[2016] UKFTT 0817 (TC)

TC05542

Appeal number: TC/2016/01456

EXCISE DUTY – CUSTOMS DUTY – IMPORT VAT – civil evasion penalties – 13,160 cigarettes brought through the green channel – whether the test for dishonesty has a subjective element – yes – whether the Appellant was dishonest – yes – whether the penalties should be further mitigated in the circumstances of this case – yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEMIN HAMMA **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR DAVID EARLE

Sitting in public at Fox Court, London on 10 November 2016

The Appellant appeared in person

Ms Amelia Walker, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant's appeal to this Tribunal is against the imposition of joint civil evasion penalties totalling £3,266. These penalties consist of an excise civil evasion penalty in the sum of £2,619, and a customs civil evasion penalty in the sum of £647. The excise civil evasion penalty was calculated as 90% of the excise duty said to have been evaded by the Appellant; the customs civil evasion penalty was calculated as 90% of the customs duty and import VAT said to have been evaded by the Appellant. The Respondents raised these joint civil evasion penalties on 21 August 2015 by a revised assessment under Section 8(1) Finance Act 1994 and Section 25(1) Finance Act 2003.

Preliminary point - late appeal

2. The Appellant's appeal to this Tribunal was received on 8 March 2016, approximately six and a half months after the revised penalty assessment was raised. The deadline for making an in time appeal to this Tribunal against the imposition of civil evasion penalties is 30 days from the date of the imposition. Therefore, as a preliminary point, we must consider whether to admit this appeal out of time.

3. The application for permission to appeal out of time was made in the Appellant's Notice of Appeal. The Appellant's reason for his delay was that he had not made the appeal earlier as "they told me" it was too late. The appeal was accompanied by two letters from the Respondents' debt collection department, part of a 2014 letter from the Respondents referring to the original assessment and a 2015 letter from the Respondents seeking further information. It is not clear who had advised the Appellant that it was too late to appeal. Although the Appellant's right to an appeal is not set out in the pages which accompany the Notice of Appeal, it is clear that it was set out in other relevant correspondence sent to the Appellant, in particular in the covering letter which accompanied the joint penalties now in dispute.

4. The Tribunal notified the Appellant's Notice of Appeal to the Respondents in accordance with the usual procedure. The notification made reference to the application for permission to make a late appeal and continued:

> "If you object to this application you must tell the Tribunal you object with reasons as soon as practicable and in any event no later than when serving your Statement of Case. Any objection should be made by formal notice. If you do not object the Tribunal will consider that you have consented."

5. No notice of objection was received from the Respondents and no reference to the Appellant's delay was made in the Respondents' Statement of Case.

6. The principles which are relevant to an application for permission to appeal out of time are those set out in *Data Select v HMRC* [2012] UKUT 187 (TCC). In essence we must consider the reasons for the delay, the extent of the delay and the

prejudice which would be caused to each side if we decide either to grant, or not to grant, the application.

7. In this case we consider that the period of delay is quite long, and the explanation for that delay is relatively weak. The letter which accompanied the joint penalties appealed against made it clear that the Appellant had 30 days to seek a review or to appeal. The Appellant did not take either of these steps until more than six months had passed. We bear in mind that lack of compliance with Tribunal deadlines should be treated no less leniently than lack of compliance with Court deadlines. Balanced against this we bear in mind that the Appellant is acting in person, that appeal terminology can be confusing and that (although the Appellant has lived in the UK for a number of years) English is not his first language. There would clearly be prejudice to the Appellant if we refused him permission to make a late appeal, as the penalties would become final. By not objecting the Respondents have indicated that they would suffer no, or only insignificant, prejudice if we grant permission.

8. Taking all these factors together, but in particular relying on the lack of objection by the Respondents, we consider that it is appropriate to grant the Appellant permission to make a late appeal, and we grant such permission.

9. Therefore we turn now to the substantive appeal.

Background to this appeal

10. We comment below in much greater detail on the evidence we heard and the facts we found. In brief, it is common ground that on 18 September 2013 the Appellant arrived at Heathrow airport, having returned to the UK from Iraq. The Appellant was travelling with his wife and young children. In his luggage the Appellant was carrying a large number of cigarettes.

11. After collecting his luggage from the terminal baggage conveyor belt, the Appellant and his family entered the Green Channel. While he was in the Green channel, the Appellant was stopped by Border Force officers and his luggage was searched. The cigarettes were found and seized from the Appellant.

12. Border Force referred the matter to the Respondents who, in August 2014, raised a joint civil evasion penalty upon the Appellant. In August 2015 a revised joint penalty was raised in the reduced total sum of £3,266. As set out above, in March 2016 the Appellant appealed to this Tribunal against the imposition of this joint civil evasion penalty.

Decision

<u>Our jurisdiction, and the burden and standard of proof</u>

13. In an appeal against civil evasion penalties the Respondents bear the burden of satisfying the Tribunal that each element of the legislation they rely upon has been demonstrated. The standard of proof is the civil standard of the balance of

probabilities. If we are not satisfied that the Respondents have demonstrated each element then we must allow the appeal.

14. If we are satisfied that each element of the legislation imposing the customs and excise civil evasion penalties has been demonstrated by the Respondents, we should go on consider whether it would be right, in the circumstances, to mitigate the penalties imposed.

15. We start by considering the legislation to identify the elements which the Respondents must demonstrate, before setting out the evidence we heard from the parties in this appeal.

Relevant legislation

16. The penalties imposed by the Respondents upon the Appellant are an excise civil evasion penalty in the sum of £2,619 and a customs civil evasion penalty in the sum of £647.

17. We consider first the excise civil evasion penalty, imposed under Section 8(1) Finance Act 1994. Section 8(1) of the Finance Act 1994 provides as follows:

> *8 Penalty for evasion of excise duty*
>
> (1) Subject to the following provisions of this section, in any case where—
>
> (a) any person engages in any conduct for the purpose of evading any duty of excise, and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded.

18. Although Section 8 was repealed by the Finance Act 2008 with effect from 1 April 2009, Article 6 of the Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 (SI 2009/571) made it clear that such repeal was limited in scope. The relevant parts of Article 6 provide that Section 8 is repealed only insofar as it relates to conduct involving dishonesty which relates to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC. Section 8(1) is preserved for penalties where the dishonest conduct relates to other matters. Therefore Section 8(1) was in force at the relevant time for the events with which we are concerned here, and it is the relevant legislation for the imposition of an excise civil evasion penalty where excise duty is alleged to have been evaded.

19. Section 25(1) Finance Act 2003 provides as follows:

> *25 Penalty for evasion*
>
> (1) In any case where—

> (a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and
>
> (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
>
> that person is liable to a penalty of an amount equal to the amount of tax or duty evaded or, as the case may be, sought to be evaded.

20. Section 24(2) Finance Act 2003 makes it clear that the "relevant tax or duty" mentioned in Section 25 means: customs duty, Community export duty, Community import duty, import VAT and customs duty of a preferential tariff country. In this case the Appellant is alleged to have evaded both customs duty and import VAT, and so the Respondents have calculated the customs civil evasion penalty by reference to both customs duty and import VAT.

21. It is clear from Section 8 and Section 25 that for the Respondents to successfully defend this appeal, and maintain the penalties imposed, they must demonstrate that the Appellant engaged in conduct for the purpose of evading tax or duty, and that the Appellant's conduct involved dishonesty. Before moving on to look at the facts in this case, it will be helpful to set out our conclusions as to what we consider is the appropriate test for dishonesty in relation to civil evasion penalties.

The test for dishonesty in relation to civil evasion penalties

22. The Appellant did not address us on the relevant test for dishonesty and whether this must include a subjective as well as an objective element.

23. The Respondents' submission was that the test for dishonesty was objective, and that we should find the Appellant's conduct involved dishonesty if ordinary people would consider that conduct was dishonest. The Respondents directed us to Paragraphs 37 to 40 of the unreported decision of His Honour Judge Pelling QC in *Sahib Restaurant Limited v HMRC*, handed down on 9 April 2008, to support their submission that the relevant test for dishonesty did not require the Appellant to have thought about whether what he was doing was dishonest, provided his conduct was such that ordinary people would consider that conduct to involve dishonesty. At Paragraph 40 of *Sahib* it was said:

> In my view in the context of the civil penalty regime at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is knowledge of the transaction sufficient to render his participation dishonest according to normally acceptable standards of honest conduct. In essence the test is objective – it does not require that the person who is alleged to have been dishonest to have known what normally accepted standards of honest conduct were.

24. The Respondents also took us to passages in the Privy Council decision of *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 All ER 333, in particular Paragraphs 15 and 16 where Lord Hoffman, giving the

judgement of the Board and commenting on an earlier decision of the House of Lords, stated:

> The reference to "what he knows would offend normally accepted standards of honest conduct" meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.
>
> Similarly in the speech of Lord Hoffmann, the statement (at [20]) that a dishonest state of mind meant "consciousness that one is transgressing ordinary standards of honest behaviour" was in their Lordships' view intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not require him to have thought about what those standards were.

25. The Respondents submitted that *Barlow Clowes* and *Sahib* made it clear that the correct test is objective, and that we should apply this objective test rather than the two stage test laid down by the Court of Appeal in *R v Ghosh* [1982] 1 QB 1053 for dishonesty in the criminal law. The *Ghosh* test has both an objective and a subjective element – not only must the conduct be dishonest by the ordinary standards of reasonable and honest people, but the Appellant must have realised that what he was doing was, by those standards, dishonest.

Our conclusion as to what is the appropriate test to apply for dishonesty

26. In reaching our conclusion on the appropriate test for dishonesty we have been assisted by the careful summary of the authorities and the analysis set out by the Tribunal in *N'Diaye v HMRC* [2015] UKFTT 0380 (TC). We agree with the Tribunal's conclusions in *N'Diaye*, and, in particular, that there must be a subjective element. We accept that the test to be applied for dishonesty in civil evasion penalties is different from the test to be applied for dishonesty in criminal offences, but we consider that the Appellant's own understanding cannot be completely irrelevant to an understanding of whether his behaviour was dishonest.

27. We consider that the appropriate test for civil evasion penalties has two stages: first we should consider whether the Appellant's actions would be considered dishonest by the ordinary standards of reasonable and honest people. Then – the subjective element – we should consider the Appellant's own knowledge at the time; we do not need to consider whether the Appellant was aware that his actions fell below what would be considered to be acceptable standards but we do need to consider whether he knew all the facts which made it wrong for him to act as he did.

28. It seems to us that this test accords with the passage in *Barlow Clowes* set out above, and also accords with the guidance set out by the Court of Appeal in *Abou-Ramah v Abacha* [2006] EWCA Civ 1462 at paragraph 66:

> … the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also

subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has:

> "a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated" (p 289 and see generally pp 389 to 391).

29. Having set out the test we should apply when considering whether the Appellant's conduct involved dishonesty, we turn to consider the evidence we heard and then set out the facts found.

Evidence heard

30. We heard oral evidence from the Appellant. Although we found the Appellant's account to be coherent and credible in parts, we bear in mind that the Appellant took no notes of events at the time and that he is reliant upon his memory of events which occurred more than three years ago and at a time when, by his own account, he was in greatly upset. We also bear in mind that some of what the Appellant told us was said for the first time at the hearing and had not been mentioned previously.

31. On behalf of the Respondents we heard oral evidence from Border Force officer, Harendra Depala and the Respondents' officer, Catherine Whittaker. We found both Mr Depala and Ms Whittaker to be honest and credible witnesses. We were particularly impressed by Mr Depala who was careful to make clear what he actually remembered and what he knew only from consulting his contemporaneous notes. For the avoidance of doubt we accept Mr Depala's evidence and Ms Whittaker's evidence in their entirety.

Facts found

32. On the basis of the oral evidence and the documents in the bundle we find the facts set out below. We note where those facts arise from undisputed evidence. Where there was a dispute as to the facts we set out each party's interpretation of events and explain the conclusion we have reached. We attempt to trace events in the order that they occurred although it has proved necessary at times to go back or forwards to earlier or later events.

<u>The Appellant's time in the UK prior to 2013</u>

33. It was common ground that the Appellant is now a British citizen and lives in the UK. However, the length of time that the Appellant has lived in the UK was in dispute. In his correspondence with the Respondents the Appellant had stated both that he had lived in the UK for 15 years (letter of 8 May 2015) and that he had lived in the UK since 2002 (letter of 15 July 2015). In his oral evidence the Appellant told us that he came to the UK in 2006 or 2007, he was not sure which, and also that he had been in the UK for 15 years (which would suggest an arrival date of approximately 2001). The Appellant also suggested 2004 or 2005 as his date of arrival in the UK and that he had been granted indefinite leave to remain in the UK in 2007 or 2008.

The Appellant also told us he had not previously had a passport and so all of his travel since his arrival in the UK would be recorded in his passport. We find that the Appellant has had British citizenship since at least February 2009, the date of issue of his passport. We consider that it is most likely that the original length of time stated by the Appellant as his length of residence is correct, and that the subsequent discrepancies arose through the Appellant's confusion as to what was being asked of him. On that basis we find that the Appellant came to the UK on a date in the period 2000 to 2002 and so at the time of the seizure had lived in the UK for approximately 11 to 13 years.

34. It was common ground that the Appellant had travelled through Heathrow airport on at least two and possibly three other occasions prior to September 2013. We consider what the Appellant told us about these previous occasions when we discuss the Appellant's understanding of the Green Channel, below.

Events in the months prior to the Appellant's 2013 trip to Iraq

35. The Appellant told us, and it was not disputed, that a few months before his trip to Iraq he had begun to smoke heavily due to his worries about the ill health of his mother, who lived in Iraq. The Appellant told us he was smoking about 40 smaller cigarettes, or 20-30 "big" cigarettes, a day at this point. In the context of the Appellant's evidence as a whole, we understand "big" cigarettes to be king size cigarettes. We find that the Appellant was smoking about 40 smaller cigarettes, or up to around 30 king size cigarettes, each day in the months in 2013 leading up to his trip to Iraq.

36. The date stamps in the copy of the Appellant's passport in the bundle are not sufficiently clear to determine the exact date in 2013 on which the Appellant and his family left to go to Iraq but the Appellant told us, in another context, that he had been away for about 40 days. The length of the trip was not disputed by the Respondents. We find that around early August 2013 the Appellant and his family left the UK to go to Iraq to see his mother.

37. The Appellant told us, and it was not disputed, that when he left for this trip he was unsure how long he would be away because of his mother's deteriorating health. We find this to be the case.

38. The Appellant told us that he had applied for a provisional driving licence before he went to Iraq. The Appellant also told us that he did not want his provisional driving licence to be sent to his home address during his absence from the UK in case it was lost. The Appellant told us that he had asked the DVLA to send his provisional licence to an address in Burton-on-Trent where a friend of his lived (the "Burton address"). The Respondents at one point appeared to suggest that they understood the Appellant to be saying that he had given the Burton address to the DVLA as his own address but we do not find this to be the case. We accept this part of the Appellant's evidence and find that before he left for Iraq, the Appellant asked the DVLA to send on his provisional driving licence to the Burton address.

39. The Appellant told us that he thought, though he was unsure, that the DVLA had written to him at the Burton address before he left for Iraq and so he had a letter from the DVLA addressed to him at the Burton address. There was some confusion as to whether the DVLA might mistakenly have issued the Appellant's provisional driving licence endorsed with the Burton address. We find that the Appellant was in possession of a document from the DVLA, either a letter or his provisional driving licence, which bore the Burton address. We find that the Appellant had this document in his possession when he left the UK to go to Iraq and that he took this document with him.

Events during the trip to Iraq

40. The Appellant told us, and it was not disputed, that while he was in Iraq his mother died. The Appellant also told us, and this also was not disputed, that this was an extremely upsetting time for him. We find these as facts.

The cigarettes

41. The Appellant told us that he brought a number of cigarettes with him on his return from Iraq. The Appellant also told us several further things about the cigarettes, which we will need to discuss point by point.

42. We look first at the number of cigarettes. The evidence of Border Force officer Mr Depala, on behalf of the Respondents, was that 13,160 cigarettes were seized from the Appellant. This figure is recorded in Mr Depala's notebook and is also recorded on the Seizure Information Notice, both of which were written on the date of the seizure. At the hearing before us the Appellant told us that he had brought as many cigarettes as he could because he was smoking so heavily and cigarettes were much cheaper in Iraq than in the UK. Before us the Appellant did not dispute the figure of 13,160. The Respondents made the point that it was only at the hearing that the Appellant had admitted for the first time that there were 13,160 cigarettes. We find as a fact that the Appellant was carrying 13,160 cigarettes with him when he entered the UK.

43. The next point for us to consider in relation to the cigarettes is that the Appellant told us that the cigarettes were bought in Iraq. The Respondents did not dispute this but made the point that this was the first time that the Appellant had stated where he bought the cigarettes. We find that the cigarettes were bought in Iraq.

44. The most contentious point in relation to the cigarettes was the Appellant's assertion that the cigarettes he was carrying were not available in the UK and (as a necessary consequence of this) that the cigarettes seized from him had been mis-described on the Seizure Information Notice completed by Mr Depala at the time of the seizure. At various times during the hearing the Appellant told us: (1) about 90% of the cigarettes he brought back were small cigarettes and he only brought back three boxes of 200 "big" "Marlboro" cigarettes; (2) the cigarettes he had brought into the UK were not available in the UK; (3) the cigarettes he brought back were slim cigarettes and very small, perhaps one quarter of the size of cigarettes in the UK; and

(4) the cigarettes he had brought were not the same as the Marlboro Light cigarettes which were available in the UK. The Appellant had also informed the Respondents (in his letter of 1 June 2015) that:

> "Any cigarettes that I have been bringing back with me they are in no use in this country or in another manner they are un known by the public in the UK."

45. Mr Depala's evidence was that he thought the cigarettes which had been seized were the normal size, rather than slim, but he himself was not a smoker. Mr Depala also told us that he would write down on the Seizure Information Notice what he saw written on the cigarette packets at the time that they were seized. On the Seizure Information Notice the cigarettes are described as "11,500 (No) Marlboro Lights ksf cigs" and "1660 (No) Milano – ksf cigs". We understand "ksf cigs" to refer to "king size filter cigarettes".

46. We find as a fact that the Seizure Information Notice was written up by Mr Depala at the time of the seizure when the cigarettes in question were in front of him. We consider that, while Mr Depala might make a minor error in the spelling of a brand name with which he was not familiar[1], it is inherently unlikely that Mr Depala would write down a completely different brand of cigarette when the cigarettes in question were directly in front of him at the time he completed the Seizure Information Notice. We consider that a combination of the passage of time (from seizure until the 2015 correspondence and then until the hearing before us) and the Appellant's distress makes it more likely that the Appellant does not clearly remember the brands of cigarette he bought or the precise quantities of each brand. We find as a fact that the cigarettes brought back by the Appellant and seized by Border Force were 11,500 Marlboro Light king size filter cigarettes and 1,660 Milano king size filter cigarettes.

47. Next we address the price paid by the Appellant for the cigarettes. The Appellant told us at the beginning of his evidence that cigarettes in Iraq were much cheaper than in the UK and cost £3 for a box of 200 cigarettes. Towards the end of his evidence he told us that the cigarettes he bought cost £400 because they were very small cigarettes. We note that price would equate to approximately £6 for 200 cigarettes. The Appellant repeated the price of £400 at a later stage in the proceedings and told us that it might still be possible for him to get documents to show the price he had paid. The Respondents pointed out that, again, this was raised for the first time at the hearing, and that there was no documentary evidence to substantiate what the Appellant was saying in relation to the price paid. We accept what the Appellant says about cigarettes in Iraq being cheaper than cigarettes in the UK. However, in considering the price paid by the Appellant, we also bear in mind that we have found that the cigarettes brought into the UK were predominantly Marlboro Light king size filter cigarettes with a smaller quantity of Milano king size filter cigarettes, and not predominantly the much smaller, slim cigarettes described by the Appellant as the

[1] Two brands of cigarettes were seized: the larger amount is consistently described as "Marlboro Lights", the smaller amount of cigarettes is described variously in Mr Depala's notebook and the Seizure Information Notice as "Milano" and "Milana".

ones he purchased. In the circumstances we do not consider that the Appellant's recollection as to the price he paid for cigarettes more than three years ago can be sufficiently reliable in the absence of any corroborating evidence, and we make no findings as to the price paid by the Appellant for the cigarettes which were seized.

48. Finally, the Appellant also told us that all the cigarettes he had brought with him were for his own consumption. This reference to the cigarettes being only for the Appellant to smoke himself also appears in the correspondence between the Appellant and the Respondents, being stated in the Appellant's letters of 1 June 2015 and 15 July 2015, and in the Appellant's Notice of Appeal. The Respondents challenged this, suggesting that the number of cigarettes brought into the UK by the Appellant would last for nearly two years even if he smoked 40 a day for the whole of that period. We consider that the Respondents are under an arithmetical misapprehension in this regard: if the Appellant was smoking 40 cigarettes a day, 13,160 cigarettes would last 329 days, or about ten and a half months. The Appellant's evidence on this point, which we have accepted, was that during this period he smoked up to around 30 king size cigarettes or about 40 smaller cigarettes each day. Therefore the 13,160 king size cigarettes brought by the Appellant would last 438 days in total, or a little over 14 months, if he smoked 30 each day.

49. When Ms Walker asked the Appellant whether cigarettes had an expiry date, he answered that they did but he was not sure how long cigarettes would last, possibly one year or two years. It was clear that estimate was no more than a guess on the part of the Appellant and that he did not actually know how long sealed packets of cigarettes would last before becoming stale. The Appellant's evidence was that he brought as many cigarettes as he could because he was smoking so heavily due to his distress about his mother. We have accepted the Appellant's evidence that he was very upset at this period, and that cigarettes in Iraq are cheaper than in the UK. On the balance of probabilities we find that, due to his distress over the very recent death of his mother and his heavy smoking, the Appellant bought as many cigarettes as he could afford while he was Iraq. We do not consider that the Appellant gave any thought to the question of whether the cigarettes would be too stale to smoke by the time he came to smoke them. In the exceptional circumstances of this case and despite the very large amount of cigarettes, we accept the Appellant's evidence that he did intend to smoke all the cigarettes himself.

The Appellant's arrival at Heathrow

50. We turn now to the events which occurred at Heathrow on 18 September 2013.

51. The Appellant told us that he and his family had arrived at the terminal and that they had gone through passport control to the baggage hall. The Appellant told us that he and his family were tired from the travel and upset from his mother's death. This was not challenged and we accept this part of the Appellant's evidence.

52. The Appellant told us that he and his wife were travelling with their four young children on the day of the seizure. However, the Appellant later accepted that his fourth child is too young to have been born by the date of the seizure and, from the

ages the Appellant gave of his children, the Appellant's third child would then have been a baby. Mr Depala's notebook, written up on the day, refers to two children travelling with the Appellant and his wife. We prefer the evidence of Mr Depala in this regard and find that on the date of the seizure the Appellant was travelling with his wife and his two eldest children, who would both then have been aged five.

53. Mr Depala told us that there were information screens above each luggage belt which informed arriving passengers of the maximum amounts of dutiable goods, including cigarettes, which could be brought into the UK without duty needing to be paid. Mr Depala told us that those screens had been there since at least 1993 when he had begun working at Terminal 3. We accept Mr Depala's evidence and find as a fact that there are information screens above each luggage belt and that they have been there on each occasion that the Appellant has travelled through Heathrow airport. Mr Depala also told us, and we find as a fact, that since at least 1993 there have been coloured information notices (in the colour of the relevant channel), each approximately ten inches high, around the entrance to each of the channels, and that these notices inform passengers about the maximum amounts of dutiable goods, such as cigarettes, which can be brought into the UK by travellers without the payment of duty.

54. The Appellant told us that his family's luggage was already on the luggage belt when he went into the luggage hall and so he did not have to wait to collect his bags. The Appellant told us that he collected his luggage without noticing or reading any information screens above the luggage belts. We accept the Appellant's evidence that he did not have to wait for his luggage and so did not see the information screens above the luggage belt on this occasion.

55. The Appellant also told us that although he had previously found the exit from the terminal by following other passengers out of the baggage hall, on this occasion there were no other passengers remaining in the baggage hall for him to follow.

56. The Appellant told us that once he and his family had collected their luggage then, in the absence of any other passengers to follow, the Appellant had asked a security guard how to exit the baggage hall. The Appellant's evidence was that he had walked to one end of the hall to try to leave but that the security guard had pointed him in the other direction and told him that the Green Channel was the only way out. The Appellant told us that the guard had then led him by the arm straight to Mr Depala; later the Appellant told us the guard had told him to go straight to Mr Depala. The Appellant did not explain why he thought he would be directed towards a Border Force officer if he was seeking directions to the exit. All of this aspect of the Appellant's evidence was challenged by the Respondents.

57. Mr Depala's evidence was that at about 4:15 p.m. he had intercepted the Appellant and his family about 100 yards into the Green Channel. Mr Depala had not seen the Appellant outside the Green Channel and had not seen anyone (other than the Appellant's family) in the Green Channel with the Appellant. Mr Depala told us that from where he was stood in the Green Channel he could not see whether the Appellant had conversed with anyone outside of the Green Channel.

58. We take judicial knowledge of the fact that all passengers arriving at Heathrow Terminal 3 must pass through one of the three[2] channels in order to leave the terminal. In deciding whether, on the balance of probabilities, the Appellant was directed into the Green Channel in order to exit the terminal we bear in mind that it is inherently unlikely that a security guard working at Heathrow would be unaware of the purpose of the Green Channel or would presume to know which of the three channels a passenger would require. Similarly, we consider it inherently unlikely that a security guard would inform a passenger that it was only possible to leave the airport by exiting through the Green Channel.

59. In the circumstances, we do not accept the Appellant's evidence he was told by a security guard to go into the Green Channel or that he was either told to go straight to Mr Depala or led straight to Mr Depala. It was common ground that the Appellant and his family went through the Green Channel. We find as a fact that the Appellant entered the Green Channel of his own volition.

Events in the Green Channel

60. We accept Mr Depala's evidence that he intercepted the Appellant and his family about 100 yards into the Green Channel. Mr Depala told us, and we accept, that once he had intercepted the Appellant he asked him to put his bags on the examination bench and that he then conducted a search of the Appellant's bags. We find that 13,160 cigarettes were found by Mr Depala in the Appellant's luggage and that those cigarettes were seized from the Appellant. Mr Depala told us, and we accept, that he completed the Seizure Information Notice in front of the Appellant. The time noted on the notice is 16:49, which accords with Mr Depala's notebook entry of the Appellant being intercepted at 4:15 p.m.

61. One of the points of contention between the parties was that the address which the Appellant provided to Mr Depala at the time of the seizure was not his own address but the Burton address. Mr Depala could not recall whether he asked the Appellant to tell him his address or asked the Appellant for some documentation which bore an address. The Appellant told us that he thought he must have given Mr Depala the document he was carrying from the DVLA which bore the Burton address. Under cross-examination Ms Walker asked the Appellant to explain why he had provided an address which was not the address at which he lived. The Appellant told us that he had handed paperwork to Mr Depala, he had not said to Mr Depala that he lived at the Burton address. We find that the Appellant showed Mr Depala the document from the DVLA which bore the Burton address, and that Mr Depala filled in the Seizure Information Notice with the address he had seen on the document shown to him by the Appellant.

[2] Mr Depala's unchallenged evidence was that there are three channels at Heathrow Terminal 3: the Red Channel - for passengers arriving from outside the EU with goods to declare, the Green Channel - for passengers arriving from outside the EU with no goods to declare and the Blue Channel - for passengers arriving from the EU.

62. When pressed to explain why he had not corrected the mistake on the Seizure Information Notice, the Appellant told us he could not read the notice and he had not checked it at the time. The Appellant also told us that, because he was tired and he was not thinking, he did not ask for an interpreter to help understand the notice better. The Appellant told us that his English has improved considerably in the last three years. The Respondents challenged the Appellant on his ability to read the notice. Mr Depala's evidence on this point was that the Appellant did not seem to have any difficulty in understanding him.

63. We do not accept the Appellant's evidence that he was unable to read the Seizure Information Notice at the time. Almost all of the notice is written in plain English. At the date of the seizure the Appellant had spent more than a decade living in the UK and had (as the Respondents pointed out) successfully completed an application for British nationality, and had made claims for housing benefit and tax credits. We find that the Appellant's understanding of English was sufficiently good at the time of the seizure to have enabled him to read the Seizure Information Notice.

64. Mr Depala told us that he would ask any person from whom goods had been seized to check the Seizure Information Notice and sign at the appropriate points. We find that Mr Depala offered the Appellant the opportunity to check the notice before signing it.

65. In considering whether the Appellant did check the Seizure Information Notice when the opportunity was offered, we bear in mind the Appellant had also told us that, because Mr Depala had seized all of his cigarettes, when he was finally outside the airport he had had to ask someone else for a cigarette in order to have a smoke. Mr Depala told us that he could not recall whether the Appellant had checked the notice and that the Appellant might have been keen to leave the Green Channel. In light of the fact that the Appellant was (at that time) a heavy smoker who had just undertaken a long flight, that all of the Appellant's cigarettes had just been seized, that the Appellant was tired and that he had very recently been bereaved, we accept the Appellant's evidence that he did not check the notice when offered the opportunity to do so.

66. The Seizure Information Notice in our bundle bore a signature which resembled the signature on the correspondence from the Appellant. The Appellant told us that the signature on the form looked like his signature but he did not remember signing the notice, he could have signed it but he was not sure. We find as a fact that the Appellant signed the Seizure Information Notice completed by Mr Depala.

67. In the light of our conclusions above, we do not consider that the Appellant deliberately mislead Mr Depala in respect of the address. We consider the error over the address to have been an unfortunate mistake.

68. The final aspect we need to consider from the interaction between Mr Depala and the Appellant in the Green Channel is the Appellant's statement in his Notice of Appeal that he had been told he could either pay an amount of tax or leave the cigarettes. At the very beginning of his evidence the Appellant told us that he had not

been offered the option of paying the duty due on the cigarettes which had been seized. However, when he was later under cross examination, the Appellant told us Mr Depala had offered him the option of taking the cigarettes and paying a penalty, and that the alternative (which he had chosen) was to leave the cigarettes to be destroyed.

69. Mr Depala's evidence was that if he found dutiable items in the bags of a passenger exiting through the Green Channel then he was obliged to seize those items. However, once the items had been seized, Mr Depala had the discretion to offer to allow a passenger to take those items upon payment of the duty due. Mr Depala told us that if he made such an offer then he would note it in his notebook. Such an offer would also require authorisation from Mr Depala's manager. Mr Depala told us that he had not made such an offer to the Appellant. Mr Depala told us he did not have the discretion to waive any penalty which might become due because the decision to impose a penalty was taken by HMRC, not Border Force. Mr Depala told us that the information leaflets he issued made that clear to all passengers, including the Appellant, from whom goods had been seized.

70. We consider it inherently unlikely that Mr Depala would tell the Appellant that if the Appellant chose to leave the cigarettes for destruction then no penalty would be imposed and that would be the end of the matter. Mr Depala was fully aware that it was for the Respondents to decide whether a penalty should be imposed. Mr Depala was also aware that once the cigarettes had been seized, the Appellant could not take those cigarettes away unless the Appellant was given the option to pay the duty. Mr Depala was clear in his evidence that he did not offer this option to the Appellant. We find as a fact that Mr Depala did not tell the Appellant that if he left the cigarettes then that would be the end of the matter.

The 2014 correspondence and the address

71. We find that after the seizure of the cigarettes at Heathrow, Border Force referred the matter to the Respondents. We accept Ms Whittaker's description of the correspondence, as reflected in the documents in our bundle.

72. On 28 May 2014 Ms Whittaker, on behalf of the Respondents, wrote to the Appellant (the "May 2014 letter"), seeking information about the Appellant's involvement in bringing goods into the UK without the appropriate duty having been paid. Ms Whittaker warned the Appellant that if her suspicions that there had been dishonest conduct were confirmed then she would consider the imposition of civil penalties. Ms Whitaker also explained that the Appellant had the opportunity to significantly reduce any penalties that might become due by making a full and prompt disclosure of his involvement in bringing products into the UK between 28 May 2012 and 28 May 2014, and also by co-operating with the Respondents' enquiry. Public Notices 160 and 300, and factsheet CC/FS9 were enclosed with the letter. In the May 2014 letter Ms Whittaker also wrote:

> If you wish to attend a meeting to assist in this enquiry, please contact me within two weeks of the date of this letter, to agree a date and venue. Please let

me know if there are any issues that I need to consider when arranging our meeting.

If you are willing to co-operate with this enquiry but would prefer to deal with the matter by correspondence, please provide the following within 30 days of the date of this letter:

73. There then followed eleven bullet points, setting out the material required by Ms Whittaker. This included requests for copy documents but also requests for an explanation of who was involved in the smuggling, confirmation of the quantities of goods brought into the UK and evidence of the cost of the goods.

74. Ms Whittaker told us, and we accept, that before sending the May 2014 letter, she had checked that the Burton address was a valid UK address. In the absence of any reason to believe that the valid UK address on the Seizure Information Notice was not the Appellant's address, Ms Whittaker addressed the May 2014 letter to the Appellant at the Burton address. On 17 June 2014 Ms Whittaker sent a reminder to the Appellant, seeking a reply by 28 June 2014. This letter was also sent to the Burton address.

75. On 11 August 2014 Ms Whittaker wrote to the Appellant at the Burton address to inform him that the Respondents considered his conduct – in bringing 13,160 cigarettes in through the Green Channel at Heathrow on 18 September 2013 – to be dishonest and as a consequence civil evasion penalties in the total sum of £3,629 had been raised upon him. These penalties were set at 100% of the duties evaded, with no reduction for co-operation or disclosure.

The 2015 correspondence

76. It is clear from the documents in the bundle that in early May 2015 the Appellant wrote to the Respondents. In that letter the Appellant stated that his friend (who lived at the Burton address) had contacted him regarding a tobacco penalty and had also previously contacted him regarding the renewal of tax credits. The Appellant stated that he had contacted the Respondents (apparently by telephone) and had been told that the penalty related to "13,000 cigarettes" brought into the UK via Manchester airport. The Appellant stated he had neither used Manchester airport nor lived at the Burton address and he asked for an explanation of the situation.

77. On 19 May 2015 Ms Whittaker replied to the Appellant. Ms Whittaker told us, and we accept, that she was concerned that she was writing to the correct person and so her initial priority was to seek evidence that the Appellant was the person from whom the cigarettes had been seized. We find that Ms Whittaker also enclosed a copy of the May 2014 letter, which did not provide details of the amount or type of goods seized, the date of the seizure or the location of the seizure. In addition to seeking a copy of the Appellant's passport and evidence that the Appellant lived at the London address, we find that Ms Whittaker also asked for a full statement from the Appellant in response to the May 2014 letter.

78. Ms Whittaker's letter crossed with a letter dated 19 May 2015 from the Appellant, apparently in response to a letter seeking payment of £3,269 in respect of the original civil evasion penalties. In his 19 May 2015 letter the Appellant wrote:

> I am asking you kindly can you explain what these payments are for; I was on the phone to your office they told me for tobacco taken away from me in Manchester airport on august 2014.
>
> I am telling you I have never been to Manchester airport in my live nether been travelled anywhere on that date or near that date.
>
> Can you please kindly explain the satiation in details? Including evidence if there's any so we can work things out together as I am thinking maybe someone else has used my details.

79. The Appellant told us that he tried telephoning the Respondents several times but that he often did not get a response and that, when he did get through, he spoke to different people each time. We accept the Appellant's evidence that he tried to telephone the Respondents.

80. On 1 June 2015 the Appellant replied to Ms Whittaker's letter. The Appellant provided the information and copy documents requested in order to clarify his address. In response to the May 2014 letter, the Appellant stated:

> I am not a smuggler I have not travelled throw Manchester airport I have always travelled from London I have been bringing a few cigarettes with me when I come back and it was only for my own use as I am a smoker and any cigarettes that I have been bringing back with me they are in no use in this country or in another manner they are unknown by the public in the UK also I have no problems in paying the duty if there was any.
>
> I do want to co-operate with you I don't mind meeting with you if you require.

81. Ms Whittaker acknowledged the Appellant's response. On 24 June 2015 Ms Whittaker wrote again to the Appellant, noting that on at least one occasion the Appellant had attempted to bring goods in excess of his non EU personal allowance into the UK. Ms Whittaker stated:

> This is your final opportunity to make a full statement of disclosure in return I will submit your case for a re-consideration of any penalty charge based on the level of your co-operation and disclosure.

82. On 15 July 2015 the Appellant replied to Ms Whittaker. The Appellant reiterated his willingness to meet an officer or have a telephone conversation, and he provided a mobile telephone number. The Appellant also stated:

> I am a smoker I have been bringing tobacco to use for myself but nothing like the amount you mention I have only bring what I was aloud at all times and smoke it myself again I am not a smuggler or part of a gung. …
>
> I want to co-operate with you I have also sign the letter you want me to and included with this statement.

83. Ms Whittaker acknowledged this response. On 8 August 2015 Ms Whittaker informed the Appellant that she considered he had failed to supply all the information requested. On 21 August 2015 the Respondents raised a revised excise civil evasion penalty and a revised customs civil evasion penalty, in the reduced total sum of £3,266, upon the Appellant. The penalties had been reduced by 10% to take account of some co-operation on the part of the Appellant. Ms Whitaker told us she considered she had worked within her remit by giving the Appellant a final opportunity to supply the information requested but that she did not consider a meeting would be relevant. Ms Whittaker told us, and we find, that the Respondents' policy on meetings had changed between 2014 and 2015, and that fewer meetings took place following that change of policy as officers were encouraged to resolve matters by correspondence where possible.

84. Ms Whittaker also told us, and we accept, that the penalties were calculated by reference to the lowest recommended retail price ("RRP") for cigarettes in the UK. The Appellant suggested to Ms Whittaker that the cigarettes seized from him were much smaller than UK cigarettes, and so a lower price should have been used. We accept Ms Whittaker's explanation that she was able to use a lower than RRP price to calculate a penalty only if she was satisfied that a lower price had been paid for the cigarettes seized. Ms Whittaker told us that the Appellant had not responded to the request in her May 2014 letter for evidence of the price paid for the cigarettes seized. The Appellant told us that he had not understood that this was what had been requested of him. We find that the Respondents asked the Appellant for evidence of the price paid for the cigarettes and that the Appellant did not respond to this request.

Application of penalty legislation to the facts found

85. We now apply Section 8(1) and Section 25(1) to the facts found, and consider whether the Appellant's conduct was for the purpose of evading tax or duty, and whether that conduct involved dishonesty.

Has the Appellant engaged in conduct for the purpose of evading tax or duty?

86. An adult travelling from a country outside the EU may bring a maximum of 200 cigarettes into the UK without payment of tax or duty. This limit is laid down in the Travellers' Allowances Order 1994 (SI 1994/955) as amended. Where a person brings more than 200 cigarettes into the UK from a country outside the EU, then the goods should be declared in the Red Channel so that the tax and duty due may be paid.

87. We have found that the Appellant brought 13,160 cigarettes into the UK from a country outside the EU. We consider that the Appellant's conduct, in taking those 13,160 cigarettes through the Green Channel, constitutes conduct for the purpose of evading tax or duty. Therefore we consider that the first limbs of Sections 8(1) and 25(1) are met.

Did the Appellant's conduct involve dishonesty

88. As we set out above, we consider that there are two stages to the test for dishonesty. The first stage is whether the Appellant's actions would be considered dishonest by the ordinary standards of reasonable and honest people.

89. The Green Channel is for passengers who have no dutiable goods to declare. As noted above, the maximum number of cigarettes which can be brought into the UK from a country outside the EU without payment of tax and duty is 200. We consider that reasonable and honest people would consider it dishonest to bring 13,160 cigarettes into the UK from outside the EU and to take those cigarettes through the Green Channel. We consider that the objective element of the test for dishonesty is met.

90. Having concluded that the objective part of the test for dishonesty is met, we consider what the Appellant knew of the facts which made his conduct dishonest by the ordinary standards of reasonable and honest people. On the facts of this case we consider that the questions we must ask ourselves are:

a) Did the Appellant know what the Green Channel meant and the consequences of entering that channel?

b) Did the Appellant know that there was a limit to the number of cigarettes travellers from non EU countries were allowed to bring into the UK without payment of tax and duty? If yes, did the Appellant know that he was carrying in excess of that amount?

91. In considering these two questions, we need to consider further aspects of what the Appellant told us about what he understood on 18 September 2013, all of which were challenged by the Respondents.

The Green Channel

92. The Appellant told us that he was not aware, either on 18 September 2013 or from previous trips, of the Red and Green Channels or of there being different channels in order to exit the terminal, and that he had not seen the different channels. The Appellant told us he had not, either on 18 September 2013 or on any previous occasion, seen any signs at the airport referring to cigarettes. When asked if he had seen signs for anything else, the Appellant replied "not really, no".

93. We have accepted Mr Depala's evidence that there are large, brightly coloured information signs at the entrance to the Red, Blue and Green Channels at Terminal 3. We have accepted that the Appellant did not need to wait for his luggage on 18 September 2013 and did not see the information signs above the luggage belt when he collected his luggage on that occasion. However, the large green signs around the entrance to the Green Channel, as described by Mr Depala, would have been obvious to anyone passing by them. These signs would have been clearly visible when the Appellant had, on previous occasions, passed through the Green Channel following other passengers.

94. The Appellant volunteered that "obviously" duty would be payable if cigarettes were brought into the UK to be sold. However, the Appellant did not go on to explain how he understood a person would declare dutiable goods in the absence of a specific channel for that purpose.

95. We agree with the Respondents that it is not credible that a person who had lived in the UK for over a decade, and who had previously passed through Heathrow airport on at least two, and possibly three, other occasions, could be unaware of the existence and the purpose of the Green Channel. That is particularly so given that Appellant, as he told us, had been stopped as he was leaving the airport on another occasion before 18 September 2013, and a Border Force officer had asked to search his bags. The Appellant told us that he had not been smoking so heavily at that time and he was only carrying a few cigarettes with him on that occasion. The Appellant told us that those cigarettes had not been seized. In light of that incident we do not accept the Appellant's evidence that, until 18 September 2013, he had understood that the only purpose of the checks undertaken by Border Force officers was to search for illegal drugs and items which would be dangerous to the public.

96. In light of the large and clearly visible signs at the entrance to the Green Channel, we conclude that, on the date of the seizure, the Appellant was aware of the existence of the Green Channel.

97. On the basis that:

- the signs at the entrance to the Green Channel set out the maximum amounts of dutiable goods which can be brought into the UK without payment of tax or duty,
- the Appellant knew that the price of cigarettes in the UK contains an element of tax and duty, and that tax and duty is payable upon commercially imported cigarettes, and
- the Appellant had previously been stopped in the Green Channel,

we conclude that, on the date of the seizure, the Appellant understood the purpose of the Green Channel.

<u>The number of cigarettes which could be brought into the UK</u>

98. The Appellant told us that, at the date of the seizure, he believed he could bring 13,160 cigarettes into the UK to smoke himself without payment of duty or tax. The Respondents submitted that it was not credible that the Appellant should believe there was no limit to the number of cigarettes which could be brought into the UK for personal use given that the Appellant had also told us that cigarettes were cheaper in Iraq than in the UK, and accepted he knew that part of the price he paid for cigarettes in the UK was to account for the tax and duty which had been paid on the import of those cigarettes.

99. In considering what the Appellant knew about the number of cigarettes which could be brought into the UK without payment of duty or tax, we look at the explanation the Appellant gave the Respondents in the correspondence between them.

100. In his first and second letters to the Respondents, the Appellant appears to suggest that he has no knowledge of the seizure. Although the Appellant might have understood the Respondents to be concerned with a seizure at Manchester airport, the Appellant does not volunteer that he had brought 13,160 cigarettes into the UK via a different airport. Given that more than 14 months' supply of cigarettes were seized, it is inconceivable that the Appellant could have completely forgotten about the seizure. In his third letter (of 1 June 2015) the Appellant still made no mention of the 13,160 cigarettes which had been seized from him less than two years earlier, although he did state:

> I have been bringing few cigarettes with me when I come back and it was only for my own use.

101. In his final letter (of 15 July 2015) the Appellant stated:

> I have been bringing back tobacco to use for myself but nothing like the amount you mention.

102. It is clear from the correspondence chain that the figure which the Appellant was denying is 13,000. We have found that the Appellant brought 13,160 cigarettes into the UK.

103. We take the view that if, on 18 September 2013, the Appellant genuinely believed that he could bring 13,160 cigarettes from a non EU country into the UK for his own consumption without having to pay any tax or duty then (even if he subsequently learned that this was not the case) it is odd that he did not explain his mistaken belief to the Respondents when he was given the opportunity to do so. Instead the Appellant denied the amount of cigarettes he had been carrying. The consistent view expressed by the Appellant in the correspondence is that he had only carried the amount of cigarettes he was allowed, and that this was a "few" cigarettes.

104. We have already concluded that the Appellant must have seen the signs for the Green Channel in which the number of cigarettes permitted is clearly set out.

105. In the light of the signs at the entrance to the Green Channel, and the Appellant's failure, prior to the hearing, to explain that he had believed he could bring 13,160 cigarettes into the UK without payment of duty or tax, we conclude that the Appellant was aware that there was a limit to the number of cigarettes which could be brought into the UK from Iraq without payment of tax and duty. We conclude also that the Appellant was aware that the number of cigarettes he was carrying exceeded that limit.

106. As we consider that the Appellant did know the facts which made his conduct dishonest by the ordinary standards of reasonable and honest people, we conclude that the subjective element of the test for dishonesty is met. Therefore we conclude that

both aspects of the test for dishonesty have been met, and that the Appellant's conduct did involve dishonesty.

Conclusions in relation to the application of the penalty legislation to the facts found

107. It follows that both limbs of Section 8(1) and Section 25(1) are met. Therefore the Respondents have demonstrated all the necessary elements for the imposition of the customs civil evasion penalty and the excise civil evasion penalty imposed upon the Appellant. We confirm, in principle, the Respondents' imposition of the penalties.

108. We now consider the amount of the penalties imposed and whether the joint civil evasion penalties imposed upon the Appellant should be mitigated in the circumstances of this case.

The amount of the penalties

109. One point which arose during the hearing was the Respondents use of the UK RRP for the price of the cigarettes at the date of the seizure to calculate the penalty. The Appellant submitted that a lower figure should have been used given the lower price of cigarettes in Iraq.

110. In the absence of any evidence having been presented to the Respondents to demonstrate the price actually paid for the cigarettes, we consider the Respondents were correct to use the RRP in calculating the joint civil evasion penalties imposed.

The power to mitigate the penalties

111. Under Section 8(4) Finance Act 1994 and Section 29(1) Finance Act 2003, the Respondents and this Tribunal both have the power to reduce the penalties to such amount (including nil) as is considered proper. On appeal to this Tribunal, we also have the power to cancel or reduce any reduction which the Respondents have given, if we consider that appropriate. In considering what reduction (if any) to a penalty is appropriate, neither we nor the Respondents can take into account the Appellant's ability to pay any penalty imposed.

112. Although the Respondents have the power to reduce the penalties to nil, their published practice (as set out in Notice 300) is to grant a reduction of up to 40% for disclosure and of up to 40% for co-operation, giving a maximum reduction of 80%. In this case the Respondents have granted the Appellant a reduction of 10% for co-operation but given no reduction for disclosure. Therefore the penalty imposed by the Respondents was 90% of the maximum penalty which could be imposed.

113. In looking at what reduction (if any) to the level of penalty is , we consider co-operation to be a measure of the Appellant's willingness to work with the Respondents, and disclosure to be a measure of what the Appellant has made known or revealed to the Respondents.

Co-operation

114. We have set out above the relevant parts of the correspondence between Ms Whittaker and the Appellant in 2014 and 2015. In looking at the degree to which the Appellant co-operated with the Respondents we start with the May 2014 letter in which Ms Whittaker offered the Appellant the choice of meeting to explain matters or of supplying correspondence. Although, as we have found, the Respondents' policy with regard to meetings changed after that letter was first sent out and fewer meetings were offered after that change of policy, when the May 2014 letter was re-sent to the Appellant in 2015, the Respondents did not explain that they were no longer offering the option of a meeting.

115. In his letters of 1 June 2015 and 15 July 2015 the Appellant stated that he was willing to attend a meeting. In the later letter the Appellant also provided his telephone number and reiterated his willingness to co-operate.

116. The Respondents submitted that the Appellant must have understood the request for material in the May 2014 letter, and been able to respond, as he had supplied relevant material to the later request for clarification regarding the correct address. We agree with the Respondents that it is very likely that the Appellant could understand the 11 bullet point requests set out in the May 2014 letter. We also agree that the Appellant probably was capable of providing a response in writing, although given the correspondence we have seen, possibly not in the detail sought by the Respondents. However, we take the view that the May 2014 letter offered the Appellant two options: to attend a meeting or to supply information and documents.

117. Many people consider it is easier to explain matters face to face than to try to provide an explanation in writing or by reference to documents. We bear in mind the Appellant's statement in his Notice of Appeal: "if you need to call me I can explain better as I am not very good in writing". This was borne out by the Appellant's appearance before us where he was considerably more articulate in person than we had expected from the correspondence.

118. We conclude that the Respondents offered the Appellant the option either to attend a meeting or to supply documents. The Appellant made it clear he was willing to attend a meeting. In the circumstances we do not consider that the Appellant can be said to have failed to co-operate because he did not provide documents as well. The Respondents did not arrange a meeting with the Appellant as they did not consider it was required; as is obvious, the Respondents are entitled to reach their own conclusions as to when a meeting is necessary and to manage their own policy in this regard. However, the Respondents did not tell the Appellant that the option of a meeting had been withdrawn and so he must provide a written explanation with documents if he wished to co-operate. We do not consider it appropriate for the Respondents not to mitigate the penalties on the basis that the Appellant had failed to provide documents, when the Respondents had failed to make it clear to the Appellant that this was the only option which remained open to him.

119. In the circumstances we consider it appropriate to increase the reduction given to the Appellant for his co-operation from 10% to 40% (the maximum reduction the Respondents would have granted). Although agreeing to meet is a minor act, in taking that step the Appellant had co-operated as much as he had (reasonably) understood from the Respondents' letters that he was required to do at that stage.

Disclosure

120. We have considered what the Appellant revealed or made known to the Respondents in the correspondence and whether this amounts to sufficient disclosure to mitigate the penalties imposed.

121. We take the view that there were no disclosures in the correspondence. As appears above, there were several instances where the Appellant's oral evidence was the first occasion on which any explanation had been provided to the Respondents.

122. We have borne in mind that the Appellant might have revealed more about events had a meeting taken place, and that the Appellant might have been expecting such a meeting to give him the opportunity to make disclosure. However, even allowing for the Appellant's obvious preference for oral communication over written communication, on re-reading the correspondence we were struck by the Appellant's consistent denial of relevant events. Denial is the opposite of disclosure. In particular, we noted the Appellant's failure to accept that he had brought 13,160 cigarettes into the UK, and his statement that he had nothing like 13,000 cigarettes. That telling of an untruth concerns us and gives us doubt as to whether the Appellant would have made a full and open disclosure to the Respondents even if a meeting had taken place.

123. In the circumstances we do not consider that any reduction should be made to the penalties in respect of disclosure. We confirm the Respondents' decision in this regard.

Conclusion

124. For the reasons set out above, we confirm the imposition upon the Appellant of joint civil evasion penalties raised under Section 8(1) Finance Act 1994 and Section 25(1) Finance Act 2003. We confirm the calculation of the penalties based upon the RRP. We consider that the Appellant should be given a total reduction to the joint civil evasion penalties of 40%.

125. We revise the customs civil evasion penalty to £431.40 and we revise the excise civil evasion penalty to £1,746. The penalties imposed upon the Appellant are confirmed in the revised total sum of £2,177.40.

126. 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.

JANE BAILEY

TRIBUNAL JUDGE
RELEASE DATE: 14 DECEMBER 2016