



TC05973

Appeal number: TC/2015/06891

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**

DILSHAD ALI AHMED

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
 MEMBER MARYVONNE HANDS**

**Sitting in public at Nottingham Justice Centre, Carrington Street, Nottingham
on 10 May 2017**

The Appellant in person

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

DECISION

1. This is an appeal by Mr Dilshad Ali Ahmed (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 1 September 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £590, being a penalty of £108 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and £482 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 which he was importing into the United Kingdom above the personal allowance of 200 cigarettes.

10 **Background**

2. On 11 June 2014, the Appellant was stopped and questioned by a UK Border Force Officer on entering the Green ‘nothing to declare’ channel at Heathrow Airport arriving from Erbil Iraq, via Vienna, Austria.

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. Iraq is not in the EU and therefore, travellers, for the purposes of the Travellers’ Allowances 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 Officer Depala, a UKBF Officer.

5. Officer Depala’s evidence is that he was on duty at the rear of belt 2, Terminal 1, London Heathrow Airport on 11 June 2014 where, with other officers, he was monitoring baggage off the Austrian Airline flight OS457 from Vienna.

6. At approximately 22:15 hours he opened and examined a suitcase bearing a baggage tag OS 271900 and found that it contained a quantity of cigarettes. The bag was in the name of (Mrs) Razhan J Kamal.

7. At 22:25 hours whilst on duty at the Green/Red Channels of terminal one Officer Depala intercepted Razhan Kamal and two other people travelling together who had entered the Green Channel. They had six bags in total. He asked for their passports and tickets and then asked the following question of all three:-

“Do you understand your customs duty free allowances such as 200 Cigarettes, 1 Litre of alcohol etc.” At this point a man identified by his passport as Mr Dilshad Ali Ahmed (the Appellant) said “Yes, I have 30 cartons of cigarettes.”

8. Officer Depala then examined all six bags and found 6,000 ‘Superslim’ cigarettes in one of them.

9. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended), Officer Depala 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 Information Notice C156 and Warning Letter BOR162, both of which the Appellant signed.

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

11. On 6 May 2015, HMRC's Officer Claire Taggart 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.

12. The letter from Officer Taggart 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."

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

“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
5 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);
- provide all information promptly;
- 10 • answer all questions truthfully;
- give the relevant information to establish your true liability;
- co-operate until the end of the investigation.”

14. On 20 May 2014, in the absence of anything further from the Appellant, Officer
15 Taggart sent a reminder letter to the Appellant.

15. On 25 May 2015 the Appellant telephoned Officer Taggart and advised her that he hadn't received the initial letter. The Appellant also stated that he was unhappy as the Border Force Officer had told him that no further action would be taken. Officer Taggart reissued the initial letter on 26 May 2015.

20 16. On 8 June 2015 the Appellant wrote to Officer Taggart. The Appellant attached a signed copy of Officer Taggart's letter of 6 May 2015, re-issued on 26 May 2015, indicating that he had read and understood its contents. He stated that he did not attempt to smuggle goods into the UK and that he was simply ignorant of the limits for importing tobacco from Iraq. The Appellant added:

25 “There was no attempt at smuggling goods into the UK, it was a simple case of ignorance of the limits for tobacco import from Iraq. I was accompanied by my wife, Mrs. Razhan Kamal and my infant child Dahlia Ahmed. My wife (pregnant at the time) was aware [sic] of the content of the suitcases and was equally unaware of the import
30 guidance. She has limited English. On that day my wife took the first case to arrive and took a seat in the baggage hall to await me. At that time she was approached by two customs officers who told her they believed the suitcase contained cigarettes. They agreed to await me joining them with the rest of the baggage and we were then taken to a customs area where the cases were opened. Some 30 cartons each containing several packets of cigarettes were taken by customs. Following checking with records showing
35 there was no previous occasions of customs concern we were told that the cigarettes were above import limits and would be confiscated but as this was a first offence no further action would be taken;

Neither of us made any attempt to hide the cigarettes and at the time we were stopped we had not entered either of the customs channels;

5 We had no intention to “smuggle” the cigarettes because we believed it was perfectly legal to bring these into the country and as soon as we were told this was not the case we accepted the confiscation and have been careful to comply with all such matters on the only further occasion that we left the UK (to Italy in April 2015) when we brought no tobacco or alcohol in our baggage.”

10 17. On 28 July 2015 Officer Hall issued CEP 15/0574 ‘civil penalty - notice of assessment’ to the Appellant. The penalties were in the sum of £108 (customs civil evasion penalty) and £482 (excise civil evasion penalty), resulting in a total liability of £590. The penalty was calculated on the total of 5,800 cigarettes - (6,000 seized less personal allowance of 200).

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

20 19. She explained how the penalty had been calculated and advised that a 20% reduction from the maximum penalty had been made which included a 65% discount (30% for disclosure and 35% for co-operation) of the total evaded duty of £1,689 reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry.

25 20. On 6 August 2015 HMRC received the Appellant’s request for review. The Appellant stated the following grounds for review. He said that some of the information he gave had not been considered. He said:

30 “My wife who was six months pregnant at the time, was feeling tired and wanted to find somewhere to sit. She had with her one of our bags that contained the cigarettes. I was waiting at the baggage carousel for the rest of our luggage. I did not look to see where she was going. My wife’s spoken English is very poor and she cannot read English at all. So she wouldn’t have been able to understand any of the signage.

35 My wife was stopped by customs personnel before she had entered either the green or the red channel. I joined her with the rest of our luggage and they took us into the green channel to look through our luggage. When they asked us whether we had any cigarettes we at once revealed the cigarettes we had in our bag. I had not been aware of any restrictions on bringing in cigarettes into the UK. The officials accepted that we hadn’t had any intention of smuggling cigarettes.

40 They said that they would confiscate the cigarettes but as this was a first offence there would be no charges to pay and I would not be charged or arrested. They said that if it were to happen again I would be fined and/or arrested. They gave me a receipt and said they would not be taking any further action.

I believe the CCTV footage ..would be proof that I am telling the truth about what occurred. I was not given the opportunity to declare the cigarettes through the Red Channel because the customs officials lead us through the Green Channel where our bags were then inspected.”

- 5 21. On 1 September 2015 Officer Clydesdale wrote to the Appellant to inform him that the decision to issue him with a civil evasion penalty was to be upheld following the review.

On 24 November 2015 the Tribunal Service received a Notice of Appeal from the Appellant.

10 **Evidence**

22. The combined bundle of documents included the witness statement of Officer Depala, and a copy of his notebook notes and the witness statement of Officer Jane Hall. Both gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence to the Tribunal under oath. He indicated that his English was poor.
15 Although he understood and could speak everyday English, he preferred to give evidence through an interpreter, provided by the Tribunal Service. He said that his wife was unable to attend to give evidence as she was taking an exam. We were provided with copy correspondence, copy relevant legislation and case law authority.

23. Officer Depala said in evidence that when stopped at the Green Channel, the
20 Appellant did not appear to have any difficulty either understanding or replying to his questions. In answer to the question whether he had any tobacco, he clearly replied “30 cartons”.

24. The Officer says that the Appellant’s statement that his wife was led to the Green Channel was incorrect. He recalled stopping a family of three, including the
25 Appellant. He also recalled that they had six bags on two trolleys and the group was together.

25. He said that he had lived in the UK since 2001 and in that time had travelled to Kurdistan, Iraq and other countries returning to the UK four times. He said that he was aware there were signs in the airport relating to tobacco and other restrictions and allowances but that when with his family he didn’t take much notice of them. He said
30 however that he was not aware of the differences between the Red, Green and Blue Channels, and could not recollect, on previous occasions when returning to the UK, which Channel he had gone through.

26. The Appellant was adamant that CCTV footage would show that he and his
35 family had been led by two UK Border Force officers into the Green Channel.

27. When asked what Channel he would have gone through had he not been led to the Green Channel he said that he did not know.

The Law

28. The legislation relevant to this appeal is:

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

Penalty for evasion of excise duty.

- 5 (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),
- 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.

- 20 (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),
- 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. (...)

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

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

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

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

S139 Provisions as to detention, seizure and condemnation of goods

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—

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

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.

25 (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, 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.

(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:

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

Travellers' Allowances Order 1994

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

(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—

(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;

(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

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.

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:

- 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 evaded or sought to be evaded.

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

3.2 By how much can the penalty be reduced?

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.

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

- 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

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.

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

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.

30 2.3.1 Reductions under Civil Evasion Penalty Rules

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

- 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.

40

The Appellant's Case

29. 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 issue penalties on the following grounds:

5 "The reviewer stated they did not believe it was credible that I did not know what
restrictions were in place for importing tobacco, and also comments that I said I "thought
it was perfectly legal" to bring this number of cigarettes into the country. I did not state
this. I explained that I was not aware of any restrictions on importing cigarettes without
10 declaring them. This does not mean, however, that I would not have declared them in
case there were restrictions, and if so, whether or not I had exceeded them. Unfortunately
I did not have the chance to do so.

 As stated in my request for a review, Border Force officers approached my wife before
she entered either the green or red channel. CCTV footage would prove this, but only a
written account in the form of the Border Force Officer's Notebook has been considered.
15 I am unhappy that all available evidence has not been considered when imposing this
penalty."

30. At the hearing, the Appellant largely reiterated his grounds of appeal to maintain
that he, his wife and child had been escorted by UK Boarder Officers from where they
were in the baggage collection area through the Green Channel. He said that he was
20 unable to afford the penalties. He had worked for a year or so on entering the UK in
2001 but since then had been on long term sick and in receipt of benefits.

HMRC's Case

Burden of proof

31. Section 16(6)(a) of the Finance Act 1994 states in relation to the burden of proof:

25 "On an appeal under this section the burden of proof as to -

(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

Shall lie upon the Commissioners; but it shall otherwise be for the Appellant to show that
the grounds of which any such appeal is brought have been established."

32. The penalty is civil in nature, and therefore the standard of proof is on the balance
30 of probabilities (*Revenue and Customs Commissioners v. Khawaja* [2008] STC 2880
(and *N'Diaye v. Revenue and Customs Commissioners* TC04562).

Dishonesty

33. In considering whether an individual's state of mind and whether there was
dishonesty, it is not necessary to enquire as to their individual standards of honesty.
35 For conduct to be dishonest, it has to be to normal acceptable standards of honest
conduct (*Barlow Clowes International Ltd (in liquidation) and other v. Eurotrust
International Ltd and others* [2005] UKPC 37 at paragraph 16 and *Abou-Ramah and
another v. Abacha and others* [2006] EWCA Civ 1492).

34. The test for dishonesty when issuing a Civil Evasion Penalty is therefore an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. In reaching a judgment as to alleged dishonesty in civil penalty cases, the tribunal must have regard to the fact that while the test is primarily objective, the tribunal's fact finding responsibilities in relation to the taxpayer's knowledge are critical (see *Osman v. HMRC* [2016] UKFTT 534 (TC) and *Bintu Binette Krubally N'Diaye v, HMRC* [2015] UKFTT 0380 (TC) (Tab B6)).

35. The burden of proof for dishonesty in a civil evasion penalty case is assessed on the balance of probabilities (see *Sahib Restaurant v. HM Revenue and Customs*, unreported, February 2008)

Submissions

36. On 11 June 2014, by entering the Green 'nothing to declare' channel at Heathrow Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax:

37. 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.

38. The Appellant with his family entered the Green channel, indicating that he had nothing to declare despite significant signage present.

39. The Appellant does not deny that the amount of cigarettes imported was over the permissible limits.

40. The Appellant told the UKBF Officer that he was aware of the allowances relating to cigarettes and tobacco. He was carrying 6,000 cigarettes - 29 times his personal allowance.

41. It is well known that Iraq 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.

42. The Appellant says that he explained to Officer Depala that he was not aware of any restrictions on importing cigarettes without declaring them. However, 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.

43. The Appellant has stated that he was not given the opportunity to declare the cigarettes through the red channel because the Customs officials led him and his family through the green channel. The Officer's notebook states that he intercepted a family of three in the green channel for a baggage search. Officer Depala's evidence

is clear that the Appellant and his wife were stopped after entering the green channel and not before.

44. The penalty imposed on the Appellant is civil in nature. As a consequence, HMRC must establish on the balance of probabilities that the Appellant engaged in a course of conduct for the purpose of evading excise duty and his conduct involved dishonesty.

45. A finding of dishonesty requires that the 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.

46. 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.

Conclusion

47. The Appellant imported the cigarettes from Iraq. 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 importation restrictions. Iraq 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.

48. The Appellant had previously travelled to the UK from Iraq and other non EU countries on several occasions and it is more likely than not that he would have been aware of the allowances for importing tobacco and cigarettes. In any event, a reasonable person would check the allowances before importing such a large number of cigarettes.

49. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. As HMRC say, the burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities.

50. 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.

51. The Appellant in his letter to HMRC of 8 August 2016 said that his wife had with her the bag that contained the cigarettes and he was waiting at the baggage carousel for the rest of their luggage. He said that she wanted somewhere to sit but he

“did not look to see where she was going. My wife’s spoken English is very poor and she cannot read English at all. So she wouldn’t have been able to understand any of the signage”.

52. He says that his wife

5 “was stopped by customs personnel before she had entered either the green or the red channel. I joined her with the rest of our luggage and they took us into the green channel to look through our luggage”.

53. The Appellant asserts that he was unaware of his wife’s whereabouts whilst he was awaiting their other bags at the carousel and that it was his wife who was stopped
10 by customs before she had entered the Green Channel. He says however that all of them were led into the Green Channel. We find this inherently improbable, particularly given that no mention was made of this by the Appellant when the goods were seized. If the Appellant was unaware of restrictions and allowances it is difficult
15 to understand why he did not say so, and protest that had he known about the restrictions or had them explained to him, he would have declared the goods at the Red Channel. Following the seizure, according to Officer Depala, the Appellant and his family left without further discussion.

54. We prefer the evidence of Officer Depala and have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.

20 55. The Appellant has not offered any grounds to successfully challenge the decision to issue the penalties.

56. The Appellant said in evidence that he has been on long term unemployment benefit and that he cannot afford the penalties. 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)
25 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.

57. 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.

30 58. HMRC can reduce a penalty on the basis of the customer’s co-operation. No challenge has been brought as to the calculation of the duties and level of mitigation. 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
35 enquiry procedure. Taking these factors into account, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 65%. We concur with HMRC’s assessment of the penalty and mitigation.

40 59. The appeal is accordingly dismissed and the mitigated penalties totalling £590 confirmed.

60. 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

RELEASE DATE: 26 June 2017

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