



TC06201

Appeal number: TC/2016/01478

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

LIIBAN MOHAMED

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER JANE SHILLAKER**

Sitting in public at Taylor House, Rosebery Avenue, London on 18 September 2017

The Appellant in person

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

DECISION

1. This is an appeal by Mr Liiban Mohamed (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 17 July 2015, as revised on 1 October 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £2,935 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 tobacco which he was importing into the United Kingdom, above the personal allowance of 250g of tobacco.

Background

2. On 24 August 2014, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Heathrow Airport, arriving from Abu Dhabi, United Arab Emirates.

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. The United Arab Emirates is not in the EU and therefore, returning travellers, for the purposes of the Travellers’ Allowances Order 1994, have a personal allowance of 250g of tobacco.

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 Sara Khan, a UKBF Officer.

5. Officer Khan’s evidence is that the Appellant confirmed he had travelled from Abu Dhabi. He was then asked if he understood that there are certain goods which 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 that and that he was not carrying any such items. He was asked if he understood the allowances in respect of cigarettes, alcohol and tobacco from outside the EU. He replied “No”. Officer Khan confirmed to the Appellant the allowance of 200 Cigarettes or 250 grams of tobacco. The Appellant responded he did not have any such goods.

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 stated “Yes”.

7. Officer Khan asked the Appellant if he was carrying any cash in excess of £1,000 to which he replied “You’re joking right? No”. Officer Khan continued her questioning asking if anything sharp was contained in the bag that could cause harm, the Appellant responded “No”.

5 8. The Officer corroborated with the Appellant that his bag was about to be searched,
whereupon the Appellant said that he had 28kg of Shisha tobacco. The Officer
questioned the Appellant if this was contained in his luggage, to which the Appellant
responded “Yes”. The Officer commenced with the bag search and saw a total of 28
10 bags of Shisha tobacco concealed in 4 clear inverted plastic bags each containing 5
Shisha tobacco bags and 2 clear inverted plastic bags containing 4 Shisha tobacco
bags. The Appellant questioned what the Officer was doing to which the Officer
replied “seizing your goods, as you are only allowed to bring in 250 grams of
tobacco”. The Appellant stated “I didn’t know, I want to pay the tax”. The Officer
15 explained to the Appellant that it was not possible as he had entered through the
Green Channel.

9. The Officer further questioned the Appellant due to the quantity found, the
Appellant responded “I have a café”. He was asked if he owned it, to which he
responded “Yes”. The Appellant would not disclose to the Officer the location or
address of the café.

20 10. The total tobacco being carried by the Appellant was 28.36kg. As the goods had
not been declared and were over the allowances as set out in the Travellers’
Allowances Order 1994 (as amended) the Appellant was advised that the tobacco
would be seized under CEMA 1979 s 139 and he was given Notice 1 and 12A and
ENF156 (Seizure Information Notice) and BOR 162 (Warning letter). The Officer
25 asked the Appellant to sign the notebook; however the Appellant refused.

11. 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.

12. On 29 May 2015, HMRC’s Officer Steven Bhaseen, a post detection audit officer
of HMRC’s International Trade and Compliance Unit, wrote to the Appellant at the
30 address he had provided, informing him that he 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
35 potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty
and Import VAT and Public Notice 160 in respect of Excise Duty and invited any
disclosure by the Appellant. The letter made it clear that any reduction in the penalty
was contingent on the Appellant’s response and co-operation with HMRC’s enquires.

13. The letter, from Officer Bhaseen explained that if the Appellant was willing to co-
40 operate with the enquiry he should provide the following within 30 days of the date of
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.
- 45 • Confirmation of who was involved in the smuggling or attempted
smuggling, exactly what they did and why they did it.

- 5
- A full explanation as to how the smuggling or attempted smuggling was carried out.
 - Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- 10
- Confirmation of the quantities of goods involved on each occasion.
 - Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
 - Details of all international travel during the period under enquiry, including the reasons for travel.
 - An explanation of what you did with, or intended to do with, the smuggled goods.
- 15
- 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.”

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

“Disclosure

25 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.

Co-operation

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

- attend all the interviews (where necessary);
 - provide all information promptly;
- 30
- answer all questions truthfully;
 - give the relevant information to establish your true liability;
 - co-operate until the end of the investigation.”

35 15. On 12 June 2015 Officer Bhaseen wrote to the Appellant again as no response had been received to his letter of 29 May 2015.

40 16. On 17 July 2015 Officer Bhaseen wrote to the Appellant and advised him that HMRC had decided that the Appellant’s actions on 24 August 2014 were dishonest, and therefore a penalty was appropriate. The letter set out that the total revenue evaded was £3,670. The penalty issued was in the sum £3,486 (consisting of an excise civil evasion penalty and a customs civil evasion penalty). The letter outlined how the penalty had been calculated and advised that a 5% reduction from the maximum penalty had been made which included 0% for disclosure out of a maximum of 40% and 5% for co-operation out of a maximum of 40%, reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry.

5 17. On 22 July 2015 Officer Bhaseen received a telephone call from the Appellant who refused to provide his date of birth and appeared non-compliant with the Officer's requests to provide in writing a request for a re-consideration. Officer Bhaseen says that throughout the telephone call the Appellant provided no co-
10 operation and raised his voice on a number of occasions, on which the Officer terminated the call. The Appellant called back and appeared very argumentative towards Officer Bhaseen. The Appellant refused a telephone interview with Officer Bhaseen and refused to liaise with the Officer further.

15 18. On 23 July 2015 Officer Kelsall, who had assumed responsibility of this case from Officer Bhaseen, conducted a telephone interview with the Appellant timed from 11am to 11.25am. The Appellant provided a disclosure in relation to the enquiry and preceding seizure saying that:

- He had been to Abu Dhabi for 4 days where he had been staying with a friend who he had met on social media, and that he had been completing a video shoot.
- 20 • He could not recall the exact quantity of Shisha tobacco that he had attempted to bring into the UK. He said he had disagreed with UKBF Officer Sara Khan about the amount, and refused to sign the seizure information notice which confirmed the amount being seized. He did however sign the other paperwork.
- 25 • He had fully intended to declare the goods, and had over £1,000 in cash to pay the duties that would have been due on the goods, but was advised by Officer Khan that he could not pay the duties as he had already entered the Green nothing to declare channel.
- He did not realise which channel he should have entered because his luggage was broken, the airport was crowded and he 'panicked'.
- 30 • He had advised Officer Khan that he had Shisha in his luggage as soon as he was asked if he had any goods, saying that the goods were intended for personal use only and also some for family members.
- He did not like the way he had been treated by Officer Khan, and because of this was not compliant at the time the goods were being seized.
- 35 • Another UKBF Officer had arrived to try and 'diffuse the situation'. He stated that this individual was very nice to him, and advised him that no further action is usually taken, unless he brought excess goods into the UK again.
- 40 • He had travelled to Abu Dhabi three times since August 2014 but could not recall the exact dates. One of the trips was from 4 November 2014 to 9 November 2014. These three trips were the only occasions on which he had travelled within the enquiry period, and on those trips, he had not purchased any excise goods.

- 5
- The only occasion when he had attempted to bring in goods over the allowable limit was 24 August 2014.
 - He was currently unemployed, but at the time of seizure in August 2014, he had just left University and was working at B & Q. His wages from B & Q had financed the purchase of the goods and the travel undertaken. Friends had allowed him to stay with them, so his accommodation was free.
- 10
- He did not appeal to UKBF about the seizure of the goods, because he had discussed it with his father, who had advised him not to.
 - He felt he had been penalised for making one mistake and was shocked to receive a penalty because this was not made clear to him previously.
- 15
- He is exposed to harassment and embarrassment every time he travels through Heathrow.
 - He is homeless and unable to pay the imposed penalties.
 - He co-operated fully and should be allowed the maximum reduction.

19. On 24 July 2015 Officer Kelsall wrote to the Appellant enclosing notes of the discussion that took place on 23 July 2015. The Appellant was asked to sign one copy of the discussion and return it by 1 September 2015. On 1 October 2015 Officer Kelsall confirmed receipt of the signed notes.

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20. On 1 October Officer Kelsall wrote to the Appellant and advised that a 20% reduction would be allowed, which meant that the overall penalty would be reduced to £2,935 based on the additional information the Appellant had provided. The letter outlined how the penalty had been calculated (10% for disclosure and 10% for co-operation). The penalties were £666 (customs civil evasion penalty) and £2,269 (excise civil evasion penalty).

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21. On 15 November 2015 the Appellant wrote to HMRC's Local Compliance team to request a review. The Appellant notified HMRC that he was currently without a fixed abode as his aunt's address was no longer available to him and therefore to communicate via his mobile phone number.

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22. On 23 December 2015 Officer Christopher Dakers who had not previously been involved in the case, carried out an independent review, and having done so upheld the decision to issue the Appellant with penalties of £2,935. Officer Dakers observed in his review that:

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- "The Border Force Officer's notebook entry states that, when asked, you advised that you had so much Shisha because you owned a (Shisha) café, implying that the goods were for a commercial purpose. This casts doubt on the credibility of your representations of personal use during the enquiry.
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- The quantity of goods was 112 times the personal allowance. There is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK, as well as the locations and purpose of the Customs channels. The Border Force Officer's notebook shows that you were aware that you'd entered the green channel and that this was the channel which meant that you had 'nothing to declare'. Upon being told that you were only allowed 200 cigarettes or 250g of tobacco you responded, "No, don't have any". This was a false representation and is considered to be an attempt to conceal the actual quantity of goods you were carrying. I do not consider your representation of being distracted to be credible, when considering it alongside the information provided by Border Force on the date of seizure.
- 10
- You have said [during enquiries following the seizure] that you were carrying over £1,000 and offered to pay the tax on the goods, but were told by the Border Force Officer that you were too late to do this. Information from Border Force states that you were asked if you were carrying any sums of money greater than £1,000 and you responded, "You're joking, right? No!" Your representation during Officer Bhaseen and Officer Kelsall's enquiries with regard to carrying over £1,000 in order to pay the duty is therefore also not considered credible.
- 15
- You disagreed with the Border Force Officer with regard to the quantity of goods you had purchased and therefore refused to sign the paperwork provided to you. You did not appeal the seizure, as your father advised you not to. At the time of seizure, you were issued with Notice 12a; this advised that if you disagreed with the seizure, then you had one calendar month in which to lodge an appeal with Border Force (referred to in Notice 12a as a 'Notice of Claim'). As no appeal against the seizure was made within the appropriate timescale, the seizure was deemed to be correct and carried out legally.
- 20
- You were advised by Border Force that no further action would be taken against you and you were not made aware that you would receive a penalty. You were provided with and signed form BOR162 — 'warning letter about seized goods' which outlined that further action may be taken, including "...sharing information with HM Revenue Customs who may take action against you such as issuing you with an assessment for any evaded tax or duty...". I am therefore satisfied that you were duly aware that further action may be taken against you.
- 25
- You say that you should be allowed the maximum reduction to the penalties because you have co-operated throughout. You responded to Officer Kelsall's line of questioning in your telephone interview on 23 July 2015, but your account of events was not considered truthful when compared to the information provided by Border Force. For this reason Officer Kelsall allowed a 10% reduction for both co-operation and disclosure. Upon reviewing the information available, I cannot see any reason for which a further reduction
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- 40
- 45

5 should be given. Whilst you have provided some disclosure, I consider that
you have provided contradicting representations to those provided by Border
Force at the time of seizure; stating that you were truthful and co-operative
with Border Force, that you intended to pay the duty and that you were only
10 given a verbal warning - despite information from Border Force stating
contrary to this.”

23. On 20 February 2016 the Appellant filed a Notice of Appeal with the Tribunal.

Evidence

15 24. The combined bundle of documents included the witness statement of Officer
Khan, including a copy of her notebook entries, the witness statement of Officer
Bhaseen, the decision maker, and the review by Officer Dakers. Officers Khan and
Bhaseen 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.

The Law

25. The legislation relevant to this appeal is:

Section 1 of the Tobacco Products Duty Act 1979 provides in so far as material:

“In this Act “tobacco products” means any of the following products, namely -

- (a) Cigarettes;
- 25 (b) Cigars;
- (c) Hand-rolling tobacco;
- (d) Other smoking tobacco; and
- (e) Chewing tobacco,

30 which are manufactured wholly or partly from tobacco or any substance used as a
substitute for tobacco...”

26. Section 2 then provides that tobacco products imported into or manufactured in
the UK are chargeable to excise duty at the rates shown in the table in Schedule 1 to
the Act.

35 27. The liability of cigarettes and tobacco to customs duty arises under Chapter 24 of
the UK Tariff, which reproduces the Combined Nomenclature (“CN”) as amended
each year. The CN forms Annex 1 to Council Regulation (EEC) No 2658/87 on the
tariff and statistical nomenclature and on the Common Customs Tariff. That
regulation determines the classification of goods entering the European Community
for customs duty purposes.

5 28. Chapter 24 of the CN for 2014 is headed “Tobacco and Manufactured Substitutes”. The notes to this Chapter provide inter alia as follows:

“ Subheading note

10 1. For the purposes of subheading 2403 11, the expression “water pipe tobacco” means tobacco intended for smoking in a water pipe and which consists of a mixture of tobacco and glycerol, whether or not containing aromatic oils and extracts, molasses or sugar, and whether or not flavoured with fruit. However, tobacco-free products intended for smoking in a water pipe are excluded from this subheading.”

29. Shisha tobacco is classified under CN code 2403 11 00 as:

15 “2403 Other manufactured tobacco and manufactured tobacco substitutes; ‘homogenised’ or ‘reconstituted’ tobacco; tobacco extracts and essences

Smoking tobacco whether or not containing tobacco substitutes in any proportion

2403 11 00 - - Water-pipe tobacco specified in subheading note 1 to this chapter”

It is subject to customs duty at the rate of 74.9% and VAT at the standard rate, again as confirmed in the UK Tariff.

20 30. Under the Travellers’ Allowances Order 1994, an individual who has travelled to the UK from a country outside the EU is entitled to bring in certain goods free of VAT and excise duty in his personal luggage. The allowance for tobacco products is for “200 cigarettes or 100 cigarillos or 50 cigars or 250 grams of smoking tobacco”. Each of these amounts represents 100% of the total relief provided for tobacco
25 products, but for any one person the relief applies to any combination of tobacco products provided that the aggregate of the percentages used up from the relief the person is afforded for such products does not exceed 100% (notes (k) and (I) to Schedule 1 of the Order).

30 31. The excise duty penalty has been imposed under s 8 FA 1994, the relevant parts of which are as follows:

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 -

35 (a) any person engages in any conduct for the purpose of evading any duty of excise, and

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

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.

40 (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. (...)

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33. This section was repealed by paragraph 21(d)(i) of Schedule 40 to the Finance Act 2008 (“FA 2008”). However, article 4 of SI 2009/511 provides that para 21 Sch 40 only repeals s 8 FA 1994 in so far as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 to FA 2008. Article 6, SI 2009/571 further provides that para 21 Sch 40 only repeals s 8 FA 1994 in respect of conduct involving dishonesty which relates to an inaccuracy in a document, or a failure to notify HMRC of an under-assessment by HMRC. Section 8 FA 1994 therefore remains in force in relation to any other conduct involving dishonesty entered into for the purpose of evading excise duty and which is not subject to Schedule 41 FA 2008.

20 34. Section 13(1) FA 1994 provides that where any person is liable to a penalty under this Chapter, HMRC may assess the amount due by way of penalty and notify that person, or his representative, accordingly. A decision by HMRC that a person is liable to a penalty is a ‘relevant decision’ (s 13A(2)(h)). Section 16(5) provides that the Tribunal has the power to quash or vary any such decision and power to substitute their own decision for one quashed on appeal. Section 16(6)(a) states the following in relation to the burden of proof in such an appeal:

“On an appeal under this section the burden of proof as to

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

30 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.”

Part III of FA 2003 imposes penalties in relation to taxes and duties on importation and exportation. Section 24(1) and (2) provides:

“(1) This Part makes provision for and in connection with the imposition of liability to a penalty where a person -

- 35 a) engages in any conduct for the purpose of evading any relevant tax or duty, or
- b) engages in any conduct by which he contravenes a duty, obligation, requirement or condition imposed by or under legislation relating to any relevant tax or duty.

(2) For the purposes of this Part “relevant tax or duty” means any of the following -

(a) customs duty; ...

40 (d) import VAT...”

35. The penalty itself is imposed under Finance Act 2003, Sections 25(1) and 29(1)(a)

- 5 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
(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
10 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. (...)
36. Section 29 is in identical terms to s 8(4) and (5) FA 1994 set out above.
37. Section 30(1) provides that where a person is liable to such a penalty, HMRC may give to that person or his representative a notice in writing demanding payment of the penalty amount and s 30(2) provides that the amount demanded is recoverable as if it were an amount of customs duty. Section 33 provides that the penalty decision can be appealed to the Tribunal. Section 33(6) again provides that the Tribunal has power to quash or vary any decision on appeal.
15
38. Section 33(7) provides that the burden of proof in an appeal in relation to the matters referred to in s 25(1) is on HMRC and is on the Appellant in relation to the grounds on which the appeal is brought.
20
39. The relevant provisions relating to forfeiture are contained in the Customs and Excise Management Act 1979, Sections 49(1), 78(3) and 139
- 25 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,
30 those goods shall ...be liable to forfeiture.
- Customs and Excise control of persons entering or leaving the United Kingdom.
S78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)
35
- S139 Provisions as to detention, seizure and condemnation of goods
(1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.
40
(2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either-
(a) deliver that thing to the nearest convenient office of Customs and Excise; or

- 5 (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.
- (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-
- 15 (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.
- (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.
- 30 (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.
- 35 (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.

40. Provisions relating to a person who has travelled from a third country on entering the United Kingdom:

45 Travellers' Allowances Order 1994

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

5 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,.

10 (2) For the purposes of this article-

(a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

15 (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;

20 (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

25 3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

4. No relief shall be afforded under this Order to any person under the age of 17 in respect of tobacco products or alcoholic beverages.

HMRC Public Notices

30 HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
- 35 • 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.

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

3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

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

- 5
- 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.

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

15 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.

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:

- 25
- 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.

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 41. In the Appellant's Notice of Appeal, he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to issue the penalties saying that he had always intended to declare the tobacco and had inadvertently gone into the wrong Channel. He says that he was not aware of the allowances and also disputes the decision to assess the penalty at £2,935. He
40 challenges the amount by which the penalties were reduced, on the following grounds:

- 45
- a) He states that his luggage strap broke whilst being retrieved from the conveyor belt, therefore having to use a small strap to carry his luggage. Due to this the Appellant was unaware of which channel he had entered, the airport was crowded and he panicked.

- 5 b) A penalty of £2,935 is unfair.
c) It is not a legitimate penalty as there are contradictions in the decision making process.
d) HMRC did not issue a fine at time of incident. He was told no further action would be taken and was warned that if such a thing was done again he would
10 face charges.
e) He received a letter asking him to provide evidence and information. The Border Force officer has not given a full true reflection of what happened.
f) He did not claim to own a Shisha café.
g) He would like consideration be given to a letter dated 23 December 2015
15 enclosed with Notice of Appeal.
h) He cannot afford to pay the penalty.

42. At the hearing, the Appellant repeated the above grounds of appeal and also said that he knew he had to declare the tobacco. He had been tired and under stress. He
20 had been distracted by having to bend and drag his bag. He had approximately £1,000 which he intended to use to pay the duties. He said he was only carrying 24 kg of tobacco. He disputed Officer Khan's record of the conversation that took place when he was stopped, but accepted that the incident took place almost three years ago and that he could not remember everything.

25 **HMRC's Case**

43. On 24 August 2014, by entering the Green 'nothing to declare' channel at Heathrow Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax, given that:

- 30 a) The Appellant does not deny that the amount of tobacco imported was over the permissible limits.
b) The Appellant entered the Green channel, indicating that he had nothing to declare despite significant signage present.
c) The Appellant told the UKBF Officer that he was not aware of the allowances relating to cigarettes and tobacco;
35 d) The Appellant was carrying 28.36 kg of Shisha tobacco which was 113 times his personal allowance;
e) 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 EU and the duty free
40 allowances for excise goods.
f) It is well known that Abu Dhabi is outside the EU for excise purposes. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them.

5 g) He would have been aware that there were limits on the amount of tobacco
he could import. Although he may not have been aware of the exact
allowance, he would have known that 28 bags of Shisha tobacco was too
much. An honest and prudent traveller would check the allowances before
10 entering the Green channel. Not doing so whilst knowing that the amount
was very likely to be over the allowances constitutes dishonest behaviour.
A reasonable and honest person would check the allowances before
importing such a large amount of tobacco.

15 h) In any event, the Appellant knew that he was meant to declare the goods
(this is implicit from his reference, in the telephone interview with Officer
Kelsall and the appeal letter of 25 November 2011, to his intention to
declare the goods). He nevertheless walked through the Green channel and
even when stopped by Officer Khan in the Green channel, he denied that
he had purchased anything from outside the UK that he was bringing back
with him and then specifically denied that he had any tobacco over 250g.

20 44. HMRC are entitled under Sections 8(1) of the Finance Act 1994 and Sections
25(1) of the Finance Act 2003 to issue the Appellant with a penalty because he acted
dishonestly and deliberately took action to positively evade duty and tax.

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

30 46. The appropriate standard of proof is the balance of probabilities: *Re B (Children)*
[2008] UKHL 35. See also *Han (t/a Murdishaw Supper Bar) v CCE* [2001] EWCA
Civ 1048, [2001] 1 WLR 2253. The Court of Appeal held that civil penalties for the
dishonest evasion of VAT under s 60 of the Value Added Tax Act 1994 and excise
duties under s 8 FA 1994 were ‘criminal charges’ for the purposes of Article 6 of the
European Convention on Human Rights. However, both Potter LJ and Mance LJ
stated that this did not mean that the proceedings were criminal for other domestic
purposes (see [84] and [88] of the judgment).

35 47. As these are civil proceedings, the standard of proof is the ordinary civil standard,
namely proof on the balance of probabilities: see *Han* at [12], *Tahir Iqbal Khawala v*
HMRC [2008] EWHC 1687 (Ch) at [25]; *Bintu Binette Krubally N'Diave v HMRC*
[2015] UKFTT 0380 (TC) at [80] and [82]; *Zuned Osman v HMRC* [2016] UKFTT
524 (TC) at [39].

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

45 ‘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

5 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.’

10

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:

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

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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 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* 120051 UKPC. 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:

30

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‘...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.’

40

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

45

52. 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.

5 53. 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 £2,935, being
80% of the culpable arrears, because HMRC exercised its discretion as to the amount
of discount to be allowed. A 10% deduction was allowed for disclosure and a further
10% for co-operation (both out of a maximum of 40%) which in the circumstances
10 was considered reasonable. Officer Dakers who undertook the review gave
comprehensive reasons why he had not been able to give the full 40% allowance for
either disclosure or co-operation

15 54. The Appellant has submitted in correspondence and in his Notice of Appeal that
he cannot afford to pay the penalty. The Finance Act 1994, Section 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.

Conclusion

20 55. The Appellant imported the Shisha tobacco from Abu Dhabi, United Arab
Emirates. There are strict limits on the amount of tobacco that can be brought into the
UK. It is well known that tax and duty is payable on imported tobacco. The airport
has clear signage which describes the allowances. The signage is designed to inform
travellers who are not aware of importation restrictions. The United Arab Emirates is
a non-EU country and so there could be no confusion with the ‘unlimited for own
25 use’ provisions which are applicable when importing from EU countries. It is
inherently unlikely that the Appellant did not know or suspect that there were
restrictions on tobacco being brought to the UK in large quantities.

30 56. It is in any event clear from the Appellant’s own evidence that he knew
customs duty was an issue. The Appellant is an experienced traveller and would, on
the balance of probabilities, have known of the allowances for importing tobacco and
cigarettes. In any event, a reasonable person would check the allowances before
importing such a large amount of tobacco. The limit is 250g.

35 57. The issue as to whether or not the tobacco was for personal use does 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.

40 58. The Appellant says that he inadvertently found himself in the Green channel and
intended to declare the tobacco. He also disputes the amount of tobacco he was found
to be carrying. In this regard we prefer and accept Officer Khan’s and Officer
Bhaseen’s evidence. Their evidence to the Tribunal was clear, credible and consistent.
Conversely the Appellant’s evidence was in parts contradictory and inconsistent. We
45 find that the Appellant did not intend to declare the tobacco and that the amount he
was carrying was 28.36 kg.

5 59. The issue in this appeal is therefore whether or not the penalties which have been
imposed were properly imposed. That raises the question of whether the Appellant
has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an
objective one and involves assessing whether the actions of the taxpayer were
dishonest by the ordinary standards of reasonable and honest people. The burden of
10 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. In the recent case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*, released on
25 October 2017, the Supreme Court said [at paragraph 74 of the judgment]:

15 ‘These several considerations provide convincing grounds for holding that the second leg
of the test propounded in *Ghosh* does not correctly represent the law and that directions
based upon it ought no longer to be given. The test of dishonesty is as set out by Lord
Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow*
Clowes. When dishonesty is in question the fact-finding tribunal must first ascertain
20 (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The
reasonableness or otherwise of his belief is a matter of evidence (often in practice
determinative) going to whether he held the belief, but it is not an additional requirement
that his belief must be reasonable; the question is whether it is genuinely held. When
once his actual state of mind as to knowledge or belief as to facts is established, the
25 question whether his conduct was honest or dishonest is to be determined by the fact-
finder by applying the (objective) standards of ordinary decent people. There is no
requirement that the defendant must appreciate that what he has done is, by those
standards, dishonest.’

30 61. The Appellant would have been fully aware that there are restrictions on the
importation of cigarettes and that she was bringing more cigarettes into the country
than she was entitled to without declaring them. Applying the objective standards of
ordinary honest people, we have to conclude that the Appellant acted deliberately and
dishonestly, taking action to positively evade duty and tax.

35 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.

40 63. 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.

45 64. 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 into account the fact that the Appellant did not provide the
information Officer Bhaseen requested, the penalty was in our view initially
calculated correctly and then reduced appropriately for the additional disclosure and

5 co-operation resulting in a total reduction of 20%. We fully concur with Officer Daker's review and assessment of the penalty.

65. The appeal is accordingly dismissed and the penalties totalling £2,935 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
10 against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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