



TC05728

Appeal number: TC/2016/03344

Excise and Customs Duty - restoration refusal - seizure and confiscation of Rolex watch - whether the review officer had taken into account irrelevant considerations and disregarded relevant considerations in reaching his decision - whether refusal reasonable and proportionate in the circumstances - no - appeal allowed - further review directed under s.16(4)(b) FA 1994

FIRST-TIER TRIBUNAL

TAX CHAMBER

CHARLES STEWARDSON

Appellant

- and -

DIRECTOR OF BORDER REVENUE

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER IAN ABRAMS**

Sitting in public at Nottingham Justice Centre on 25 January 2017

Mr Charles Stewardson appeared in person

Ms Cristina Alfred, of Counsel for the Respondents

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1. This is an appeal by Mr Charles Stewardson (“the Appellant”) against a decision by the Director of Border Revenue (“the Respondents”) not to restore a Rolex Submariner GMT watch (“the goods”) seized on the 25th March 2016. The Respondents says that the Appellant failed to declare the goods, worth approximately £5,500 and in excess of the permitted limit of £390, when required to do so.

Background

2. On 25th March 2016, at approximately 21.00pm, the Appellant arrived at Luton Airport on flight EZY2062 from Geneva, Switzerland.

3. From disembarkation to clearing Customs there are displayed a number of notices, in the baggage reclaim area and just before the Customs channel entrances, advising which countries fall inside/outside the European Union (“EU”) and also the duty free allowances for excise dutiable products acquired outside the EU. Switzerland is not in the EU and therefore is a ‘third country’ or a territory where the EU provisions on VAT or excise duty, or both, do not apply for the purposes of the Travellers’ Allowances Order 1994, SI 1994/955, as amended by the schedule to the Travellers’ Allowances (Amendment) Order 2008, SI 2008/3058. Returning travellers are restricted to bringing into the UK £390 worth of goods, including perfumes, gifts, and souvenirs.

4. The Appellant, who was accompanied by his wife and children, 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 John Dennis, a UKBF Officer.

5. According to Officer Dennis’s notebook entries, after having put to the Appellant the prohibitions and restrictions and established that the Appellant was aware of the duty free allowances, the Appellant was asked twice “Have you purchased any goods over £390 on your trip?” to which the Appellant responded “No” each time. Officer Dennis says that he then showed the Appellant Public Notice 1 which sets out the restrictions on the amount of tobacco products, alcoholic drinks and other goods and for a third time asked the Appellant the same question, the Appellant replying “No, do you mean personal items such as a watch and a jacket”, to which the Officer replied “Yes, can I see the watch please”.

6. The watch, a Rolex Mariner, was not contained in the Appellant’s luggage but in a large gift bag carried by his wife. Officer Dennis’s notes say that he observed to the Appellant that he had replied “No” three times to the question whether he had purchased goods worth over £390 on his trip. The Appellant responded that although he travelled every week he was unaware of restrictions and allowances on goods intended for personal use. He said that his wife had purchased the watch for him as a gift.

5 7. As the goods had not been declared and were over the allowances as set out in the
Travellers' Allowances Order 1994 (as amended), Officer Dennis seized the goods as
liable to forfeiture under s 139 of the Customs and Excise Management Act 1979
("CEMA") because, by entering the Green Channel, the Appellant had failed to
10 'other goods' allowance for travellers arriving from non EU countries. Accordingly
the goods were liable to forfeiture under sections 78 (4) and 49 (1) (a). The officer
then issued the Appellant with Public Notices 1 and 12A, being Seizure Information
Notice BOR156 and Warning Letter BOR162, both of which the Appellant signed.

15 8. On 26 March 2016 the Appellant wrote to the Respondents asking for the goods to
be returned saying:

20 "This was a gift bought in good faith at GVA airport for me by my wife, not realising
that Switzerland was not part of the EU. We made the assumption (incorrect as it turns
out) that buying a watch from an official dealer at the airport meant that it was all duty
paid as per the other airport jewellers in Europe. We had also just spent a week in France
so were not really in the mind-set of being in a non-EU country having spent no time in
Switzerland other than the airport.

25 It was a simple and regrettable oversight and not associated with any wrongdoing until
the officer asked specifically if we had bought any goods over the GBP390.00 limit
whilst being away. I had always thought that only related to items such as cigarettes,
alcohol and items for commercial purposes, hence my answers to his questions about
whether we had anything to declare. I didn't think we did. My wife is extremely upset
given that this was a genuine gift.

30 I realise that ignorance is no defence but I can only point out that we genuinely did not
know and that I have never committed a crime in my life so would ask that I can
promptly pay any duties owed and have the gift returned to me. We really cannot afford
to just lose over GBP5500.00 due to an oversight."

9. The Appellant's letter was acknowledged by the Respondents on 31 March 2016
saying the Appellant's case "would be processed as quickly as possible".

35 10. When the item was seized, the Appellant was given a Seizure Information Notice
and Notice 12A, which explained "What you can do if things are seized by H. M.
Revenue & Customs". It informed the Appellant that he could challenge the legality
of the seizure in a Magistrates' Court by sending a notice of claim to the Border Force
within one month of the date seizure.

40 11. The legality of seizure was not formally challenged by the Appellant in the
Magistrates' court within the necessary one month period, and therefore the seizure
was deemed to be legal pursuant to paragraph 5 Schedule 3 CEMA.

12. On 30 April 2016, the Respondent's National Post Seizure unit wrote to the
Appellant refusing restoration of the goods.

13. On 7 May 2016 the Appellant requested a review of the decision. He said:

5 “1)The goods according to HMRC definition are not classed as excise goods as specified in your letter of 30th April so I am hoping this gives you more leeway to not have to apply a general policy applying to such goods.

10 2) The item was a gift from my wife as previously stated. We had spent a week in France and only used a Swiss airport to return home. We really did not even think there would be any duty considerations or know that a major Swiss airport would sell goods not having duty already included. At the time of return, after 22.00pm arriving into Luton, we had two very tired children, one of which (my 22 month old) was so beside herself with exhaustion she was screaming and your Border Force colleague actually helped us by ushering us to the front of the queue in recognition of her distress. We really were not in any state to look at any notifications that may have been on the walls and just wanted to get her (and us) home and to sleep. When being asked questions by the Border Force I really did not even think there was anything to consider. I only realised and acknowledged that I had made an error when the Guard put the leaflet in front of me and forced me to focus on it rather than my screaming child. Once seen I then did realise my oversight and offer to pay any duty owed there and then. Whilst I acknowledge that ignorance may not be any defence technically I have never had any previous instances or offences and feel that seizure of a 5,500 item is an extremely disproportionate penalty for such an honest oversight and in such stressful circumstances....”

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The Review letter

14. On 8 June 2016, Officer R Brenton, who had not previously been involved in the decision, wrote to the Appellant to confirm that he had undertaken a full independent review.

30 15. Officer Brenton advised the Appellant that the goods were worth £5,500, which was more than fourteen times the allowance of £390. The Officer said that the Appellant’s explanation when stopped at Customs that he did not understand the restrictions because although he travelled every week he did not know about the allowances was clearly implausible. The Officer observed that a seasoned traveller would be expected to be fully appraised of the allowances from countries/areas outside the EU and aware that goods sold in the ‘airside’ shops would be duty free.

35 16. As regards the Appellant’s assertion that he had made an ‘honest’ mistake, Officer Brenton observed that he had in Geneva airport at a ‘duty free’ shop purchased a watch to the value of £5,500, only hours prior to entering Border Force Controls in the UK declaring ‘nothing in excess of his statutory allowances’ and must have known that he was expected to disclose any dutiable goods that he had acquired during his time out of the UK and to answer questions truthfully.

40 17. Officer Brenton noted that Officer Dennis had showed the Appellant Notice No.1 ‘Travelling to the UK - What you can bring in; what you can’t bring in; what you must declare’ and had asked “have you purchased any goods over £390 on your trip?”

45

5 which question Officer Dennis said had been put to the Appellant three times and on each occasion the Appellant replied “no”.

18. Officer Brenton said that Officer Dennis’s repeated questions were clear and unequivocal as were the Appellant’s replies and that the Appellant had attempted to mislead Officer Dennis. Officer Brenton said:

10 “That on those grounds alone, I have good reason to doubt your credibility. You confirmed, on three separate occasions, that you had not purchased any goods over £390 on your trip. You clearly knew that you were misleading the Officer.”

19. Officer Brenton went on to observe that the Appellant had said, after the seizure of the goods:

15 “I then did realise my oversight and offered to pay any duty owed there and then.”

Officer Brenton said that this statement was analogous to a shoplifter, once caught outside of the shop with unpaid goods in his possession, offering to pay for the goods - attempting to being treated the same as the ‘honest’ shoppers queuing at the tills.

20. Officer Brenton informed the Appellant that he was upholding the decision.

20 21. On 15 June 2016 the Appellant lodged a Notice of Appeal against the decision with tribunal.

Evidence

22. The combined bundle of documents included:

- 25
- A copy of Border Force Officer Dennis’s notebook entries relating to the seizure of the goods and seizure documentation.
 - The Appellant’s request for restoration and the subsequent exchange of correspondence.
 - Officer Brenton’s review letter.
- 30
- The Appellant’s Notice of Appeal.
 - The Respondent’s statement of case.
 - Generic Photographs of Duty free tax watch shops (produced by the UKBF Officers).
- 35
- Photographs of the Geneva Rolex Boutique where the Appellant purchased the watch. These photograph were provided by the Appellant who pointed out that they showed no ‘duty free markings whatsoever’.

- 5
- The Appellant and his wife both gave oral evidence and were cross-examined by Ms Alfred for the Respondents.

Officer Dennis did not provide a witness statement and neither Officer Dennis nor Officer Brenton attended the hearing to give oral evidence.

10 **The Law**

23. The legislation relevant to this appeal is:

Section 49 CEMA states:

(1) Where –

- 15 (a) any imported goods, being goods chargeable on their importation with customs or excise duty, are, without payment of that duty -

(i) unshipped in any port,

(ii) unloaded from any aircraft in the United Kingdom,

(iv) removed from their place of importation ... or those goods shall.... be liable to forfeiture."

Section 78(1) of CEMA states:

- 20 (1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom; or

- 25 (b) being dutiable goods or chargeable goods, he has obtained in the United Kingdom without payment of duty or tax,

and in respect of which he is not entitled to exemption from duty and tax by virtue of any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

Section 78(4) of CEMA states:

- 30 Any thing chargeable with any duty or tax which is found concealed, or is not declared, and any thing which is being taken into or out of the United Kingdom contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment, shall be liable to forfeiture.

Section 139(1) of CEMA provides:

- 35 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.

5 *Section 152 of CEMA* establishes that:

The Commissioners may, as they see fit-

.....(b) restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under the Customs and Excise Acts.

Section 167(1) of CEMA provides that:

10 (1) If any person either knowingly or recklessly—

(a) makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or an officer, any declaration, notice, certificate or other document whatsoever; or

15 (b) makes any statement in answer to any question put to him by an officer which he is required by or under any enactment to answer,

being a document or statement produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained; and any goods in relation to which the document or statement was made shall be liable to forfeiture.

20 *Article 45 of Council Regulation 918/83/EEC* establishes the allowances for travellers arriving from third countries. For goods other than alcohol and tobacco, this limit is £390 worth.

Sections 14 to 16 Of the Finance Act 1994 provide:

Section 14(2):

25 (2) Any person who is—

(a) a person whose liability to pay any relevant duty or penalty is determined by, results from or is or will be affected by any decision to which this section applies,

(b) a person in relation to whom, or on whose application, such a decision has been made, or

30 (c) a person on or to whom the conditions, limitations, restrictions, prohibitions or other requirements to which such a decision relates are or are to be imposed or applied,

may by notice in writing to the Commissioners require them to review that decision.

Section 15(1):

Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either-

35 (a) confirm the decision; or

- 5 (b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate.

Sections 16 (4) to (6):

10 (4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

15 (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

20 (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—

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

(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

30 (c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

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

Travellers' Allowances Order 1994

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

40 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—

- 5 (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;
- 10 (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.
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.

25 **The Appellant's Case**

24. The Appellant, in his Notice of Appeal, says:

"1. The penalty is entirely disproportionate given the facts:

- 30 a. Returning to the UK late in the evening with 2 very tired children, one of which (2-year old) was screaming so loudly that the Border Force staff actually ushered us to the front of the queue following prompts from other people in the queue. The other child (4-year old) kept lying down to sleep.

35 It was a very stressful return trip having travelled from a ski resort in France to the airport and then 3.5 hours in airport and plane and then back into a big queue in Luton. It is not really realistic to expect a parent in such a situation to read a wall-poster, especially when they have no reason to believe they have done anything wrong having regularly bought watches at other European airports with no issues.

- b. In the decision review by Officer Brenton there were several inaccuracies and assumptions which were incorrect.

- 40 i. He states that the officer asked three times whether I had bought goods over £390.00 on my trip. This is absolutely wrong. He asked if we had anything to declare and I said "no". He then asked if we were bringing anything into the country that we wanted to declare and I said "no, I don't bring alcohol and cigarettes back with me" as I did not think for a minute I was doing anything wrong. Only then did he ask me to focus on a leaflet that specifically asked the
- 45 question about bringing anything in over the value of £390.00. Given that I had a

5 screaming child with me, the first time I focused on the leaflet I then asked if that could mean a watch. There was actually no mention of a jacket until later in the conversation when I said that people buy clothes and such from abroad all the time and mentioned I had bought a jacket on the holiday but then went on to clarify that was in the French resort, not Geneva airport.

10 ii. The Border Guard then went on to say "you will probably get it back but you will have to jump through lots of hoops to do so".

15 iii. He then assumes that I, as an experienced traveller would know the allowances, which is incorrect as I travel extensively in the EU and do NOT know the technical considerations of a European country vs an EU country. In fact, as I often buy watches in Amsterdam I would not have felt that Geneva would be any different, especially having spent a week in France and just using Geneva as the nearest airport, so not "feeling" any different to normal EU countries, as I had been dealing in Euros all week, not Swiss Francs. He has made the assumption that, because he works in this arena every day, everyone else knows such

20 technical differences. We don't.

iv. He then accuses me of dishonesty saying that we bought goods in a "duty-free" shop. How am I to know, that is the case? To me it is a shop that doesn't declare itself as duty-free as far as I am aware. As previously mentioned, the shop in Amsterdam is similar as are the prices so why would I assume it is "duty-free"?

25 v. He also mentions misleading the officer. As stated above, the questions asked were not as per his account at all. There was no attempt to mislead whatsoever and the answers to the questions reflected my belief that I had done nothing wrong. I accept that was an error having since seen the leaflet but I did not know that at that time, hence the answers.

30 Whilst I am sure that Officer Brenton may see behaviour on a daily basis which makes him very cynical, I am extremely offended that he should question my credibility rather than accept a genuine explanation. We were a normal, decent, middle-class family returning from a holiday with no criminal record. To be treated like we are seasoned criminals is disgraceful.

35 2. What this comes down to, in my view, is:

- The account of the questions is factually incorrect. That is key here, as the initial two questions were not specific at all, otherwise I would have realised earlier and mentioned the watch - as I did when the Border official put the leaflet in front of me.

- As soon as I realised I offered to pay any duty owed, as any reasonable person would.

40 - There was no attempt to hide or conceal the item at all."

25. At the hearing, the Appellant reiterated the grounds of his appeal as contained in the Notice of Appeal. He added that Officer Dennis would have seen his wife who was carrying a large box, which contained the watch. Immediately Officer Dennis showed him the leaflet which referred to a restriction of £390 in respect of personal

45 goods he volunteered that he had purchased a watch and a jacket. He stressed that

5 Officer Dennis had not asked him three times whether he had purchased goods over the value of £390 whilst on his trip.

26. The Appellant said that Officer Dennis's notes were also factually incorrect in a number of respects. He says that:

- 10 • He did not confirm that he was aware of the prohibitions and restrictions on the importation of goods as stated by Officer Dennis in his notebook entries.
- He was only asked the question “have you purchased any goods over £390 on your trip” once not three times.
- 15 • He was shown public notice number one – “Travelling to the UK. What you can bring in and what you cannot bring in” and referred to the restrictions on the importation of tobacco products alcohol drinks - and ‘other goods’ which he noted were restricted to £390.
- 20 • He was not asked again by Officer Dennis whether or not he had purchased goods over £390 on his trip, but having seen the restriction on other goods immediately asked whether this included personal items such as a watch or a jacket.
- 25 • Officer Dennis did not put it to him that he had been asked three times whether he had purchased goods over £390, because that is not what happened. When Officer Dennis said that ‘other goods’ will include a watch he explained that he was unaware of the limit for personal goods and offered to pay the duty. There is no note of this in Officer Brenton’s review decision
- 30 • His wife was stood immediately next to him holding the large gift box containing the watch and that it was highly likely Officer Dennis had seen the box before he started asking the Appellant questions. The receipt for the watch was in the box. There was no attempt at concealment whatsoever. Again there was no mention of this in Officer Brenton’s review decision.
- At no time did he fail to tell the truth about the contents of his luggage as had been stated by Officer Brenton.

In summary, Officer Brenton in arriving at his review decision placed reliance upon misleading information.

35

HMRC’s Case

27. On 25 March 2016 the Appellant was stopped on entering the Green ‘nothing to declare’ Channel at Luton Airport. The Appellant is a seasoned traveller and it is implausible that he would not have been aware of the prohibition on importing goods

5 in excess of the permitted limit. It is implicit that the Appellant acted dishonestly and deliberately took action to evade duty and tax given that:

- a) the Appellant was entering the Green Channel, indicating that he had nothing to declare despite significant signage present;
- 10 b) the Appellant does not deny that the goods imported were over the permissible limits;
- c) the Appellant failed to tell the truth about the contents of his luggage.

28. To the extent that the Appellant is arguing that the decision not to restore the watch was unreasonable, the Respondent contends that the review decision not to offer the goods for restoration was one that could have been reasonably arrived at.

15 a. The Respondent had regard to and applied its stated policy that, although seized goods should not normally be restored, each case must be examined on its merits to determine whether not there are exceptional factors to support restoration. This policy has been held to be reasonable by the Tribunal. As per
20 paragraph 53 of the judgment of the Tribunal in the case of *Clear PLC v The Director of Border Revenue* TC/2009/14440:

“The Tribunal found as a fact that the general policy of the Respondents not to restore the goods where properly seized is reasonable.”

b. There were no exceptional reasons to support a case for restoration and the wider circumstances of the case all suggest that the decision not to restore the
25 watch was reasonable. In particular:

i. There is a limit of £390 to the value of goods that can be imported into the UK from “third countries”, such as Switzerland, without the payment of duty and / or tax. Above this threshold, such goods must be declared. In spite of the large and visible signs displayed at the arrivals
30 terminal in Heathrow inviting travellers, from outside the EU, to enter the appropriate “Goods to Declare / Nothing to Declare Channel”, the Appellant deliberately entered the “Nothing to Declare Channel”. In doing so, the Appellant failed to make a declaration when under a legal obligation to do so.

ii. Subsequent checks have shown that, at the time the Appellant was intercepted, there were Officers of the Respondent available at the “Goods to Declare” channel. Consequently, it would have been simple for the Appellant to have declared the watch but he chose not to do so.
35

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

5 “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
10 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.”

15 30. 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:

20 “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
25 the defendant himself must have realised that what he was doing
was by those standards dishonest. In most cases, where the
actions are obviously dishonest by ordinary standards, there will
be no doubt about it. It will be obvious that the defendant
himself knew that he was acting dishonestly. It is dishonest for a
defendant to act in a way which he knows ordinary people
30 consider to be dishonest, even if he asserts or genuinely believes
that he is morally justified in acting as he did.”

31. ‘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 -
35 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:

40 “...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.”

45 32. The Appellant’s actions as set out in paragraph 27 above demonstrate that he
acted dishonestly and deliberately took the action to positively evade duty and tax.

5 His attempt to clear Customs without paying any duties by entering the Green Channel “nothing to declare” with goods demonstrates his intent to positively evade duty and tax.

Conclusion

10 33. The function of the Tribunal is to determine whether the Respondents’ decision not to restore the goods to the Appellant was a decision which could not have been reasonably arrived at. In assessing whether the decision was reasonable, the decision maker, Officer Brenton, must have properly considered all relevant matters and not have taken into account any irrelevant matters. The burden of proof is on the Appellant. In order to succeed in his appeal the Appellant has to satisfy the Tribunal that the Respondent could not reasonably have arrived at the decision made by Officer Brenton in his letter of 8 June 2016 within s 16(4) of the 1994 Act. The burden of proof 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].

20 34. 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. The Appellant does not challenge the legality of the seizure, but rather challenges the reasonableness of the refusal to restore the goods. The facts of the matter are not in dispute save for the conversation which took place when the Appellant was stopped by Officer Dennis.

25 35. The Respondents have a policy of not restoring goods that have been properly seized, unless there are any exceptional factors to support restoration. Illicit smuggling has a substantial adverse effect on legitimate trade and there is a compelling need for a rigorous regime to prevent the loss of revenue to the Exchequer. The policy is therefore necessarily strict in order to deter travellers from trying to bring in goods in excess of the permitted limits through the “Green Channel”, while allowing exceptional circumstances to be taken into account on a case by case basis. This policy has been held to be reasonable - *Clear PLC v The Director of Border Revenue*.

35 36. We have to consider whether on the facts Officer Brenton’s review decision was reasonable. In so doing, the applicable law, as summarised in *Imran Bakht v Director of Border Revenue* [2014] UKFTT 551 (TC) is as follows:

40 4. (The Jurisdiction of the Tribunal) is a supervisory one, and from the case law in *Customs and Excise Comrs v J H Corbitt (Numismatists) Ltd* [1980] STC 231, *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 and *Kohanzad v Customs and Excise Commissioners* [1994] STC 967, we derive the following approach, which we understand is uncontroversial:

- (1) The jurisdiction of the Tribunal in this matter is only supervisory.
- (2) The Tribunal cannot substitute its own discretion for that of UKBA.

5 (3) The question for the Tribunal is whether UKBA's decision was unreasonable in the sense that no reasonable adjudicator properly directing himself could reasonably reach that decision.

10 (4) To enable the Tribunal to interfere with UKBA's decision it would have to be shown that UKBA took into account some irrelevant matter or had disregarded something to which they should have given weight.

15 (5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of UKBA was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.

(6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of UKBA was unreasonable.

20 36. The Tribunal must ask itself whether the reviewer's decision was one that no reasonable reviewer could have come to because the reviewer had taken irrelevant matters into account, had not taken relevant matters into account, or had made an error of law. This is the test of reasonableness which the Tribunal must consider as set down in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

25 37. The case law in relation to the restoration of seized goods was reviewed by the Upper Tribunal (Tax and Chancery Chamber) in *HMRC v Jones* [2010] UKUT 116 (TCC). The Upper Tribunal in that case reviewed the earlier authorities, including the Court of Appeal's decision in *Gascoigne v Customs and Excise Commissioners* [2004] EWCA Civ 1162, in which it was confirmed that as forfeiture potentially
30 interferes with the Appellant's rights to property under article 1 to the First Protocol of the European Convention on Human Rights, issues of proportionality were a relevant consideration for the Tribunal. This means that, although each case must be considered on its facts, there must be a reasonable relationship of proportionality between the means employed and the aim pursued by UKBA in forfeiting the goods.

35 38. The Appellant says that he made an honest mistake. The watch had not been concealed in his baggage. It was being carried by his wife, who was standing right next to him, in a large box which was clearly visible to the Border Force Officer. There is a conflict of evidence with regard to the conversation which took place between the Appellant and Officer Dennis, but it is clear that the Appellant
40 immediately volunteered that he had purchased a watch (and a jacket, although the jacket had been purchased in France) when he realised his mistake.

39. According to Officer Dennis, he asked the Appellant twice "have you purchased goods over £390 on your trip" and on both occasions the Appellant said "No". Officer Dennis says that he asked the same question for a third time, the Appellant again
45 replying "No". The Appellant disputes this saying that for Officer Dennis to ask the same question three times and for him to reply "No", particularly after he had been shown Public Notice number 1, is inherently improbable.

5 40. Officer Brenton does not appear to have addressed the Appellant's contention that
immediately after Officer Brenton had shown him the leaflet setting out the restriction
on personal goods, the Appellant qualified his earlier reply (that he had not purchased
goods in excess of £390), and volunteered that he had purchased a watch. It is clear
10 this is also not mentioned by Officer Brenton. Nor is there any mention (irrespective
of whether it may have been irrelevant to his decision) that the Appellant offered to
pay the duty on the goods.

15 41. Officer Brenton considered the general policy not to restore seized goods, and his
decision was not fettered by it as he considered whether an exception to the policy
could be made because of the merits of the case. However Officer Dennis did not
supply a witness statement. His only evidence is that contained in his notebook
entries. He was not available to give oral evidence and be cross examined by the
Appellant. Notebook entries are by common acknowledgment not contemporaneous
and are normally only a summary of the conversation which took place with the
20 traveller. Furthermore the notes are of necessity often written up some time (we
understand possibly up to an hour) after the event, because of time pressures.

42. We accept the evidence given by the Appellant to the Tribunal. His evidence was
corroborated by his wife and consistent.

25 43. Officer Brenton relied upon Officer Dennis's notebook entries which may not
have been entirely accurate and comprehensive. We are also not satisfied that Officer
Brenton did not take into account some irrelevant matter or disregard something to
which he should have given weight.

30 44. The decision appealed against is therefore in our view not reasonable. Nor given
all the circumstances was it a proportionate response to the Appellant's infringement.
We do not accept that on the facts, and having objectively considered the merits of the
case, Officer Brenton could reasonably have reached the decision not to restore the
watch to the Appellant on payment of the duty. The review decision was therefore in
our view one that could not have been reasonably arrived at.

Order

35 45. We make the following orders pursuant to our decision to allow the Appeal and in
accordance with s 16(4) of the Finance Act 1994:

- a. The decision not to restore the Appellant's goods shall cease to have effect from
the date of release of this decision.
- 40 b. The Respondents shall conduct a further review of the decision to restore the
goods and serve the same on both the Appellant and the Tribunal within 28 days of
release of this Decision and such review shall be on the basis of the conclusions
reached in this decision.
- c. An Officer not previously involved with the case shall conduct the further review.

5 d. The Appellant will have a further right of appeal to the Tribunal if dissatisfied with the outcome of the further review.

46. 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: 1 APRIL 2017

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