexico *prior to the seizure*, she had cigarettes seized and “had to pay a fine”. She states she was not smuggling cigarettes and won't be purchasing further goods on future holidays.’ (emphasis added)

46. HMRC submit that Miss Evans ‘acted dishonestly and deliberately took the action to positively evade duty and tax’ on taking into account the following:

10 ‘(a) The Appellant was entering the Green Channel, indicating that she had nothing to declare despite significant signage present.

15 (b) The Appellant appears to be a frequent traveller, as between April 2009 and October 2012 she has travelled extensively to many countries outside the European Union, including four (4) trips to Tenerife prior to the date of seizure emphasising the perception that the Appellant would have known the level of allowances and that there was a dishonest attempt to evade UK duties.

20 (c) Upon a search of her baggage the previously named items were found and the Appellant's overall quantity of goods was 22 times the allowed limit.’

47. In relation to the test for dishonesty, the Statement of Case first cites the two-step test in *R v Ghosh* [1982] 1 QB 1053, then refers to other authorities as follows:

25 ““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 and Customs* (February 2008 – unreported) is found in case of *Barlow Clowes International Limited (in liquidation) and others v Eurtrust International Limited and others* [2005] UKPC 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn BDH v Tan* [1995] 2 AC 378 was the correct test ...’

48. The Statement of Case concludes by stating that the appellant's ‘actions demonstrate that she acted dishonestly and deliberately took the action to positively evade duty and tax’ by entering the Green channel ‘with the concealed cigarettes’.

35 49. Mr Scott elaborated along the same vein as the Statement of Case in his submissions. Mr Scott used the idiom ‘once bitten, twice shy’ to suggest that the experience of being fined on entry to Mexico should have cautioned Miss Evans. He drew the inference from the Mexican trip that the Tenerife trip in March 2013 was not Miss Evans's first attempt to evade duties.

40 50. Mr Scott further submitted that no ‘sensible person with a responsible job’ would have relied on what a shopkeeper told her and run the risk of losing that [job] for the sake of £500; that Miss Evans's explanation was not credible; that she had avoided answering the questions if she was being dishonest; that ‘she must know

there were restrictions'; that she knew the duty and VAT are needed to pay for public services; but 'this lady was prepared to run any risk and save the duties'.

The Appellant's case

51. By Notice of Appeal received on 4 September 2014, Miss Evans appealed against the penalty, attaching all her letters in the post-review stage to 'explain how [she] misunderstood [her] allowances', which would seem to be her principal ground of appeal.

52. In respect of her correspondence with HRMC, she has also stated:

10 'I do not feel that any of the information I sent has been considered at all one letter is dated 18th July 2014 referring to a letter I sent 28th July which would be impossible ...'

53. On 13 April 2015 Miss Evans wrote to the Tribunal concerning HMRC's Statement of Case and its representation of the facts relating to her trip to Mexico. She had phoned the officer responsible for the Statement of Case to clarify that the trip to Mexico was *after* the event of 20 March 2013, not 'prior to the seizure' as stated. The officer confirmed that he would not change it, and in the words of Miss Evans: '[the officer] gave me the impression that he could not be bothered to change it, that it was unimportant and that was the end of the matter where he was concerned'.

54. To Miss Evans, however, she considers the facts on the Mexican trip provided in the Statement of Case as 'false information' and 'very detrimental' to her case 'by making out that [she] had already been in this situation before'.

55. She stated that the Mexican trip occurred after the event and that the shop assistant at the airport duty free outlet checked her passport, but never mentioned the new regulations on tobacco allowances into Mexico; that she was sold cigarettes packaged as three boxes of 200 when Miss Evans and her partner were each allowed only one box of 200. Miss Evans narrated:

30 '... we were told on the plane just before landing and we told the officials straight away who directed us to a kiosk to pay money so we could take them into Mexico, I volunteered this information because it was another example of how this situation of my mistake can happen.'

The relevant law

Excise duty penalty

56. Section 8 of the Finance Act 1994 ('FA 1994') provides as follows:

'8 Penalty for evasion of excise duty

35 (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.

- 5 57. Under s 8(4) of FA 1994, HMRC and on appeal, the Tribunal ‘may reduce any penalty to such amount (including nil) as they think proper’.

Customs duty and import VAT penalties

- 10 58. The provisions for the imposition of penalties for the evasion of customs duty and import VAT under s 25 of FA 2003 are, in all material respects, identical to those set out above for the evasion of excise duty under s 8 of FA 1994.

59. On appeal, the Tribunal has full jurisdiction to consider whether the penalty has been properly imposed, and to reduce the penalty where appropriate, but not on the grounds of inability to pay.

Burden and standard of proof

- 15 60. The burden of proof in establishing ‘conduct involving dishonesty’ lies with HMRC as provided under s 16 (6) of FA 1994 (for excise duty) and s 33(7)(a) of FA 2003 (for customs duty and import VAT).

61. The standard of proof is the civil standard of the balance of probabilities. See *Krubally N’Diaye v HMRC* [2015] UKFTT 0380 at [53]-[83].

Case law on the test of dishonesty

- 20 62. HMRC’s Statement of Case starts with the test of dishonesty in *R v Ghosh* [1982] 2 QB 1053 (*‘Ghosh’*) at p 1064. The two-step *Ghosh* test is appropriate for establishing the two elements in criminal liability, with the first step being an objective test for the guilty act – that ‘according to the ordinary standards of
25 reasonable and honest people what was done was dishonest’; and the second step is a subjective test for the guilty mind – ‘whether the defendant himself must have realised that what he was doing was by those standards dishonest’.

- 30 63. While penalty proceedings of the nature at issue in this appeal are ‘criminal’ for the purposes of article 6.2 of the European Convention on Human Rights (‘ECHR’), it is established that such penalty proceedings are civil proceedings under domestic law, see *Khawaja v HMRC* [2008] EWHC 1687 (Ch), and *Khawaja v HMRC* [2012] UKFTT 0183 (TC).

- 35 64. Under article 6.2: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. The relevance of an appellant’s Convention rights under article 6.2 in a penalty case therefore concerns the burden of proof, but not the standard of proof. Miss Evans is therefore assumed ‘innocent’ until HMRC have proved that her conduct involved dishonesty, and the standard of proof is on a balance of probabilities as applicable to civil proceedings.

65. The test of dishonesty apposite to a penalty appeal under civil proceedings is primarily objective, not the two-step *Ghosh* test applicable to criminal proceedings. There had been ambiguity concerning whether the test of dishonesty in civil proceedings should include a subjective element, and this was clarified by Lord Hoffmann at [10] in *Barlow Clowes International v Eurotrust International Limited* (*'Barlow Clowes'*):

10 ‘Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards.’

66. The test of dishonesty adopted in *Barlow Clowes* was first set out in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] All ER 97 (*'Tan'*) in relation to civil liability for accessory breach of trust. In the leading judgment, Lord Nicholls stated the test of dishonesty is by ‘an objective standard’:

20 ‘Whatever may be the position in some criminal or other contexts [quoting *Ghosh*], in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard.

...

The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual.’

25 67. Although the test of dishonesty in civil proceedings is by an objective standard, that test is to be applied in the light of the subjective circumstances of the individual, as described by Lord Nicholls in *Tan*:

30 ‘Honesty, indeed, does have 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. Further, honesty and its counterpart, dishonesty are mostly concerned with advertent conduct, not inadvertent conduct.’

35 68. In respect of how this ‘subjective element’ is to be taken into account by the court, Lord Nicholls’ guidance is:

40 ‘Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party¹ at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.’

¹ The reference to ‘the third party’ in this context is with regard to the defendant being an accessory in the breach of trust.

Discussion

69. Miss Evans has repeatedly stated that she had thought Tenerife was in the EU. The objective facts that Tenerife is territorially a part of Spain, and Spain is in the EU, have led her to think that Tenerife is in the EU for customs clearance purposes.

5 70. If one is to search for an answer on the internet to the question – ‘Is Tenerife in the EU?’ – the most viewed answer would seem to be: ‘Yes, as a part of Spain, Tenerife is very firmly within the EU, and its currency is the Euro. However, the island has VAT free status which means it falls outside the EU customs allowances.’
10 The answer to the same question in relation to travel insurance purposes states: ‘Tenerife and the Canary Islands are part of the EU, except for certain tax exemptions, such as VAT.’

71. If one is to refine the question to – ‘Is Tenerife in the EU customs union?’ – one is likely to be directed to the official website of the European Commission and to find the official statement of Tenerife’s status stated as follows:

15 ‘The Canary Islands are part of the European Customs Union, though they are excluded from VAT application.’

72. What does it mean for customs clearance purposes that Tenerife is ‘part of the European Customs Union’, though ‘excluded from VAT application’? None of these available answers would assist an average member of the public unversed in EU
20 customs law to ascertain what it could mean in terms of his or her personal allowances for bringing excise dutiable goods into the UK from Tenerife.

73. The official answer as regards an individual traveller’s allowances can be found in the website of the European Commission by following a number of links to the heading ‘Entering the EU’². The title heading for the relevant page is ‘Customs and
25 tax allowances for travellers’ and introduces the tabulated allowances with the following statement:

30 ‘If you enter the EU from a non-EU country, goods having **no commercial character** in your personal luggage can be imported free of customs duties, VAT and excise duties within the following limits.’
(emphasis original)

74. The table of allowances is followed by some footnotes, and then a statement introducing a list of ‘territories’, with the statement reading:

35 ‘The limits laid down in the table above also apply if you come from

- Canary Islands
- Channel Islands ...
- Gibraltar...
- other territories where VAT and EU excise provisions do not apply.’

² The relevant information is under the ‘ec.europa.eu’ website and the links to trace to get to the page are: European Commission > Taxation and Customs Union > Individuals > Travelling > Entering the EU.

75. Notwithstanding all the objective facts that point towards Tenerife as part of the EU, (being part of Spain, being in the European Customs Union), for customs clearance purposes, Tenerife is to be treated as ‘outside the EU’ like a third country. The relevant information from the best authority (i.e. the European Commission) for the Canary Islands comes under ‘Entering the EU’. To find the correct information, to some extent, it seems to presuppose that one already knows the ‘peculiar’ status of Tenerife for customs clearance purposes, by looking under the allowances applicable to a traveller from a third country whereby one is ‘*entering* the EU’ (i.e. from outside the EU), and not as a traveller moving ‘within the EU’.

76. The test of dishonesty in the present case is set by an objective standard: was the appellant’s behaviour dishonest according to normally accepted standards of behaviour? Viewed objectively, those facts peculiar to Tenerife’s status as part of the EU for most purposes have given rise to Miss Evans’s mistaken belief that Tenerife is therefore within the EU for customs clearance purposes.

77. The facts given by the shopkeeper in Tenerife and relied on by Miss Evans are not entirely false, but he crucially failed to inform Miss Evans that Tenerife is an exception to the ‘norm’, to be treated as outside the EU for customs clearance purposes. We conclude that Miss Evans had bought the cigarettes for personal use and that she had a genuine, though mistaken, belief that they were not subject to any duty or tax on import.

78. Furthermore, in concluding that Miss Evans was not dishonest in clearing customs through the Green channel, we have taken into account her ‘personal attributes, experience and intelligence, and the reason for her action, including what [she] actually knew at the time, as distinct from what a reasonable person would have known or appreciated’. In so doing, the Tribunal has regard to the following facts:

(1) Though Miss Evans is a frequent traveller, she had been travelling as a non-smoker for some eight years prior to this trip to Tenerife. The trip to Tenerife in March 2013 was her *first* trip abroad after resuming smoking in December 2012. A gap of eight years is a significant break. Her circumstances mean that her knowledge as regards customs clearance was not comparable to a frequent traveller who has been a continuous smoker.

(2) The trip was booked as a ‘last minute deal’; Miss Evans was travelling with her choice brand of cigarettes to last her through the holiday; she did not expect to come across JPS Black to warrant making any purchase that would necessitate customs clearance; she had not concerned herself therefore with checking her allowances before leaving for Tenerife.

(3) The purchase of 22 boxes of Red West was her ‘last minute buying’, prompted by the excess euro left at the end of the holiday, and the attractive low price of the cigarettes on sale compared to domestic prices.

(4) Her reliance on the information from the shopkeeper, though misplaced, was not unreasonable given that she had no internet access to check the allowances; that the shop would appear to be located in the vicinity of a hotel servicing tourists; Tenerife is a popular destination for

UK tourists, and it is not unreasonable to expect the shopkeeper would know the allowances applicable to a tourist returning to the UK.

5 (5) That Tenerife is and has been part of Spain as far as Miss Evans knew; it was not unreasonable to reason that since Tenerife no longer used the peseta and has adopted the euro as Spain did, Tenerife must be in the EU as is Spain.

10 (6) If those four previous occasions when Miss Evans had travelled to Tenerife were within the eight years when she was a non-smoker, those trips were unlikely to raise her awareness of the excise goods restrictions peculiar to Tenerife as a 'third country' for excise duty, customs duty and import VAT purposes.

15 (7) The notices in and around Manchester airport may not immediately alert Miss Evans to Tenerife not being in the EU for customs purposes. By including Spain under the EU countries, with the parenthesis (but not the Canary Islands), it is not immediately obvious that Tenerife is therefore outside the EU for customs clearance purposes.

20 (8) Even if those airport notices would have made immediate sense to Miss Evans, her alertness was to some extent impaired by the travel sickness medication she had taken. From disembarkation to customs clearance, her mind was also preoccupied by the series of incidents that had a cumulative and adverse effect on her concentration.

25 79. We note that if Miss Evans was consistent with her belief that Tenerife was in the EU, she should have chosen the Blue channel for customs clearance. It is probable that on those four former occasions when Miss Evans returned from Tenerife, she had cleared customs by the Green channel, and she did so in March 2012 based on her previous experience. The question was not put to her to explain why she did not choose the EU channel for customs clearance. The fact that she did not choose the EU channel does not distract from our conclusion.

30 80. We believe that Miss Evans, in volunteering information in February 2014 about her Mexican trip, did so with the view of illustrating how she had been misinformed by a shopkeeper on another occasion. Her choice of word in referring to the payment being a 'fine' suggests to us her readiness to accept where she might have been at fault rather than the legal position of the sum of money paid on landing. It would seem from the Mexican episode, she declared the excess cigarettes carried on board the plane straight away on landing in Mexico, and paid the requisite duty and was allowed to take the goods into the country. That would seem to be the conduct of an honest person acting according to what she knew was the honest thing to do.

40 81. We also find as a fact that the Mexican trip took place *after* the Tenerife trip of March 2013, and not prior to the seizure event at Manchester airport as HMRC have stated. Miss Evans referred to her 'recent' trip to Mexico when she wrote her first letter to HMRC in February 2014; the time reference for 'recent' is therefore to February 2014, nearly a year after the Tenerife trip. It is wholly unwarranted the way HMRC and counsel have construed the date of the Mexican trip as pre-dating the

Tenerife trip despite Miss Evans's clarification, and have sought to draw inferences of dishonest conduct from their misconstruction.

82. We do not agree with HMRC either that Miss Evans 'concealed' her cigarettes; she had answered in the positive to the question whether she was carrying any cigarettes *before* the luggage was searched. We have considered Mr Scott's submissions, but following his arguments, we have reached contrary conclusions – that no 'sensible person with a responsible job' would have 'run the risk of losing her job for the sake of £500'; that Miss Evans's explanation was credible.

83. The fact in issue is whether Miss Evans was dishonest in her action. We do not need to decide the case on burden of proof since we are able to make findings of fact that Miss Evans' action was not dishonest. We have considered the totality of the evidence, factual and circumstantial, and concluded that there is an inherent integrity in Miss Evans's account of her action in clearing customs through the Green channel on her return from Tenerife in March 2013.

84. The penalty assessment is accordingly cancelled. It is not necessary for the Tribunal to consider whether the reduction to the penalty assessment is sufficient.

Postscript

85. Miss Evans has submitted a printout from HMRC's website on 'Tax and duty on goods brought to the UK from the European Union', which contains the statement: 'When arriving into the UK from an EU country you can bring in an unlimited amount of most goods.' This statement, however, is not without qualification. One qualification is to be found in the leaflet issued by UK Border Force on 'Travelling to the UK', where it is stated for goods brought into the UK within the EU – 'We are more likely to ask you questions if you have more than 800 cigarettes.'

86. Had Miss Evans been returning from Madrid (within the EU) instead of Tenerife (outside the EU) with the 4,400 cigarettes, and cleared customs via the Blue channel, she could still have been intercepted by Border Force with questions asked. The quantity of tobacco, having significantly exceeded the guideline of 800 (at 5.5 times the recommended guideline for import for 'personal' use), would most probably be seized as for 'commercial' use.

87. Such a seizure is open to challenge at the Magistrates' Court within a strict time limit, and on the ground that the goods seized, though far exceeding the recommended 'personal' use guideline, are not for commercial use. In the absence of a timely and successful challenge at the Magistrates' Court against the legality of the seizure, the goods seized would be *deemed* as imported for commercial use and duly condemned.

88. An assessment by HMRC would most likely follow, to charge the equivalent of the excise and customs duties on the goods seized, and a wrongdoing penalty would most probably be imposed in addition to the duty assessment. The procedures and consequences of a seizure of goods brought into the UK within the EU, and from outside the EU, are different, and the legal considerations on an appeal to the Tribunal are also different. For Miss Evans's benefit, it is worth noting that the 'unlimited

amount' for excise dutiable goods brought into the UK from within the EU, as she might have understood it, is not without qualification.

Decision

5 89. For the reasons stated above, the appeal is allowed. The penalty in the sum of £883 is discharged.

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

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**DR HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 14 OCTOBER 2016

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