



**TC06782**

**Appeal number: TC/2017/01749 and 02486**

*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**

**STEPHEN GRAFTON and SHARON PIERCE**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER RAYNA DEAN**

**Sitting in public at Alexandra House, The Parsonage, Manchester on 21 March 2018**

**The Appellants in person**

**Ms Jennifer Newstead Taylor, of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

5 1. These are appeals by Mr Stephen Grafton and Ms Sharon Pierce (“the Appellants”) against decisions by the Respondents (“HMRC”) dated 17 November 2016, to issue Excise and Customs Civil Evasion Penalties pursuant to s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003:

- i. in respect of Mr Grafton, to issue him with a Civil Evasion Penalty (“the Penalty”) in the amount of £2,609
- 10 ii. in respect of Ms Pierce, to issue her with a Civil Evasion Penalty (“the Penalty”) in the amount of £2,798

- for the evasion and/or attempted evasion of Customs Duty, and Excise Duty, in that they failed to declare cigarettes which they were importing into the United Kingdom above the personal allowance of 200 cigarettes.

15 2. On 2 June 2017, the Tribunal gave directions consolidating the appeals.

### **Background**

3. On 16 July 2015 the Appellants were stopped and questioned by a UK Border Force (“UKBF”) Officer on entering the Green ‘Nothing to Declare’ channel at Gatwick Airport arriving from St Kitts in the West Indies.

20 4. In the baggage reclaim area before 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. St Kitts is not in the EU and therefore, travellers, for the purposes of the Travellers’ Allowances Order 1994, have a personal allowance of 200 cigarettes.

25 5. The Appellants were travelling together as partners and collected their luggage together but separated in the Green Channel. They then chose to exit through the ‘Nothing to Declare’ Green Channel, indicating that they had no goods to declare, at which point they were separately intercepted by UKBF Officers and their bags searched.

30 6. Each Appellant informed the Border Force Officer that they were travelling alone. They were not. Ms Pierce only confirmed this once the cigarettes had been found. Mr Grafton only confirmed this when the baggage receipts he provided to Officer Young did not match his luggage.

35 7. Searches of Mr Grafton’s bags revealed 25,000 Lambert & Butler cigarettes. Upon the cigarettes being found, he stated that the cigarettes were for his own use and asked how he could pay the fine.

8. Ms Pierce said that she had “a few” cigarettes in her luggage, when in fact she had 26,800 Lambert & Butler cigarettes.

9. Ms Pierce's cigarettes were packed in her suitcases covered with a small amount of clothing.

10. The purchase cost of the cigarettes carried, as per the receipts, was \$4,420. They had pre-ordered the goods on 9 July 2015, paying a cash deposit of \$2,000.

5 11. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended), Officer Young seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the Appellants with Public Notices 1 and 12A, Seizure Information Notice BOR156 and Warning Letter BOR162. Ms Pierce signed both  
10 documents. Mr Grafton only signed BOR162.

12. The legality of seizure was not challenged in the Magistrates' court and the seizure and forfeiture of the goods was therefore deemed to be lawful pursuant to Paragraph 5 Schedule 3 CEMA.

15 13. On 20 July 2016, HMRC's Officer Chris Harwood of HMRC's International Trade and Excise Unit, wrote separately to each of the Appellants, informing them that HMRC were 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 Appellants were invited to co-operate with the enquiry and advised of the action  
20 they could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellants. The letter made it clear that any reduction in the penalty was contingent on the Appellants' response and co-operation with HMRC's enquires.

25 14. The letter from Officer Harwood explained that if the Appellants were willing to co-operate with the enquiry they 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  
30 you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling.
- For each person involved, please state exactly what they did.
- For each person involved, please state why they did it.
- 35 • A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, (the dates) alcohol or tobacco products were smuggled (or attempts made to smuggle them) into the UK.
- 40 • Confirmation of the quantities of goods involved on each occasion.

- Details of all international travel during the period under enquiry, including the reasons for travel.
- 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.”

5

15. Officer Harwood also referred the Appellants to Public Notice 300, s3 where it states that a reduction in penalty may be given as follows:

“Disclosure

10 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:

- 15
- attend all the interviews (where necessary);
  - provide all information promptly;
  - answer all questions truthfully;
  - give the relevant information to establish your true liability;
  - co-operate until the end of the investigation.”

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16. On 29 July 2016, HMRC received Mr Grafton’s letter, dated 28 July 2016, detailing his travel history, the intended use of the cigarettes and a signed copy of the letter to him dated 20 July 2016 indicating that he had read and understood its contents. Mr Grafton on behalf of both Appellants added:

25 “The reason bringing cigarettes back was to give them to family members purely as gifts from our holidays. Sharon Pierce brought cigarettes back to give to family members purely as gifts from our holidays, was also totally unaware of any explanations. Went on holiday - seen cigarettes in shop thought it would be a nice gift for our family members, put cigarettes in our luggage and returned to the UK as normal. I have only ever brought  
30 cigarettes back on this occasion only.

Previous travel - March 2016 Tenerife - leisure break, November 2015 Barbados - leisure break, July 2015 St Kitts - leisure break, May 2015 Paris - romantic break, January 2015 Barbados - leisure break, October 2014 Palma - leisure break.

35 We are both law abiding citizens with no criminal history of any wrong doing at all. I must sincerely apologise for being totally naïve with respect to customs regulations and generally was not acting with any agenda or criminal intention. We both got caught up in the enjoyment of our holiday and we were both profoundly mistaken in our actions as we both thought we were acting in a good nature towards our family members.

40 We now always read and make custom regulations a point of understanding when undertaking any future international travel and are now always 100% aware of our

allowance. I fully intend not to exceed my allowance ever again as we have both realised the severity of this situation.....”

5 17. On 12 August 2016, HMRC considered Ms Pierce’s letter, dated 26 July 2016, detailing her travel history, the intended use of the cigarettes and a signed copy of the letter to her dated 20 July 2016 indicating that she had read and understood its contents.

18. On 19 August 2016 Officer Harwood issued a ‘Civil Penalty - Notice of Assessment’ to Mr Grafton of £2,163 and to Ms Pierce of £2,319.

10 19. Officer Harwood explained that there are two factors, disclosure and co-operation, which determine the level of penalty 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 co-operating with the enquiry procedure.

15 20. He explained how the Penalty had been calculated and advised that a reduction from the maximum penalty had been made which represented a 65% discount (3% for disclosure and 35% for co-operation) of the total penalty reflecting the degree of disclosure and co-operation given by the Appellants in the course of the enquiry.

21. On 30 August 2016, Mr Grafton wrote to Officer Harwood saying:

20 “.. we were not acting in a dishonest manner. We were purely acting with good faith towards our friends and family at that time in buying the cigarettes as gifts, our only crime is being completely naive to the point that we failed to think rationally or with perspective towards our allowance. In hindsight we should have checked and made ourselves aware of the allowance available to us, unfortunately we failed to do this and we hold our hands up to that fact.

25 This situation has been very stressful to us both financially and emotionally as we as a partnership are trying for a baby and are currently under the professional care of the Liverpool Women’s NHS foundation trust. ....Financially this has cost us a great deal to get to this point and I ...have no money in which to pay such a penalty.”

30 22. On 21 September 2016, Mr Grafton wrote requesting a review of the decision for each Appellant. He added that after seven years service in the British Army he had, over time, developed Post Traumatic Stress Disorder. He had recently been involved in giving evidence to the Iraq Fatality Investigations team with regard to the death of a fifteen year old boy while he was serving out in Iraq. During this time period he had to seek professional help from his GP and had also attended counselling. The reason for him going ahead of his partner separately on the day he was stopped was to leave the airport environment quickly, as he feels very vulnerable and uncomfortable in crowded and confined spaces due to his PTSD. He stated that when fighting a mental illness one does not have the sound judgement or awareness of a person who does not have an illness, so it is only fair that his actions are judged on those circumstances. He could not see how it can be fair to be punished twice for one error of judgement.

40 23. Ms Pierce wrote on the same date setting out personal reasons for the way in which she acted when stopped by the Border Force Officer.

24. On 3 November 2016, Officer Clydesdale on review upheld the decisions but said that the Penalties had initially been incorrectly calculated. On 17 November 2016 Mr Harwood issued letters revising the Penalties upwards to £2,798 in the case of Ms Pierce and £2,609 in the case of Mr Grafton.

5 25. Following a second review by Officer Beattie on 25 January 2017, the revised Penalties for Mr Grafton were upheld. Officer Clydesdale wrote to Ms Pierce on 17 January 2017 confirming the Penalty issued to her after a second review.

26. On 20 March 2017 the Tribunal Service received a Notice of Appeal from each Appellant.

## 10 **Evidence**

27. The combined bundle of documents included the witness statement of Border Officer Young who carried out the bag searches, a copy of his notebook entries and the witness statement of Officer Harwood. Both gave oral evidence under oath to the Tribunal. Officer Darby provided a witness statement and gave oral evidence under  
15 affirmation. Mr Grafton also gave oral evidence to the Tribunal under oath. We were provided with copy correspondence, copy relevant legislation and case law authority.

## **The Law**

28. The legislation relevant to this appeal is:

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

20 Penalty for evasion of excise duty.

(1) Subject to the following provisions of this section, in any case where -

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

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

that person shall be liable to a penalty of an amount equal to the amount of duty evaded or, as the case may be, sought to be evaded.

(4) Where a person is liable to a penalty under this section -

30 (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. (...)

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

35 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),

5 that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded. (...)

29 Reduction of penalty under section 25 or 26.

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

10 (a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and

(b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners. (...)

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

49(1) Where-

a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-

20 (i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

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

S139 Provisions as to detention, seizure and condemnation of goods

30 (1) Anything liable to forfeiture under the Customs and Excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard.

(2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either—

(a) deliver that thing to the nearest convenient office of Customs and Excise; or

35 (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.

40 (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—

5 (a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

(b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

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

(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.

20 (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.

25 (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:

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

#### Travellers' Allowances Order 1994

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

35 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—

40 (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;

45 (b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;



(c) “third country”, in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991

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

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

## HMRC Public Notices

### HMRC Notice 300 Customs civil investigation of suspected evasion

#### 2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
- his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
- The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

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.

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

- Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
- Up to 40 per cent - fully embracing and meeting responsibilities under the procedure by, for example: supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.

In most cases, therefore, the maximum reduction obtainable will be 80 per cent of the value of import duties on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a complete and unprompted voluntary disclosure.

### HMRC Notice 160 Compliance checks into indirect tax matters

#### 2.3 How can penalties be reduced?

It is for you decide whether or not to co-operate with our check, but if you do you should be truthful as making a statement to us you know to be false, you could face prosecution.

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

You should tell us about anything you think is relevant when we are working out the level of the penalty. At the end of the check we will take into account the extent of your cooperation.

### 2.3.1 Reductions under Civil Evasion Penalty Rules

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

- up to 40% - early and truthful explanation as to why the arrears arose and the true extent of them
- up to 40% - fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.

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 Appellants' Case**

29. In the Appellants' Notice of Appeal they do not deny that the amount of tobacco imported was over the permissible limits. They appeal HMRC's decisions to issue penalties on the following grounds:

- a) Ms Pierce was suffering from travel sickness. The medication she takes causes drowsiness.
- b) They feel victimised by the actions of the Border Force Officers on the day they were stopped, as they were essentially surrounded and interrogated in a manner that was most uncomfortable to them and they still suffer from stress and anxiety because of it.
- c) They were completely unaware of the restriction on the importation of tobacco products.
- d) In the (above) circumstances HMRC cannot make a fair judgement and to do so would be unjust and immoral and does not give a fair reflection of the facts.

During the hearing Mr Grafton added to the grounds of appeal that:

- a) He suffers from PTSD and that this may have impacted on his judgement and reasoning.
- b) He has complied with HMRC's requests to the best of his ability.
- c) The penalties are too harsh.
- d) They were not acting with any criminal intentions.

30. At the hearing, Mr Grafton gave evidence and in his submissions largely reiterated the grounds of appeal contained in the Notice of Appeal to the Tribunal and earlier correspondence with HMRC.

## HMRC's Case

### *Burden of proof*

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

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

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

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

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

### *Dishonesty*

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

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

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

### *Submissions*

30 36. The Penalty imposed on the Appellants is civil in nature. As a consequence, HMRC must establish on the balance of probabilities that the Appellants engaged in a course of conduct for the purpose of evading excise duty and that their conduct involved dishonesty.

35 37. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the EU and the duty free allowances for excise goods.

38. The Appellants entered the Green channel, indicating that they had nothing to declare despite significant signage present.

39. The Appellants do not deny that the amount of cigarettes imported was over the permissible limits. The Appellants were together carrying 51,800 cigarettes - almost  
5 129 times over their collective personal allowances.

40. It is well known that the West Indies are outside the EU for excise purposes. The Appellants should have been fully aware that they were bringing more goods into the country than they were entitled to without declaring them.

41. The Appellants say that they were not aware of any restrictions on importing  
10 cigarettes without declaring them. However, a reasonable and honest person would check the allowances before importing such a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.

42. On 16 July 2015, by entering the Green 'Nothing to Declare' channel at Gatwick  
15 Airport, it was implicit that the Appellants were acting dishonestly and deliberately taking action to positively evade duty and tax.

43. Because the Appellants acted dishonestly and deliberately took the action to positively evade duty and tax, HMRC are entitled under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003 to issue the Appellants with the Penalties.

### **Conclusion**

20 44. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the Appellants have been dishonest. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities.

25 45. The Appellants imported the cigarettes from the West Indies. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. The airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. The West Indies is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are  
30 applicable when importing from EU countries.

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

47. The Appellants were experienced travellers having been to Tenerife in March 2016, St Kitts in July 2015, Paris in May 2015, Barbados in January 2015 and Palma in October 2014. Therefore, they would have been aware of the Channel system and of the allowances.

48. It is inherently unlikely that the Appellants did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities.

49. If the Appellants had not been stopped the loss of Customs and Excise Duty to the Crown would have been £6,182 in respect of Mr Grafton and £7,797 in respect of Ms  
5 Pierce.

50. The goods cost, as per the receipt, amounts equivalent to £1,362.60 and £1,460.06. These are considerable amounts, particularly as the Appellants assert that they are unable to pay the penalties. If the goods were bought as gifts as initially  
10 claimed, then it has to be queried how the Appellants are able to afford such gifts and overseas travel given their alleged limited finances.

51. Mr Grafton states that he suffers from PTSD and that this may have caused him not to exercise the sound judgement that would be expected of a person of honest intentions. Ms Pierce says that she was suffering from travel sickness and that the medication she was taking made her feel drowsy.

15 52. The Appellants had pre-ordered the cigarettes at the St Kitts duty free shop on the outward journey and paid a cash deposit of \$2,000. The purchase of the cigarettes was therefore planned and not made on impulse. Mr Grafton may have been diagnosed as suffering from PTSD but he and Ms Pierce were experienced travellers and were able to arrange for the cash deposit and prepare appropriate luggage to carry an extremely  
20 large quantity of cigarettes. Despite the fact that the purchase was planned, the Appellants took no steps to enquire as to the customs limits. Their actions, when going through customs, including separating and initially denying that they had any cigarettes to declare, were intended to avoid the duty on the goods they were carrying.

25 53. The Appellants have not offered any grounds to successfully challenge the decisions to issue the penalties.

54. As the Appellants dishonestly attempted to evade import VAT, Excise and Customs duties, in each case a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

30 55. The Appellants state that they cannot afford the penalties. Hardship is not a valid ground of appeal. Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) 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.

35 56. HMRC can reduce a penalty on the basis of the customer's co-operation. No challenge has been brought as to the calculation of the duties and level of mitigation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure.

40 57. The Appellants have each been awarded a 65% reduction calculated as 30% for disclosure and 35% for co-operation. Accordingly, the penalties have been reduced

from £7,456 to £2,609 in respect of Mr Grafton and from £7,797 to £2,798 in respect of Ms Pierce. In the circumstances, the reductions are fair, reasonable and in accordance with legislation.

5 58. The appeal is accordingly dismissed and the mitigated Penalties of £2,609 issued to Mr Grafton and £2,798 issued to Ms Pierce are confirmed.

10 59. 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: 22 October 2018**

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