

[2017] UKFTT 221 (TC)



TC05711

Appeal number: TC/2016/02778

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

GRAHAM MCGRATH

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JACQUI DIXON**

Sitting in public at City Centre Tower, Hill Street, Birmingham on 27 January 2017

The Appellant in person

Mr David Griffiths, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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1. This is an appeal by Mr Graham McGrath (“the Appellant”) against a decision by the Commissioners for Her Majesty Revenue & Customs (“HMRC”) notified to the Appellant by letter on 18 April 2016. This was a varied decision from earlier
10 decision(s) notified to the Appellant by letters on 2 January 2016 and 12 February 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £1,789.00 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or
15 attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

Background

2. On 23 November 2014 the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Manchester
20 Airport arriving on flight TCX2469 from Banjul, Gambia.

3. At the airport, 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
25 of the Travellers’ Allowance Order 1994, have a personal allowance of 200 cigarettes.

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

30 5. Officer Bushnell says that he asked the Appellant a series of initial questions about his journey, his baggage and whether he was aware that there are certain prohibitions and restrictions on goods being imported. The Appellant confirmed that he was aware of the prohibitions and restrictions.

35 6. The Officer searched the Appellant’s baggage, inside of which he found 4,000 Ronson KSF Cigarettes which is 20 times the allowed limit.

7. As the goods had not been declared and were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended), the Officer 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
40 Information Notice BOR156 and Warning Letter BOR162, both of which the Appellant signed.

8. 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.

- 5 9. On 24 December 2014 the Appellant arrived at Birmingham Airport on flight TCX4133 from Banjul, Gambia.
10. At the airport from disembarkation to clearing Customs there are similarly 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
10 acquired outside the EU. There are notices in the baggage reclaim area and just before the Custom channel entrances. Mr McGrath chose to exit through the Green 'nothing to declare' channel, indicating that he had nothing to declare.
11. The Appellant was stopped and questioned on entering the Green 'Nothing to Declare' channel by UK Border Force Officer Andrew Copley and asked by the
15 Officer where he had travelled from. The Appellant confirmed that he had travelled from Gambia.
12. The Appellant was asked whether the baggage was his, had he packed the baggage himself and was he aware of the contents of the baggage. The Appellant said he understood and confirmed that he was aware of their contents.
- 20 13. The Appellant was asked whether he was aware that there were restrictions on the amount of cigarettes and tobacco that could be imported into the UK. The Appellant confirmed he was aware of the restrictions.
14. The Appellant was asked specifically if he had any cigarettes and he replied “eighteen to twenty packets” (of 200). He was then asked if he knew how many he
25 was allowed and he replied “one”.
15. On conducting a search of the Appellant’s baggage, 3,800 Ronson KSF cigarettes were discovered which was nineteen times the Appellant’s allowed limit.
16. Again, as the goods had not been declared and were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended), the Officer seized the goods
30 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 BOR156 and Warning Letter BOR162, both of which the Appellant signed.
17. Again the legality of seizure was not challenged in the Magistrates’ court and the
35 seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.
18. In total the overall quantity of goods seized at Manchester and Birmingham airports, i.e. 7,800 Ronson KSF cigarettes, was thirty-nine times the Appellant’s allowed limit. If the Appellant had not been stopped, a total of £2,237 in Customs and Excise Duty would have been evaded in addition to any potential sale value of the
40 goods.
19. On 19 November 2015, HMRC’s Officer Andy Lawrence, a post detection audit officer of HMRC’s International Trade and Compliance Unit, wrote to the Appellant

5 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
10 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
- Public Notice 160 in respect of Excise Duty
- Factsheet CCIFS9 (The Human Rights Act and Penalties).

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

20. In his letter, Officer Lawrence 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
20 his 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
25 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
30 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.
- 35 • 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."

40 21. Officer Lawrence 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

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 22. As no response had been received, on 4 December 2015 Officer Lawrence issued a reminder letter to the Appellant requesting a response by 20 December 2015.

23. As he received no response, on 6 January 2015 Officer Lawrence issued a Civil Evasion Penalty - Notice of Assessment for the sum of £2,296. The customs civil evasion penalty was £497 and the excise civil evasion penalty was £1,799. The Notice
20 of Assessment explained how the penalty had been calculated and advised no reduction had been made for disclosure or co-operation as the Appellant had not made any attempt to correspond with HMRC. The maximum reductions allowable are 40% for disclosure and 40% reduction for co-operation.

24. In a letter dated 19 January 2016 the Appellant requested a review of his case. In
25 his letter he advised that he visits his girlfriend, who lives in Gambia on a regular basis. He said that he would be unable to pay the penalty imposed on the limited income he has. He states the seizures were a result of his “stupidity” in trying to save money due to his financial situation and that he regrets his actions.

25. On 12 February 2016 Officer Lawrence, after reviewing and considering the
30 information provided by the Appellant, recalculated the total evaded duty as being £2,237 and issued a revised civil penalty - notice of assessment in the sum of £1,789 (£388 Custom civil evasion penalty and £1,401 Excise civil evasion penalty). Officer Lawrence gave a 10% reduction for disclosure and a 10% reduction for co-operation.

26. On 19 February 2016 Officer Lawrence received a telephone call from the
35 Appellant. The Appellant reiterated that he was unable to afford the penalty imposed and queried the seizure process and the warnings that had been given to him.

27. Officer Lawrence fully detailed the seizure process to the Appellant and advised
40 him that he signed the Seizure Information Notices (BOR156) and Warning Letters (BOR162) at both seizures. The Appellant said that he did not read the documents which he had signed.

- 5 28. The Appellant was advised that the Border Force had decided not to did not take criminal action, which was the warning to which the Appellant referred to. However HMRC, as stated in the Warning Letters, were issuing a wrongdoing penalty for evaded tax and duty. Officer Lawrence explained that reductions may be allowed dependent on the Appellant's disclosure of information and their co-operation.
- 10 29. Officer Lawrence explained the options open to the Appellant. The Appellant could accept and pay the disputed amount due, request a review, or appeal directly to the Tribunal. The Appellant stated he would like a review and he was advised to provide any additional information which he hadn't already provided and include his reasons for disagreeing with the disputed amount due.
- 15 30. On 2 March 2016, the Appellant wrote to Officer Lawrence (received on 9 March 2016), saying that the offence arose due to confusion on his part. He was given the forms which he did not pay any attention to and thought it was the end of the matter when the goods were seized.
- 20 31. He said that he works 28-30 hours per week on £8.15 per hour with no holiday pay. He states he rents a council flat for £74.00 per week. He states he does not own a credit card and did not have any savings. He said that he had stopped smoking to try and make ends meet. He did not own his own transport.
- 25 32. On 18 April 2016 Officer Loughbridge, an Officer not previously involved in the original decision, wrote to the Appellant to confirm that he had undertaken a full review. Officer Loughbridge noted that the Appellant had not read the seizure paperwork provided to him at the airports and commented that he considered it would have been prudent for the Appellant to have done so, prior to signing that he acknowledged it. The form BOR 162 clearly explained that HMRC could take action such as issuing the Appellant with an assessment for any evaded tax or duty and a
- 30 33. Officer Loughbridge explained that in his view the penalties had been correctly issued as the Appellant had acted dishonestly in attempting on two occasions to import an amount of excisable goods above the statutory allowance and that he was therefore legally liable to a civil penalty.
- 35 34. Officer Loughbridge 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.
- 40 35. Based on the information available to him, Officer Loughbridge considered that the mitigation offered was reasonable and correct.
36. By Notice of Appeal the Appellant appealed to the Tribunal on 1 June 2016. The Notice of Appeal included an application to make an Appeal out of time. The Appellant's Grounds of Appeal were that:

- 5 a) He knew he had an excessive amount of cigarettes, but on their seizure thought it was the end of the matter;
b) If he had known that he would receive a penalty, he would have kept the cigarettes, and;
c) He is unable to afford the penalty.

10

37. HMRC issued confirmation that they did not oppose the Appellant's application for an extension of time

Evidence

15 38. The combined bundle of documents included the witness statement of Officer Gerald Bushnell and Andrew Copley, and a copy of their notebook notes, and also the witness statement of Officer Andy Lawrence, who had undertaken the review. All three officers gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence to the Tribunal. We were also provided with copy correspondence, copy relevant legislation and case law authority.

20 39. In evidence the Appellant said that he had travelled from Gambia five times before, but said that he had never previously brought tobacco back with him.

40. The Appellant said that he had purchased the cigarettes for approximately £120 in Gambia. He agreed that the cigarettes would cost £2,428 if purchased in the UK.

25 41. The Appellant said that the 7,800 cigarettes were for him and that he was simply trying to save money,

42. He said that he did not have the financial means to pay the penalties that had been imposed.

The Law

43. The legislation relevant to this appeal is:

30 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

35 (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—

- 5 (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. (...)
- 10 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
- 15 (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.
- 20 (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
- (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. (...)
- 25
- 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-
- 30 (i) unshipped in any port,
- those goods shall ...be liable to forfeiture.
- Customs and Excise control of persons entering or leaving the United Kingdom.
- 35 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
- 40 (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)
- 45 below, either—

- 5 (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.
- 10 (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.
- 15 (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;
- 20 (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.
- 25 (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.
- 30 (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.
- 35 (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:

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

Travellers' Allowance Order 1994

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

- 5 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—
- 10 (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;
- 15 (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
- 20 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.
- 25 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

30 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).
- 35 • 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.

3.2 By how much can the penalty be reduced?

40 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:

- 45 • Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.

- 5
- 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.

10 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?

15 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.

20 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:

- 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.
- 25

30 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

35 44. At the hearing, the Appellant acknowledged that he was aware of restrictions on the importation of cigarettes and that on both occasions when he was at Manchester and Birmingham airports he had been carrying in excess of the allowable limits. He said that had he known that a penalty would be issued in addition to seizure of the cigarettes, he would have offered to pay the duty payable.

45. He said that he was on a very limited income and had no idea how he would be able to pay the penalties imposed.

40 46. He also argued that further mitigation should have been allowed by Officer Loughbridge on the basis that he had provided full disclosure and co-operation with the enquiry.

5 **HMRC's Case**

47. On 23 November 2015 and 24 December 2014, by entering the Green 'nothing to declare' channel at Manchester and Birmingham Airports, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- 10 a) The Appellant was entering the Green channel, indicating that he had nothing to declare despite significant signage present.
- b) The Appellant does not deny that the amount of cigarettes imported was over the permissible limits. He says that they were for his own personal use which is an irrelevant consideration where goods are imported from a
15 non-EU country.
- c) The overall quantity of goods seized was 39 times the allowed limit.
- d) If the Appellant had not been stopped and the goods seized, the loss of Customs and Excise Duty to the Crown would have been £2,237.
- 20 e) The Appellant had previously returned to the UK from Gambia and it is therefore reasonable to conclude that he would have known the level of allowances.

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

25 '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
30 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.'

35 49. 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:

40 '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

5 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
10 he is morally justified in acting as he did.....’

50. ‘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 -
15 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:

20 ‘...although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards, a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct statement of the law and their Lordships agree.’

25 51. The Appellant’s actions as set out in paragraph 47 above demonstrate that he acted dishonestly and deliberately took the action to positively evade duty and tax.

52. 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
30 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty.

53. 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.

54. The penalty is based on the amount of Customs Duties, Import VAT and assessed excise duty that was involved in the offence. In this case the penalty is £1,991, being
35 50% of the culpable arrears.

55. HMRC exercised its discretion as to the amount of discount to be allowed. A 10% deduction was allowed for early disclosure and a further 10% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable.
40 Officer Loughbridge who undertook the review said that he had not been able to give 40% allowance for either disclosure or co-operation because the Appellant had failed to provide all the information requested. He believed it was inherently improbable that the Appellant, having previously travelled to the UK from Gambia several times, believed he was entitled to import 7,800 cigarettes, which represented 39
45 times his allowance.

5 Conclusion

56. The Appellant imported the cigarettes from Gambia. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods. The airport has clear signage which describes the allowances. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them. The signage is designed to inform travellers who are not aware of importation restrictions. Gambia 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.

57. The Appellant had been a regular traveller to the UK from Gambia 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.

58. 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.

59. 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]).

60. It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.

61. 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 funds available to pay when considering reduction of the penalty.

5 62. 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.

63. 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 not entirely open with Officer Loughbridge and did not provide the information he requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 20%. We concur with Officer Loughbridge's assessment of the penalty.

64. 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.

20 65. The appeal is accordingly dismissed and the penalties totalling £1,789 confirmed.

66. 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.

30 **MICHAEL CONNELL**
TRIBUNAL JUDGE

RELEASE DATE: 13 MARCH 2017