



TC05772

Appeal number: TC/2016/03072

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**

SHAHBAZ KHAN

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ELIZABETH POLLARD**

Sitting in public at Phoenix House Rushton Avenue Bradford on 13 February 2017

The Appellant in person

Ms Jennifer Newstead Taylor, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This is an appeal by Mr Shahbaz Khan (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 26 February 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £1,538 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

Background

2. On 28 December 2014, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Islamabad, Pakistan via Dubai.

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

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

5. Officer Loughlin’s evidence is that the Appellant confirmed he had travelled from Islamabad in Pakistan. He was then asked if he understood that there are certain goods travellers are not allowed to bring into the United Kingdom such as drugs, offensive weapons or indecent/obscene material. The Appellant confirmed that he understood and that he was not carrying any such items. He was also asked to confirm that he understood his allowances.

6. The Appellant confirmed when asked that the bags he had with him were his and confirmed that he had packed them himself. He was asked whether he was aware of the contents of his luggage and he stated ‘Yes’.

7. On conducting a search of the Appellant’s luggage, 9,980 Players Gold Leaf Cigarettes were found, together with 400 Marlborough KSF cigarettes. In total, the overall quantity of goods 10,380 cigarettes seized was 51 times over the Appellant’s personal allowance.

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 Loughlin seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 (“CEMA”) and issued the Appellant with Public Notices 1 and 12A, being Seizure

5 Information Notice C156 and Warning Letter BOR162, both of which the Appellant signed.

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

10 On 14 January 2016, HMRC's Officer Sophie Goodrum of HMRC's International Trade and Compliance Unit, wrote to the Appellant at the address he had provided, informing him that HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on the Appellant's response and co-operation with HMRC's enquires.

20 11. The letter, from Officer Goodrum, explained that if the Appellant was willing to co-operate with the enquiry he should provide the following within 30 days of the date of her letter:

- "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- Confirmation of the quantities of goods involved on each occasion.
- Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
- Details of all international travel during the period under enquiry, including the reasons for travel.
- An explanation of what you did with, or intended to do with, the smuggled goods.
- Any documentation you think will support the information you are providing.
- Any other information or explanations you think may be of use to this enquiry."

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

"Disclosure

45 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

5 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.

Co-operation

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

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

15 13. As Officer Goodrum had not received a response from the Appellant, on 29 January 2016 she issued a reminder letter to prompt a reply. The letter advised that if she did not hear from him by 13 February 2016, she would take that as his intention not to help her in her check and a decision would be made regarding the imposition of a penalty in this matter.

20 14. On 1 February 2016 Officer Goodrum received a call from the Appellant who confirmed he had received the initial letter 5 days previously. He asked what he needed to do to respond to the letter to which advice was given. The Appellant stated he was travelling to Dubai that day for 5 weeks and therefore would be unable to respond. Officer Goodrum asked the Appellant if there was anyone who could act on his behalf, to which he advised there was not. The Officer then asked the Appellant if
25 he could correspond with her via e-mail; however he stated he did not want to be dealing with the matter whilst on holiday. Officer Goodrum then informed the Appellant that if she did not receive a written response from him within the given time, she would continue with her enquiry without his co-operation. The Appellant
30 agreed to correspond with her via e-mail and was advised that Officer Goodrum would send the HMRC e-mail protocol for him to read, sign and return to enable her to correspond via e-mail. She informed the Appellant that she required the signed e-mail protocol document and his written response by 13 February 2016.

35 15. On 17 February 2016 Officer Goodrum received an e-mail from the Appellant who requested an update on his case. He reiterated his desire to co-operate with her regarding this matter.

40 16. On 17 February 2016 Officer Goodrum e-mailed the Appellant and advised him that the time he was given to provide his written disclosure had passed but that a further 10 day extension would be allowed. She attached copies of Factsheet CC/FS9 and Public Notices 160/300 which were issued to the Appellant on 14 January 2016 for his convenience

- 5 17. On 24 February 2016 Officer Goodrum e-mailed the Appellant to confirm that she had received his signed declaration but that she had still not received his written disclosure which she required no later than 27 February 2016.
18. On 24 February Officer Goodrum received Mr Khan's written disclosure via e-mail. He stated that at the time when he was travelling he used to smoke a lot of
10 cigarettes, roughly between 20-40 cigarettes per day. He stated it was very costly considering the price of cigarettes in the UK and when he went to Pakistan, his friend advised him to purchase the cigarettes from Pakistan and take them to the UK. He states that the cigarettes were for personal use and not to make any financial gain. The Appellant stated that this was his first attempt to bring cigarettes into the UK and he
15 was not aware of 'tax and customs duty regulations' or how many cigarettes an individual is allowed without paying relevant duties. Finally the Appellant stated that he has been travelling back and forth to Pakistan since 2006 but this was his first attempt to bring cigarettes back to the UK.
19. Officer Goodrum concluded that a penalty was due because she did not believe it
20 to be credible that the Appellant genuinely believed he was entitled to import such a substantial quantity of cigarettes without declaring them. From disembarkation to clearing Customs there is considerable signage displayed advising which countries fall inside/outside the EU and also the duty free allowances for excise dutiable products acquired outside the EU. The Appellant was a frequent traveller. There is
25 significant signage present in all airports and therefore it was unrealistic to believe that he has never seen these and was unaware of his customs allowances.
20. When mitigating the penalty, Officer Goodrum considered the information provided by the Appellant in his e-mail dated 24 February 2016. He had answered some questions raised in the initial letter, but he did not provide a full explanation as
30 to how the smuggling attempt was carried out, disclose the quantity of goods seized or his travel during the period under enquiry. The Appellant denied knowing his customs allowances even though he has indicated he is a frequent traveller. He prolonged the case by not providing his written disclosure within the given time. He also asked for an extension to his case without explaining the reason for the delay and had to be
35 prompted on four separate occasions to provide his written disclosure before it was finally received by HMRC.
21. Officer Sophie Goodrum calculated the Excise Duty, Customs Duty and Import VAT that would be due on the cigarettes seized amounted to £3,078. The figure was based on 10,180 cigarettes, taking into account the 200 cigarette allowance for duty-free importation
40
22. On 26 February 2016 Officer Goodrum issued a Civil Evasion Penalty - Notice of Assessment totalling £1,538 (Customs civil evasion penalty £333 and Excise civil evasion penalty £1,205), after allowing a 25% reduction for disclosure and a 25% reduction for cooperation, together with the Duty Calculations.
- 45 23. On 17 March 2016 Officer Goodrum received a telephone call from the Appellant saying that he didn't agree and could not afford the penalty.

5 24. On 24 March 2016 Officer Goodrum received an e-mail from the Appellant
requesting an independent review of her decision. He said that he had been
completely honest about the event in question, he wasn't aware of the UK rules and
regulations regarding importing cigarettes into the UK and the cigarettes were strictly
10 for personal use. He felt that the decision was particularly harsh and he was not in a
position to pay such a hefty penalty.

25. Officer Brian McCann carried out an independent review of the case and on 3
May 2016 notified the Appellant that the penalty was to be maintained in full. Officer
McCann explained why the penalty had been imposed and the factors considered in
the review.

15 26. Officer McCann considered that the Appellant had travelled frequently enough to
have experience of the procedures and allowances when passing through Customs.
The volume of cigarettes he was carrying was substantial and it was not credible that
he thought he could import such a substantial quantity of tobacco, into the UK from
Pakistan, without making a declaration to Customs. He had attempted to import and
20 bring back 10,380 cigarettes being tobacco products liable to both customs and excise
duties which was 51.9 times the allowance of 200 cigarettes. This could not be
considered to be an innocent act. There is considerable signage within airports which
outline the restrictions and allowances on importing goods into the UK. It would have
been sensible for the Appellant to seek assistance from UKBF officials if he had any
25 doubts as to his allowances. In choosing to ignore the signs and enter the 'green'
channel it was implicit that he had acted dishonestly.

27. Officer McCann pointed out that Civil Evasion Penalties can be reduced by up to
40% for early and truthful explanation as to the events giving rise to the penalties and
up to a further 40% by fully embracing and meeting responsibilities by, for example,
30 supplying information promptly, quantification of irregularities, attending meetings
and answering questions. There was sufficient evidence to demonstrate that the
Appellant intended to evade UK duty and taxes and he was therefore liable to be
issued with a Customs Duty Civil Evasion Penalty and Excise Duty Civil Evasion
Penalty. Given all the circumstances a full 80% discount could not be offered.

35 28. Officer McCann noted the Appellant's statement that he was unable to pay the
liabilities imposed and explained that it is specifically stated in legislation that the
ability to pay a civil penalty cannot be considered in determining the liability to such
penalties. The Appellant's representation with regards to his financial position could
not therefore not be considered.

40 29. By Notice of Appeal dated 2 June 2016, the Appellant appealed the penalty to the
First-Tier Tribunal.

Evidence

30. The combined bundle of documents included the witness statement of Officer
Graham Loughlin, and a copy of his notebook entries; and the witness statement of
45 Officer Sophie Goodrum, Both gave oral evidence under oath to the Tribunal. The

5 Appellant also gave oral evidence under oath to the Tribunal. We were also provided with copy correspondence, copy relevant legislation and case law authority.

The Law

31. The legislation relevant to this appeal is:

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

10 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

15 (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.

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

20 (a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(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)

25 s25 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

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

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

29 Reduction of penalty under section 25 or 26.

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

35 (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

40 (b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners. (...)

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

49(1) Where-

- 5 a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-
- (i) unshipped in any port,
those goods shall ...be liable to forfeiture.
- 10 Customs and Excise control of persons entering or leaving the United Kingdom.
- S78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)
- 15 S139 Provisions as to detention, seizure and condemnation of goods
- (1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.
- 20 (2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—
- (a) deliver that thing to the nearest convenient office of Customs and Excise; or
- (b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention
- 25 with full particulars of the thing seized or detained.
- (3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those
- 30 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—
- (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,
- 35 shall be given to the Commissioners at the nearest convenient office of Customs and Excise;
- (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
- 40 relation to that thing.
- (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
- 45 direct.

5 (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.

10 (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.

(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.

15 Paragraph 5 Schedule 3 CEMA states:

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.

20 Travellers' Allowance Order 1994

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

25 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—

30 (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;

35 (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

40 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.

45 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

5 2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
- 10 • 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 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.

15 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:

- 20 • 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.

25 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

30 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.

35 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:

- 40 • 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.

5 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

10 32. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £1,538 on the following grounds:

- The 10,380 cigarettes were for his own use.
- He purchased the cigarettes to save money as they were cheaper in Pakistan
15 than the UK.
- This was his first attempt to bring cigarettes into the UK
- He was unaware of tax and customs duty regulations of UK/EU of bringing goods in and how many an individual is allowed without paying any customs duty on the goods
- He innocently purchased the cigarettes and brought them to the UK, without
20 knowing the rules and regulations and without realising the consequences.

33. At the hearing, the Appellant repeated his earlier grounds of appeal.

34. He challenged Officer Loughlin's assertion that he had been asked whether he was aware of his allowances, saying that he was not aware of his allowances or the
25 difference between the red and green channels. He went through the green channel because that's what he always did. All he had done was join the queue with everyone else. He hadn't seen the allowances signs or even considered it necessary to read them. He had been to Pakistan to attend the funeral of his grandmother and most of the time following disembarkation he had been speaking on his mobile to his mother
30 and therefore was very much preoccupied.

35. He said that he had purchased the 9980 John Player cigarettes in Islamabad and the 400 Marlborough at the airport itself. The total cost was approximately £200. He had entered Pakistan with only one suitcase containing his clothes and possessions and had to purchase another suitcase to accommodate the cigarettes. When his bags
35 were searched (he had one bag containing clothes and personal possessions and one bag containing the cigarettes) at Islamabad airport the cigarettes were seen by the airport security officers and nothing was said. He now accepted that the officials were probably not aware of international allowances on tobacco products but that hadn't helped in dispelling his erroneous assumption that there was no limit on cigarettes
40 imported for personal use. He accepted that he should have checked his allowances, but said that he had not been deliberately dishonest.

5 36. The Appellant said that he had entered the green channel and said that he had
nothing to declare because that was his honestly held belief. When asked whether he
had any cigarettes or tobacco products he immediately said “yes”, not thinking that
there may have been a problem. The cigarettes were for his own personal use, his
friends and family. In all the circumstances he considered the penalty of £1,530 to be
10 particularly harsh. He felt that the correct course of action would have been some
form of warning or caution. He would have paid the duties there and then. He found it
difficult to understand how the cigarettes could be confiscated and that he also had to
pay a penalty on potentially evaded excise and customs duty when he was willing to
pay the duty.

15 37. He said that had lived in the UK since 2006 and since then had travelled
extensively. He had travelled to and from Pakistan six or seven times. He had also
travelled to South Africa in 2015.

38. HMRC's Case

20 39. On 28 December 2014, by entering the Green ‘nothing to declare’ channel at
Manchester Airport, it was implicit that the Appellant was acting dishonestly and
deliberately taking action to positively evade duty and tax given that:

- a) The Appellant entered the Green channel, indicating that he had nothing to
declare despite significant signage present.
- 25 b) The Appellant does not deny that the amount of cigarettes imported was
over the permissible limits.
- c) The Appellant was carrying 9980 cigarettes - 51 times more than his
personal allowance.
- 30 d) 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.
- e) It is well known that Pakistan is outside the EU for excise purposes The
Appellant should have been fully aware that he was bringing more goods
into the country than he was entitled to without declaring them.
- 35 f) Not doing so in the belief that the amount was likely over the allowances
constitutes dishonest behaviour. A reasonable and honest person would
check the allowances before importing a large amount of cigarettes.
Failing to declare under those circumstances constitutes dishonest
behaviour.

40 40. 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 because he acted dishonestly
and deliberately took action to positively evade duty and tax.

5 41. A finding of dishonesty requires that act undertaken (entering the green channel with an amount of excise goods above the allowance) was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what he was doing was, by those standards, dishonest.

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

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

15 ‘It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of evading tax, then by adding that the conduct must involve dishonesty before the penalty is to attach, Parliament must have intended to add a further element in addition to the mental element of intending to evade tax. We think that that element can only be that when he did, or omitted to do, the act with the intention of evading tax, he knew that according to the ordinary standards of reasonable and honest people that what he was doing would be regarded as dishonest.’

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

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

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40 45. ‘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:

45

‘...although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by

5 ordinary standards, a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct statement of the law and their Lordships agree.'

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

15 47. 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.

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

20 49. 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 £1,538, being 50% of the culpable arrears.

25 50. HMRC exercised its discretion as to the amount of discount to be allowed. A 20% deduction was allowed for early disclosure and a further 20% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer McCann who undertook the review said that he had not been able to give the full 40% allowance for either disclosure or co-operation because the Appellant had failed to provide the information requested. He believed it was inherently improbable that the Appellant, having previously travelled to the UK from a non
30 EU country, believed he was entitled to import a total of 10,380 cigarettes, which represented 51.9 times his allowance.

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

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

Conclusion

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

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

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

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

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

57. It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and
30 outside the European Union and the duty free allowances for excise goods. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty
35 and tax.

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

59. 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.

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

5 reduction for an early and truthful explanation as to why the arrears arose. Secondly,
there can be a reduction for fully embracing and meeting responsibilities under the
enquiry procedure. Taking these factors into account, the fact that the Appellant did
not provide the information Officer Goodrum requested, the penalty has in our view
10 been calculated correctly and reduced appropriately for disclosure and co-operation
resulting in a total reduction of 40%. We concur with Officer McCann's assessment
of the penalty.

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

62. The appeal is accordingly dismissed and the penalties totalling £1,538 confirmed.

20 63. 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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