



TC05023

Appeal number: TC/2015/03169

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

ASEEM BINYAMEEN

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER PHILIP JOLLY**

Sitting in public at Bennett House, Town Road, Hanley, Stoke on Trent on 8 December 2015

Mr Yassar Hussein for the Appellant.

Mr Simon Charles, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This is an appeal by Mr Aseem Binyameen (“the Appellant”) against a decision by the Respondents (“HMRC”) on 20 January 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £6,689 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 6 October 2013, 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 on flight PA220.

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 Allowance 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 Andrew Whitehead, a UKBF Officer.

5. Officer Whitehead’s evidence is that the Appellant confirmed he had travelled from Islamabad in Pakistan and confirmed he was travelling alone. He was asked if he understood his allowances and replied ‘Yes’. He was then asked if he had anything in excess of his allowances to which he stated ‘No’. 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.

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’. The Appellant was then asked to confirm what was in his bags. He said that they contained ‘clothes and books’.

7. On conducting a search of the Appellant’s luggage, which consisted of two holdall bags, one small black suitcase and two large black suitcases, 40,000 John Player Gold Leaf King Size Filter cigarettes were found. No clothes or books were found in the luggage. When asked who the cigarettes were for the Appellant said they were for himself and that he had paid for them. In total, the overall quantity of goods seized was 200 times the Appellant’s personal allowance.

5 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 Whitehead 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
10 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
seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

15 10. On 6 October 2014, HMRC's Officer Melissa Hatcher 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
20 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.

25 11. In her letter, Officer Hatcher 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.
- 30 • 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.
- 35 • 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.
- 40 • 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.
- 45 • Any other information or explanations you think may be of use to this enquiry".

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

5 “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.

10 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;
- 15 • 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 20 October 2014 Officer Hatcher issued a reminder letter to the Appellant.

20 14. On 23 October 2014, Officer Hatcher received a telephone call from Mrs Binyameen the Appellant’s mother. Officer Hatcher advised her that HMRC needed a signed authority (form COMP 1) from the Appellant to confirm that she could represent him.

25 15. During the conversation Mrs Binyameen advised Officer Hatcher that the Appellant was seventeen years old and that he didn’t know that he couldn’t bring cigarettes into the United Kingdom. Mrs Binyameen said that Officer Hatcher’s initial letter of 6 October 2014 had not been received. Officer Hatcher agreed to reissue the letter, doing so on 24 October 2014. Officer Hatcher also enclosed a form COMP 1 for the Appellant to complete if he required his mother to represent him.

30 16. On 29 October 2014, Officer Hatcher received a signed receipt from the Appellant to confirm he had read and understood the enclosures, i.e. Public Notices 160 and 300 and the Factsheet CC/FS9 which were enclosed with Officer Hatcher’s letter of 6 October 2014 and the reissue of the letter sent on 24 October 2014. There was also an incomplete form COMP 1.

35 17. On 30 October 2014 Officer Hatcher re-issued form COMP 1 for correct completion.

40 18. On 31 October 2014 Mrs Binyameen telephoned Office Hatcher to say that the Appellant was advised at Islamabad Airport that if the duty was paid in Pakistan he could bring as many cigarettes into the United Kingdom as he wished. She also stated the Appellant’s friends had ‘chipped in’ to buy the cigarettes. Officer Hatcher

5 explained that HMRC have no jurisdiction over other countries or what happens in their shops.

19. On 5 November 2014 Officer Hatcher received the second form COMP 1 from the Appellant, which unfortunately was not signed by the Appellant. Alongside the Comp 1 was a handwritten letter providing the information Officer Hatcher's initial letter of 10 6 October 2014 had asked for.

20. The handwritten letter from the Appellant reiterated what his mother had said to Officer Hatcher in the telephone conversation of 31 October 2015 in that it stated he was told at Islamabad Airport that if the duty was paid in Pakistan he could bring the cigarettes back to the United Kingdom. The letter also stated this was his first time he 15 had attempted to bring goods into the United Kingdom and that he had no receipts. It also stated that he had previously travelled a few times with his father including attending a family wedding, but could not remember on what dates.

21. On 6 November 2014 Officer Hatcher issued a third form COMP 1 for correct completion, which on 13 November 2014 was received fully completed, confirming 20 that his mother had his authority to represent him.

22. On 20 January 2015 Officer Hatcher issued a 'civil penalty - notice of assessment' to the Appellant in the sum of £6,689 (£1,327 customs civil evasion penalty and £5,362 excise civil evasion penalty). Officer Hatcher allowed a 15% reduction for disclosure and 25% reduction for co-operation.

23. On 12 February 2015, Dicksons Solicitors wrote to HMRC saying that at the time 25 of seizure the Appellant was only sixteen years of age. They reiterated the previous assertion that the Appellant had been advised at Islamabad Airport that he could bring into the United Kingdom whatever he had purchased. The cigarettes were in his hand luggage and the Appellant, when apprehended, had given a full and frank disclosure 30 that he was carrying a large quantity of cigarettes. They requested a review of the decision. Officer Hatcher therefore transferred the matter to HMRC's local compliance appeals and reviews department in Glasgow.

24. On 6 March 2015, HMRC wrote to the Appellant to confirm that a full 35 independent review had been carried out by Officer Christopher Dakers who had not previously been involved in the decision. The Appellant was informed that the decision had been upheld.

25. Officer Daker advised the Appellant that he had taken into account that he was 40 only sixteen at the time of seizure, but that HMRC policy advice dictates that this does not have any effect on an individual's liability to a Civil Evasion penalty. There had been no difficulty in the Appellant understanding Officer Whitehead and answering his questions.

26. Officer Daker said that when stopped at the airport the Appellant said he was not carrying any goods in excess of his allowance and that he was carrying 'books and clothes' in his bags. However, a subsequent search of the bags revealed 40,000 cigarettes but no clothes or books. The officer said that this demonstrated that the

5 Appellant was aware that there were restrictions on importing cigarettes and that he
had made a dishonest attempt to mislead officer Hatcher. Officer Daker said that the
Appellant's travel history indicated that, having travelled to and from Pakistan prior
to the seizure, he was an experienced traveller and it was therefore reasonable to
10 conclude that he would have been aware of the restrictions, import allowances and
procedures when passing through customs. Officer Daker did not consider it credible
that the Appellant believed he was entitled to import 40,000 cigarettes from Pakistan,
which represented 200 times his allowance, without making a declaration to customs.

15 27. Officer Daker noted that although the Appellant said he had been advised by retail
staff at Islamabad airport that he could bring back whatever duty paid goods he purchased
in Pakistan, it was not credible that he would accept the word of someone whose job it is to
sell tobacco; especially considering the price difference between cigarettes in Pakistan and
the UK. In any event, there is considerable signage within Manchester airport at both the
20 baggage reclaim area and before entering the 'green' channel, which outlines the
restrictions and allowances on importing goods into the UK. At the very least it would
have been prudent for the Appellant to have checked the allowance he was entitled to. The
signs are visual aids which include pictures of dutiable goods, including tobacco products.
In choosing to ignore the signs and enter the 'green' channel it was implicit that he had
acted dishonestly.

25 28. Officer Daker advised that although the Appellant said that he was unable to pay
the liabilities imposed on him, 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.

30 29. Officer Daker 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
responsibilities under the enquiry procedure.

35 30. Officer Daker said that whilst the Appellant had responded to Officer Hatcher's
enquires within the appropriate timescales, he had not fully responded to the questions
outlined in her letter of 6 October 2014, nor was it considered that he provided fully
truthful information. For that reason Officer Hatcher had allowed a 15% reduction for
disclosure and a 25% reduction for co-operation, which Officer Daker considered
40 reasonable and correct. In his view, a total penalty reduction of 40%, given the level
of disclosure and co-operation, was appropriate. The Appellant was advised that if
he did not agree with the decision he could appeal to the Tribunal within 30 days.

31. On 20 May 2015 HMRC received the Appellant's Notice of Appeal against the
decision. The Notice of Appeal included an application for permission to make a late
appeal.

5 32. On 19 June 2015 HMRC served notice on the Tribunal and the Appellant that they did not oppose the Appellant's application for an extension of time in which to lodge his appeal

Evidence

10 33. The combined bundle of documents included the witness statement of Officer Andrew Whitehead, and a copy of his notebook notes, and also the witness statement of Officer Melissa Hatcher. Both 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.

15 34. In evidence the Appellant said that he had travelled to Islamabad to attend a family wedding. The trip had taken three days including two days travelling. He was not able to provide any great detail about the wedding he had attended, save that it was approximately four hours travelling away from the airport. He had travelled previously twice before, once to visit his ill grandmother and on another occasion with his father to another family wedding. He said that he had never previously
20 brought cigarettes back with him.

35. The Appellant initially asserted in evidence that when interviewed by Officer Whitehead, he had said that he was carrying 'clothes and cigarettes' not 'clothes and books'. However on further cross examination he agreed that he said he was carrying 'clothes and books' but that Officer Whitehead had looked at him was quizzically, at
25 which point he said that he was also carrying 'some cigarettes'. He agreed that he was not carrying any clothes or books. He also agreed that he told Officer Whitehead that the cigarettes were for him, whereas correspondence from his mother indicated that friends had chipped in to buy the cigarettes. He also agreed in evidence that it was his intention to give some of the cigarettes to others, in particular to his father and
30 brother.

36. The Appellant said that the importation of the cigarettes was not a premeditated act. He had not taken any suitcases with him, having bought the luggage at the airport. He also purchased the cigarettes at the airport in duty free having been told that he would not have to pay duty on the cigarettes when returning to the UK. He had
35 purchased the cigarettes for approximate £700 in cash and obtained a hand written receipt which he had lost. He agreed that the cigarettes would cost £12,000 if purchased in the UK. He said that if he had bought the cigarettes outside the airport he would have been able to purchase them much cheaper. However he could not explain why he thought the cigarettes may have been 'duty free' in the UK when he had
40 purchased them 'duty free' in Islamabad airport.

37. The Appellant said that the 40,000 cigarettes consisted of 200 packs of 200 (20×10 packets in each pack) and that 80 packs were for him. The other 120 packs were for others. He said that he smoked 10 to 15 cigarettes a day and agreed that it would therefore take approximately three years to smoke 80 packs (16,000) of
45 cigarettes.

5 38. The Appellant said that he had a part-time job earning approximately only £312 per month, and that he did not have the financial means to pay the penalties that are being imposed

The Law

39. The legislation relevant to this appeal is:

10 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 –

(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. (...)

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

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.

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

(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

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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,

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those goods shall ...be liable to forfeiture.

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

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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

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(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—

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(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.

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(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—

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(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;

(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;

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

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(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.

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 40. 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 £6,689 on the following grounds:

- The amount of the penalty is disproportionate. He refers to a case which he does not name which he states is currently with the House of Lords.
- 15 • The goods were for personal use.
- He is unable to afford to pay the amount detailed in the assessment.

41. At the hearing, Mr Hussein said that the Appellant was only sixteen when intercepted on 6 October 2013. He reached seventeen just over two months later, on 10 December 2013. He said that the Appellant had acted in good faith and was not
20 aware of the limits on the importation of cigarettes.

42. Mr Hussein said that in his view an adult should have been present when the Appellant was interviewed. His request to make a telephone call to his parents when intercepted by Officer Whitehead was refused. He accepted that the Appellant, albeit sixteen, was a mature individual who spoke excellent English, but there was some
25 doubt as to precisely what answers the Appellant had given to Officer Whitehead's questions and it clearly would have been useful for his mother or father to have been present.

43. Mr Hussein said that it was a very unsophisticated first offence. The Appellant was of good character and, he says, had purchased the cigarettes in Islamabad airport
30 as he understood that in doing so duty would have been paid and that was the reason why he had been informed no duty was payable when importing the cigarettes to the UK. Mr Hussein said the Appellant may have been stupid and naive but he was not dishonest. He also argued that further mitigation should have been allowed by Officer Hatcher on the basis that the Appellant had provided full disclosure and co-operation
35 with the enquiry.

HMRC's Case

44. On 6 October 2013, by entering the Green 'nothing to declare' channel at Manchester Airport, it was implicit that he was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- 40 a) the Appellant was entering the Green channel, indicating that he had nothing to declare despite significant signage present.

- 5 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, although Mrs Binyameen said that the Appellant's friends had 'chipped in' to purchase the cigarettes and he now says that only some of the cigarettes were for him.
- 10 c) The Appellant stated he had clothes and books in his luggage but in fact had only cigarettes. He did not tell the truth about the contents of his luggage.
- d) The overall quantity of goods seized was 200 times the allowed limit.
- 15 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 £11,149.
- f) The Appellant has travelled extensively to Pakistan and it is therefore reasonable to conclude that he would have known the level of allowances.

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

 '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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46. 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:

35 '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

40 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

5 consider to be dishonest, even if he asserts or genuinely believes that
he is morally justified in acting as he did.....’

10 47. ‘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:

15 ‘...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
20 Court of Appeal held this to be a correct statement of the law and their
Lordships agree.’

48. The Appellant’s actions as set out in paragraph 36 above demonstrate that he
acted dishonestly and deliberately took the action to positively evade duty and tax.

25 49. The case which Mr Hussein briefly referred to (paragraph 40 above) has no
relevance to this case as it relates to consumption and proportionality issues in respect
of EU importations and therefore is not relevant to this appeal.

50. 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.

30 51. 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.

35 52. 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 £6,689, being
60% of the culpable arrears.

40 53. HMRC exercised its discretion as to the amount of discount to be allowed. A 15%
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 Daker 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 the information requested. He believed it was inherently improbable that
the Appellant, having previously travelled to the UK from Pakistan several times,
believed he was entitled to import 40,000 cigarettes, which represented almost 200
times his allowance.

5 Conclusion

54. 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 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. It is clear from the Appellant’s evidence to the Tribunal that he knew customs duty was an issue. That was the reason why he said he had purchased the cigarettes at Islamabad airport. The Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes.

55. We found the Appellant’s evidence inconsistent. When initially questioned by Officer Whitehead, the Appellant said that he had books and clothing in his bags, whereas he actually had 40,000 cigarettes and no books or clothing. The Appellant was not able to provide any evidence as to where he had purchased the cigarettes or the price he had paid for them.

56. The Appellant had been a regular traveller to the UK from Pakistan 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 importing such a large number of cigarettes.

57. 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 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.

58. 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]).

59. 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 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

5 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 and tax.

60. 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.
10 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.

61. 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
15 Act 2003.

62. 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 Hatcher and did not provide the information she requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 40%. We concur with Officer Daker's assessment of the penalty, as set out in paragraph 26-
25 30 above.

63. 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.

64. The appeal is accordingly dismissed and the penalties totalling £6,689 confirmed.

30 65. 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
35 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

40 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2016