

[2017] UKFTT 0218 (TC)



TC05708

Appeal number: TC/2016/03086

Excise and Customs Duty - importation of tobacco products - appeal against Civil Evasion Penalties - s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 - whether dishonesty - yes - whether allowances given to reduce penalties correct - yes - appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

KAJAL ALI

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DEREK ROBERTSON**

Sitting in public at City Exchange, Albion Street Leeds on 23 January 2017

The Appellant in person

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

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1. This is an appeal by Mr Kajal Ali (“the Appellant”) against a decision by the Commissioners for Her Majesty’s Revenue and Customs (“HMRC”) notified to the Appellant by letter on 6 May 2016. This was a varied decision from earlier decision(s) notified to the Appellant by letters on 18 December 2015 and 7 March 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £1,991.00 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

Background

2. On 23 October 2014, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Bangladesh via Abu Dhabi.

3. From disembarkation to clearing Customs there are displayed a number of notices advising which countries fall inside/outside the European Union (“EU”) and also the duty free allowances for excise dutiable products acquired outside the EU. Bangladesh is not in the EU and therefore, returning travellers, for the purposes of the Travellers’ Allowance Order 1994, have a personal allowance of 200 cigarettes.

4. Despite the notices, which are also situated in the baggage reclaim area and just before the Customs channel entrances, the Appellant chose to exit through the ‘nothing to declare’ Green channel, indicating that he had no goods to declare, at which point the Appellant was intercepted by UKBF Officer, Matthew Keane.

5. Officer Keane’s evidence is that he intercepted two passengers in the Green ‘nothing to declare’ channel, the Appellant and his mother Mrs Ruf Banu, who had arrived on flight EY15 from Abu Dhabi, having begun their journey in Bangladesh. The Appellant is registered blind and his mother has limited mobility but did not have any visual impairment. They were being assisted by an employee of OCS (facilities and management service), who provide assistance to passengers with restricted mobility. The Appellant confirmed he had travelled from Bangladesh.

6. Officer Keane established that the Appellant spoke English but that Mrs Banu did not. He asked the Appellant a series of initial questions about their journey, their baggage and whether they were aware that there are certain prohibitions and restrictions on goods being imported. He clarified that they were aware they were in the channel for nothing to declare. The Appellant answered the questions on behalf of both himself and Mrs Banu and in doing so stated “I don’t think I have anything to declare”.

5 7. Officer Keane searched their baggage, inside of which he found 13,600 B&H KSF cigarettes and 400g chewing tobacco. The Appellant claimed ownership and responsibility for all the goods.

8. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended), Officer Keane seized the goods as
10 liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice BOR156 and Warning Letter BOR162, both of which the Appellant signed.

9. The legality of seizure was not challenged in the Magistrates' court and the
15 seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

10. On 2 October 2015, HMRC's Officer Chris Harwood, a post detection audit officer of HMRC's International Trade and Compliance Unit, wrote to the Appellant at the address he had provided, informing him that HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, under s
20 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed

- Public Notice 300 in respect of Customs Duty and Import VAT
- 25 • Public Notice 160 in respect of Excise Duty
- Factsheet CCIFS9 (The Human Rights Act and Penalties).

The letter invited any disclosure by the Appellant and made it clear that any reduction in the penalty was contingent on the Appellant's response and co-operation with
30 HMRC's enquires.

11. In his letter, Officer Harwood explained that if the Appellant was willing to co-operate with the enquiry he should provide the following within 30 days of the date of his letter:

- 35 • "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- 40 • A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- Confirmation of the quantities of goods involved on each occasion.

- 5
- Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
 - Details of all international travel during the period under enquiry, including the reasons for travel.
 - An explanation of what you did with, or intended to do with, the smuggled goods.
- 10
- Any documentation you think will support the information you are providing.
 - Any other information or explanations you think may be of use to this enquiry.”

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

15 “Disclosure

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

20 Co-operation

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

- attend all the interviews (where necessary);
 - provide all information promptly;
 - answer all questions truthfully;
- 25
- give the relevant information to establish your true liability;
 - co-operate until the end of the investigation.”

13. As no response had been received, on 19 October 2015 Officer Harwood issued a reminder letter to the Appellant requesting a response by 2 November 2015.

30 14. Officer Harwood received a reply from the Appellant dated 18 October 2015. In his letter, received by HMRC on 29 October 2015, the Appellant stated that he had travelled with his mother to Bangladesh to visit his sick father. This was the first time he had bought cigarettes from abroad. He bought them as the cigarettes were cheaper than in England. He stated that he is heavy smoker and he had borrowed some money

35 from his cousin to buy the cigarettes. In his letter the Appellant states that he is registered blind. He states he was not aware that his actions in importing 13600 cigarettes were against the law and if he was aware he would not have broken the law. He could not afford a penalty.

40 15. On 5 November 2015 Officer Harwood wrote to the Appellant asking for further information and in addition asked the Appellant to provide medical evidence which supported his disability. A deadline of 19 November 2015 was given for a response. The Appellant did not respond to this letter.

5 16. On 18 December 2015 Officer Harwood issued a Civil Evasion Penalty —Notice
of Assessment for the sum of £2,696.00 reduced from £4,150.00. The customs civil
evasion penalty had been reduced from £898 to £583. The excise civil evasion penalty
had been reduced from £3,252 to £2,113. The Notice of Assessment explained how
10 the penalty had been calculated and advised that in total a 35% reduction had been
made (15% for disclosure and 20% for co-operation) given to the Commissioners in
the course of their enquiries. The maximum reductions allowable are 40% for
disclosure and 40% reduction for co-operation.

15 17. In a letter dated 7 January 2016 the Appellant requested a review of his case. He
stated in the letter that when he was stopped at Customs he was informed that as it
was his first offence no further action would be taken. He reiterated that he is
registered blind and had been unable to read any notices about Customs limits. He
was unaware of any restriction on the amount of cigarettes he could bring into the
country. The cigarettes were for personal use, and as he has a limited income on
benefits he was taking the opportunity to purchase the cigarettes at a reduced rate.

20 18. On 20 January 2016 HMRC wrote to the Appellant explaining that the case had
been passed onto another Officer to deal with. It was now being dealt with by Officer
Robinson instead of Officer Harwood. Officer Robinson confirmed “that he was
provisionally upholding his colleague’s decision”. In his letter Officer Robinson
asked the Appellant to provide medical evidence of his condition, to enable him to
25 consider re-mitigating the penalty. He asked for a response by 4 February 2016.

30 19. On 12 February 2016 HMRC received a telephone call from Ms Wood of
Chapeltown Citizens Advice Bureau, on behalf of the Appellant. Ms Wood advised
that the Appellant had missed the deadline of 4 February 2016 to provide medical
evidence for re-consideration of the penalty, as he had only received the letter from
his doctor on 8 February 2016. Ms Wood enquired as to how the Appellant should
now proceed. She was advised that the deadline had expired, but if the Appellant
could provide the supporting evidence requested then he should do so as soon as
possible. Once received HMRC would review and confirm their decision in writing.

35 20. In a letter dated 12 February 2016 received by HMRC on 15 February 2016, the
Appellant enclosed a letter from his doctor dated 8 February 2016. The letter from Dr
B Hammersley of Hilton Road Surgery, Chapeltown, Leeds, confirmed the Appellant
had been blind since birth.

40 21. On 7 March 2016 Officer Robinson issued a revised Civil Evasion Notice of
Assessment to the Appellant for the revised sum of £2,044.00. The amended customs
civil evasion Penalty was for £442. The amended excise civil evasion penalty was for
£1,602. The Notice of Assessment explained that HMRC had further reviewed the
information provided by the Appellant and had reduced the penalty amount. The
penalty had been calculated and a 50% reduction had been made in order to reflect the
degree of disclosure (20%) and co-operation (30%) given to the Commissioners in the
45 course of their enquiries.

5 22. In a letter dated 31 March 2016 received by HMRC on 4 April 2016, the
Appellant requested an independent review of the matter. His letter maintained he was
bringing the cigarettes in for his personal use. This was a first time offence and he
asked HMRC to consider waiving the penalty because of the severe hardship it would
10 without any comment as to whether he was allowed to bring such quantities into the
UK. He and his wife had no earned income but were in receipt of benefits. He had
three children to support. He would struggle to pay any penalty off even at five
pounds a week.

15 23. Review Officer Howard carried out an independent review of the case and notified
the Appellant on 6 May 2016 that the penalty issued should be varied and further
reduced to £1,991 as he was “satisfied that the ‘chewing tobacco’ was covered within
the allowances and should not form any part of the penalty”.

20 24. Officer Howard in the review letter took into account the points raised by the
Appellant and his statement that it was the first time he had brought tobacco products
into the UK and that he did not know the restrictions on importing tobacco goods in
excess of the personal allowance. Officer Howard explained that it is nonetheless a
traveller’s responsibility to ensure that they do not contravene the law by importing
dutiabale goods into the UK over their permitted allowance, as per The Travellers’
25 Allowance Order 1994 (with the various amendments). If he had not known these
allowances and procedures before he travelled he could have researched them (e.g.
through the internet, or through friends and family). If he had done so, he would have
been aware of the personal allowances and procedures for bringing cigarettes into the
UK. He could have also sought advice from Border Force Officials. By failing to
30 check the limits and restrictions on bringing cigarettes and tobacco into the UK and
entering the 'Green' (nothing to declare) channel it was implicit that the Appellant
had acted dishonestly.

35 25. The volume of cigarettes and chewing tobacco was substantial and in Officer
Howard’s view it was not credible that the Appellant thought he could import such a
high quantity of cigarettes into the United Kingdom from a third country, without
making a declaration to customs.

26. Officer Howard advised that although the Appellant said that he was unable to pay
the liabilities imposed, it is specifically stated in legislation that the ability to pay a
civil penalty cannot be considered in determining the liability to such penalties. The
Appellant’s financial position could not therefore be considered.

40 27. Officer Howard further explained that s 29 of the Finance Act 2003 and s 8(4) of
the Finance Act 1994 allow HMRC to reduce a penalty as they think proper. There are
two factors, disclosure and co-operation, which determine the level of any reduction.
Firstly there can be a reduction for an early and truthful explanation as to why the
arrears arose. Secondly there can be a reduction for fully embracing and meeting
45 responsibilities under the enquiry procedure.

5 28. Officer Howard reviewed the reductions allowed by Officer Harwood in respect
of the joint penalty and said he had taken into account that the Appellant had partly
co-operated with his enquiries. However he had not provided details of all
international travel within the requested period or the reasons for doing so. Therefore
10 he had not fully assisted with Officer Harwood's enquiries. This is reflected in the
reductions allowed and he considered the level of the joint penalty to be proportionate
to the duty lost. The legislation allows discounts to be applied, and HMRC had
reduced the liability from 100% to 50%.

29. Based on the information available to him he agreed that the mitigation offered
was reasonable and correct.

15 30. By Notice of Appeal the Appellant appealed to the Tribunal on 1 June 2016.

Evidence

31. The combined bundle of documents included the witness statement of Officer
Andrew Keane, and a copy of his notebook notes, and also the witness statement of
Officer Stephen Gardner, in the absence of Officer Robinson who was on leave. Both
20 gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence
to the Tribunal under oath. We were also provided with copy correspondence, copy
relevant legislation and case law authority.

32. In evidence the Appellant said that he had travelled to Bangladesh to visit his sick
father. He was 44 years old, had lived in the UK for twenty-four years. He had
25 travelled to the UK from Bangladesh five times before, but said that he had never
previously brought tobacco back with him. His native language is Bengali but he
understands and speaks good English.

33. The Appellant said that he had purchased the cigarettes for approximately £274 in
Bangladesh. He agreed that the cigarettes would cost £4,088 if purchased in the UK.

30 34. The Appellant said that the 13,400 cigarettes consisted of 67 packs of 200 (20×10
packets in each pack) and that all 67 packs were for him. He said that he smoked 30 to
40 cigarettes a day and that the cigarettes would last him approximately two years.

35. The Appellant said that he was on benefits and that he did not have the financial
means to pay the penalties that had been imposed

The Law

36. The legislation relevant to this appeal is:

Finance Act 1994, Sections 8(1) and 8(4)

Penalty for evasion of excise duty.

(1) Subject to the following provisions of this section, in any case where –

- 5 (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),

10 that person shall be liable to a penalty of an amount equal to the amount of duty evaded
or, as the case may be, sought to be evaded.

(4) Where a person is liable to a penalty under this section—

- (a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to
such amount (including nil) as they think proper; and
15 (b) an appeal tribunal, on an appeal relating to a penalty reduced by the
Commissioners under this subsection, may cancel the whole or any part of the
reduction made by the Commissioners. (...)

Finance Act 2003, Sections 25(1) and 29(1)(a)

s25 Penalty for evasion.

(1) in any case where

- 20 (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),

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

29 Reduction of penalty under section 25 or 26.

(1) Where a person is liable to a penalty under section 25 or 26—

- 30 (a) the Commissioners (whether originally or on review) or, on appeal, an appeal
tribunal may reduce the penalty to such amount (including nil) as they think proper;
and
(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a
penalty reduced by the Commissioners under this subsection may cancel the whole or
any part of the reduction previously made by the Commissioners. (...)

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

35 49(1) Where-

a) except as provided by or under the Customs and Excise Acts 1979, any imported
goods, being chargeable on their importation with customs or excise duty, are,
without payment of that duty-

(i) unshipped in any port,

40 those goods shall ...be liable to forfeiture.

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

S78(3) Any person failing to declare anything or to produce any baggage or thing as
required by this section shall be liable on summary conviction to a penalty of three times

5 the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)

S139 Provisions as to detention, seizure and condemnation of goods

10 (1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

(2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—

(a) deliver that thing to the nearest convenient office of Customs and Excise; or

15 (b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

20 (3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

(4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say—

25 (a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

30 (b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

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

35 (5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

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

(7) If any person, not being an officer, by whom anything is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

45 (8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

Paragraph 5 Schedule 3 CEMA states:

5 If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

Travellers' Allowance Order 1994

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

15 2. (1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage,.

(2) For the purposes of this article—

20 (a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

(b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;

25 (c) "third country", in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991

30 3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

35 4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- 40
- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
 - his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
 - The penalty that the law imposes is an amount equal to the relevant tax or duty
- 45 evaded or sought to be evaded.

The penalty can be mitigated (reduced) to any amount, including nil. Our policy on how the penalty can be reduced is set out in Section 3.

5 3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

The maximum penalty of 100 per cent import duties evaded will normally be reduced as follows:

- 10
- Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
 - Up to 40 per cent - fully embracing and meeting responsibilities under the procedure by, for example: supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.

15 In most cases, therefore, the maximum reduction obtainable will be 80 per cent of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

HMRC Notice 160 Compliance checks into indirect tax matters

20 2.3 How can penalties be reduced?

It is for you decide whether or not to co-operate with our check, but if you do you should be truthful as making a statement to us you know to be false, you could face prosecution.

If you choose to co-operate and disclose details of your true liability then you can significantly reduce the amount of any penalties due.

25 You should tell us about anything you think is relevant when we are working out the level of the penalty. At the end of the check we will take into account the extent of your cooperation.

2.3.1 Reductions under Civil Evasion Penalty Rules

The maximum penalty of 100% tax evaded will normally be reduced as follows:

- 30
- up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them
 - up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.

35 In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

The Appellant's Case

40 37. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £1,991 on the following grounds:

- The amount of penalty is unfair given that he was unaware of the restrictions on importing tobacco.

- 5
- The goods were for personal use.
 - He is unable to afford to pay the amount detailed in the assessment.

38. At the hearing, the Appellant said that he was of good character and had purchased the cigarettes in Bangladesh as he understood that in so doing, duty would have been paid. He also argued that further mitigation should have been allowed by
10 Officer Howard on the basis that the Appellant had provided full disclosure and co-operation with the enquiry.

HMRC's Case

39. On 23 October 2014, by entering the Green 'nothing to declare' channel at Manchester Airport, it was implicit that the Appellant was acting dishonestly. He had
15 deliberately taken action to positively evade duty and tax given that:

- a) The Appellant entered the Green channel, indicating that he had nothing to declare despite significant signage present.
- b) The Appellant does not deny that the amount of cigarettes imported was over the permissible limits. He says that they were for his own personal use which is an irrelevant consideration where goods are imported from a non-EU country. He also accepts that he did not acquaint himself with the restrictions and allowances on the importation of cigarettes, as he should have done before travelling to Bangladesh.
20
- c) The Appellant had previously travelled to Bangladesh and it is therefore reasonable to conclude that he would have known the level of allowances.
25
- d) The overall quantity of goods seized was 68 times the allowed limit.
- e) If the Appellant had not been stopped and the goods seized, the loss of Customs and Excise Duty to the Crown would have been £3,982.
- f) The Appellant had previously travelled to Bangladesh and it is therefore reasonable to conclude that he would have known the level of allowances.
30

40. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word 'dishonesty'.

35 'It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of evading tax, then by adding that the conduct must involve dishonesty before the penalty is to attach, Parliament must have intended to add a further element in addition to the mental element of intending to evade tax. We think that that element can only be that when he did, or
40 omitted to do, the act with the intention of evading tax, he knew that

5 according to the ordinary standards of reasonable and honest people
that what he was doing would be regarded as dishonest.’

10 41. Dishonesty in this context follows the guidance given by the Court of Appeal in *R v. Ghosh* [1982] 1 QB 1053, CA, where a two-step test for showing dishonesty was set out:

15 ‘In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. . . If it was dishonest by those standards
20 then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest
25 for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did.....’

30 42. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest, trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* 120051 UKPC 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* 9951 2 AC 378 was the correct test and was summarised as follows:

35 ‘...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. The Court of Appeal held this to be a correct statement of the law and their Lordships agree.’

43. The Appellant’s actions as set out in paragraph 39 above demonstrate that he acted dishonestly and deliberately took the action to positively evade duty and tax.

40 44. Because the Appellant acted dishonestly and deliberately took the action to positively evade duty and tax, HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty.

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

5 46. The penalty is based on the amount of Customs Duties, Import VAT and assessed excise duty that was involved in the offence. In this case the penalty is £1,991, being 50% of the culpable arrears.

10 47. HMRC exercised its discretion as to the amount of discount to be allowed. A 25% deduction was allowed for early disclosure and a further 25% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Howard who undertook the review said that he had not been able to give 40% allowance for either disclosure or co-operation because the Appellant had failed to provide all the information requested. Furthermore he believed it was inherently improbable that the Appellant, having previously travelled to the UK from
15 Bangladesh several times genuinely, believed he was entitled to import 13,4000 cigarettes, which represented 68 times his allowance.

Conclusion

20 48. The Appellant imported the cigarettes from Bangladesh. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods. The airport has clear signage which describes the allowances. The Appellant should have been fully aware that he was
25 bringing more goods into the country than he was entitled to without declaring them. The signage is designed to inform travellers who are not aware of importation restrictions. Bangladesh is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable when importing from EU countries.

30 49. The issue as to whether or not the cigarettes were for personal use does not arise. The facts of the matter are not in dispute and the Appellant did not challenge the legality of seizure of the goods within the statutory time limit. Where there is no timely challenge, the law provides that the goods are deemed to be condemned as forfeited and what that means in practice, is that, in law, the Appellant is deemed to
35 have imported the goods for commercial use. That is a final decision and the Tribunal has no jurisdiction to consider that issue any further.

40 50. The issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed and for the correct amount. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

45 51. It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. We have to

5 conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.

52. The Appellant has not offered any grounds on which he could successfully challenge the decision to issue the penalty. Hardship is not a valid ground of appeal. Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the
10 Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

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

15 54. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account, the fact that the Appellant was
20 not entirely open with Officer Harwood and did not provide the information he requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 50%. We concur with Officer Howard's assessment of the penalty.

25 55. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld nor why the penalty has not been calculated correctly and to best judgement.

56. The appeal is accordingly dismissed and the penalties totalling £1,991 confirmed.

30 57. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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