[2020] UKFTT 342 (TC)

TC07822

CUSTOMS AND EXCISE DUTY PENALTIES – importation of cigarettes – penalties imposed for conduct involving dishonesty – Appellant claimed genuine misunderstanding of legal limits – held conduct dishonest and appropriate aggregate mitigation given for disclosure and cooperation – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02801

BETWEEN

MOHAMMAD MEHTI DORAFSHANIAN **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 27 July 2020 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are described in the decision.

DECISION

INTRODUCTION

1. HMRC issued a joint civil evasion penalty of £538 (the "Penalty") to Mr Dorafshanian on 20 November 2018 in respect of 4,500 cigarettes which were seized from him at Heathrow Airport on 11 November 2017. That Penalty comprised a customs evasion penalty of £116 and an excise evasion penalty of £422. Mr Dorafshanian is appealing against that Penalty (both as to its imposition and the amount). I note that Mr Dorafshanian's notice of appeal to the Tribunal states that his appeal is about air passenger duty, and describes the dispute as being about the penalty on excess passenger duty. However, the grounds of appeal, evidence of imposition of the Penalty, review conclusion letter and HMRC's statement of case all indicate that the Penalty was imposed in respect of the importation of cigarettes and I have treated the appeal as being against such Penalty.

2. As described further below, there have been delays by Mr Dorafshanian at various stages of the appeal process, including:

(1) the appeal to the Tribunal was late; and

(2) failure to comply with directions resulted in the appeal being struck out on 22 November 2019.

3. Mr Dorafshanian requested a review of HMRC's decision to issue the Penalty, and although that was made late the review request was accepted by HMRC as of 8 February 2019. The review conclusion letter dated 13 March 2019 upheld the decision to issue the Penalty, and informed Mr Dorafshanian that if he wanted to appeal he must write to the Tribunal within 30 days of the date of that letter. The appeal was notified to the Tribunal on 2 May 2019. The appeal was acknowledged by the Tribunal on 20 May 2019, and the acknowledgement letter sent to HMRC stated that if HMRC objected to the appeal being made late, they must tell the Tribunal (with reasons) as soon as practicable and in any event no later than when serving their statement of case, failing which the Tribunal would consider that HMRC had consented.

4. HMRC filed and served its statement of case on 18 July 2019. That statement of case does not contain any objection to the lateness of the appeal, nor was any separate objection notice filed. Accordingly, I treat HMRC as having consented to the appeal being made late. The decision as to whether to accept late notice of an appeal remains within the discretion of the Tribunal, even where HMRC consent. However, given that the delay was approximately three weeks and HMRC have prepared a full statement of case and hearing bundle for this appeal, I consider that it is in the interests of fairness and justice to accept late notice of the appeal to the Tribunal.

5. The appeal was struck out by the Tribunal in November 2019 (following non-compliance by Mr Dorafshanian with an unless order). Having been struck out, Mr Dorafshanian then applied for his appeal to be reinstated. HMRC did not object to that reinstatement and Judge Brown reinstated the appeal in a decision of 16 March 2020. The details of the non-compliance with directions are not relevant to the substance of this appeal and are therefore not set out here. (I have set out, and made findings in relation to, the timing of responses to enquiries by HMRC in respect of the issuance of the Penalty as these are relevant to the level of mitigation applied by HMRC.)

6. The Tribunal then prepared to list the appeal for a hearing, and asked the parties for dates to avoid. However, on 15 June 2020 the Tribunal informed the parties that it was considering the most appropriate manner to determine the appeal given that, due to the COVID-19 pandemic, the Tribunal was no longer conducting face to face hearings. In response to the questions asked by the Tribunal, HMRC consented to the appeal being determined on the

papers, also noting that it would be suitable for determination by a telephone conference call. Mr Dorafshanian asked that the appeal be determined on the papers. In view of these responses, the appeal was listed to be determined by me on the papers.

BACKGROUND AND FINDINGS OF FACT

7. I had various papers in a hearing bundle of 195 pages, including Mr Dorafshanian's notice of appeal, correspondence between the parties including the review conclusion letter, HMRC's statement of case, extracts from the Border Force officer's notebook (Officer Matthew Rowles), together with a witness statement dated 20 September 2019 from Officer Rowles and a witness statement of Officer Wendy Hirst of HMRC dated 17 September 2019. Officer Rowles was the officer who had stopped Mr Dorafshanian at Heathrow on 11 November 2017. Officer Hirst had, amongst other matters, received the explanations from Mr Dorafshanian as to the events of that date and issued the Penalty. I also had a bundle of authorities comprising relevant legislation, cases and HMRC notices.

8. The facts were largely common ground between the parties and are set out below, albeit that the parties take issue as to whether they constitute dishonesty. These are the facts as I find them.

9. On 11 November 2017, Mr Dorafshanian was stopped by Officer Rowles of Border Force and questioned by him at Heathrow Airport. He was returning to the UK from Istanbul and had entered the green channel indicating he had "nothing to declare". During questioning Mr Dorafshanian told Officer Rowles that he was carrying cigarettes on him. Mr Dorafshanian had arrived on a flight from Turkey, but had started his journey in Tehran. Mr Dorafshanian stated that he had been told he could bring ten cartons of cigarettes into the UK.

10. Following a search of Mr Dorafshanian's bag by Officer Rowles, he was found to be carrying 4,500 Bahman cigarettes (ie nine boxes). These goods were seized as they were over the permitted personal allowance (of 200 cigarettes) and Mr Dorafshanian was issued with forms BOR156 and BOR162 which he signed. Notices 1 and 12a were also issued to him.

11. Mr Dorafshanian did not challenge the legality of the seizure.

12. On 1 August 2018, Officer Hands of HMRC wrote to Mr Dorafshanian to inform him of HMRC's enquiry into the evasion of customs and excise duties and invited him to disclose any relevant information/documents. Public Notices 300 and 160 and factsheet CC/FS9 were also issued at the same time. The letter explained that co-operation with the enquiry could reduce any penalties that may become due. A response was requested within 30 days of the date of the letter.

13. On 15 August 2018, Officer Robinson of HMRC issued a reminder letter to Mr Dorafshanian informing him that if he wished to co-operate with HMRC's enquiries he should provide a response by 31 August 2018.

14. HMRC did not receive any communication from Mr Dorafshanian in response to these letters and on 12 September 2018 Officer Hall of HMRC issued a civil evasion penalty of £1,542 (comprising £334 customs evasion penalty and £1,208 excise evasion penalty) (the "Initial Penalty"). Form HMRC1 (what you can do if you disagree) was included with the letter. No mitigation was awarded as no response had been received from Mr Dorafshanian.

15. On 7 October 2018 Mr Dorafshanian wrote to HMRC stating that he had sent a previous letter answering all questions and had signed the declaration form confirming that he had read and understood the information sent to him. He "recently came back" and noticed the letter with the Initial Penalty. He had tried to call HMRC "many times with no success". He also stated that the events on the day of the seizure were a "genuine mistake and misunderstanding" of the legal limits and requested a review of the decision to charge the Initial Penalty.

16. No additional information or evidence was provided to support Mr Dorafshanian's statements that he had responded to the letters sent in August, or that he had tried to call HMRC. However, neither of these statements has been challenged by HMRC, either in the subsequent correspondence with him by the audit team (set out below) or in HMRC's statement of case by way of submissions, which state only that no response was received. Furthermore, given that the pattern of correspondence demonstrates that Mr Dorafshanian has generally engaged with HMRC throughout the process, and there is an example of another letter from him spending several weeks astray within HMRC (see [22] below), I find that Mr Dorafshanian had responded to HMRC as he described.

17. On 17 October 2018, Officer Hall wrote to Mr Dorafshanian explaining that the penalty letter, without any reductions for mitigation, was issued because HMRC had not received a response from Mr Dorafshanian. HMRC enclosed copies of all previous correspondence issued to him and asked him to re-send his written response so that HMRC could consider whether a penalty was still applicable and, if so, the information he provided would be taken into consideration and any reductions offered. Mr Dorafshanian was asked to provide a response by 31 October 2018.

18. On 31 October 2018, HMRC received a letter from Mr Dorafshanian dated 27 October 2018. He had signed the appropriate declaration and provided an explanation of the events that took place on 11 November 2017. That explanation included that he had bought nine boxes of cigarettes at "the airport" and had asked about the limit for the UK. He was told it was ten boxes, so he thought he was carrying the right amount. He had travelled through customs a number of times and never brought anything more than the legal limit - this was a genuine misunderstanding and mistake.

19. There is no additional information as to which airport is being referred to by Mr Dorafshanian. I consider that it is clear from the context that his explanation is that he asked about the limits at the airport at which he bought the cigarettes, and that this was not on arrival in the UK. Mr Dorafshanian was travelling back from Iran via Turkey and there is no additional information as to whether the airport at which he bought the cigarettes was that in Tehran or Istanbul. This does not make any difference to the relevant limits (both being third countries). Given that I am aware that general practice upon buying goods in airports is to require passengers to produce their boarding pass, it is perhaps more likely that they were bought in Tehran (as his boarding pass would have shown that he was flying to Istanbul and it would have been necessary for him to clarify that he was asking about limits for the UK, whereas in Istanbul such additional clarification should not have been necessary). However, there was no evidence before me as to whether this practice would invariably have been followed in either airport. Furthermore, Mr Dorafshanian may still have asked about the UK even if it was (or should have been) apparent to anyone checking his boarding pass that this was his final destination. I do not consider I need to make any finding other than that the cigarettes were bought at the airport in either Tehran or Istanbul.

20. HMRC have not challenged the statements made by Mr Dorafshanian (repeated in his notice of appeal) that he asked about the limits when buying the cigarettes. There was no witness statement filed by Mr Dorafshanian for the purposes of the appeal. Such a witness statement would, if prepared with the assistance of a representative, be likely to have included a statement of truth, and even in the absence of that would have been signed by Mr Dorafshanian. However, it has been clear to HMRC since 31 October 2018 that as part of his appeal Mr Dorafshanian is maintaining that, as a matter of fact, he had asked about the limits for importing cigarettes when he bought them and that he had believed that he bought (and thus imported) less than the legal limit. HMRC do not challenge the assertion that he asked about limits when buying the cigarettes, or that he had been told that the limit was ten boxes, in their

statement of case (albeit that they do challenge Mr Dorafshanian's decision to rely on what he was told by airport staff (including stating that he should have been aware of the allowances and their existence) and his subsequent actions in not checking with an "appropriate official" and using the green channel), and nor is there any evidence that they had done so at any earlier stage of correspondence with Mr Dorafshanian. Given the statements made by Mr Dorafshanian, and HMRC's decision not to challenge them, I find that Mr Dorafshanian had asked about limits for bringing cigarettes into the UK when he bought them.

21. On 20 November 2018, following the information received from Mr Dorafshanian, Officer Hirst of HMRC issued a revised civil evasion penalty for £538.00 (being a £116.00 customs evasion penalty and £422.00 excise evasion penalty), this being the reduced amount which is now the subject-matter of this appeal. As Mr Dorafshanian had provided some information and assistance in relation to the enquiries, a reduction of 65% was awarded – 30% for disclosure and 35% for co-operation (the maximum allowable for each in accordance with HMRC's publicly stated practice, which is not legally binding, being 40%).

22. On 1 February 2019, Mr Dorafshanian telephoned Officer Hirst, explaining that he had written to HMRC requesting a review of the decision to issue the Penalty. HMRC informed him that they had not received the review request and that he should re-send his letter so that the matter could be referred to an independent review officer. It later appeared that Mr Dorafshanian's letter had in fact been received by HMRC on 9 January 2019 but had taken some time to reach the appropriate office. On 8 February 2019 HMRC sent out an acknowledgement of this letter and stated that they would accept his late request for a review and his request had been referred to an independent review officer.

23. On 12 March 2019, HMRC wrote to Mr Dorafshanian with the outcome of their review, upholding the decision to issue him with the Penalty. That letter stated that the mitigation allowed by the HMRC officer issuing the penalty was within the range the reviewing officer would expect.

24. On 2 May 2019, Mr Dorafshanian appealed to the Tribunal.

GROUNDS OF APPEAL OF MR DORAFSHANIAN

25. The notice of appeal sets out the following (as grounds of appeal and desired outcome):

> "I replied to HMRC, they apply the maximum penalty base on that I have not answered all the questions and not helping with the inquiry first and also because I've passed through costumes before They assuming that I knew or I should know what exactly the limit is, Therefore I've not getting a penalty removed.
>
> They did not considering the fact that I never bring any goods more than limit to the UK and this was a first time. I bought 9 boxes of cigarettes at the airport and I ask if that's allowed to take with me they said it's ok and i bought them.
>
> I would like to get the penalty removed. I have a disability and I'm not working and I don't have any income…"

26. In his letter to HMRC of 7 October 2018 (see [15] above), Mr Dorafshanian described the matter as being a "genuine mistake and misunderstanding" of the legal limits which had happened for the first time. This was repeated in his letter of 27 October 2018, which also set out his explanation that he had asked about the limit when buying the cigarettes at the airport.

27. From these, I take Mr Dorafshanian's grounds of appeal as being:

(1) HMRC had applied the maximum penalty on the basis that he had not answered all the questions and had not helped;

(2) HMRC were assuming that, as he had passed through customs before, he knew or should have known the limits on cigarettes, whereas this was a genuine mistake or misunderstanding on his part;

(3) HMRC had not taken into account the fact that he had not previously exceeded the limits – this was the first time he had done so;

(4) he had bought nine boxes of cigarettes at the airport, asked if he was allowed to take them with him and been told that this was OK; and

(5) he has a disability, is not working and does not have any income.

RELEVANT LAW

28. In respect of penalties for unpaid excise duty, s8 Finance Act 1994 ("FA 1994") provides, so far as relevant, as follows:

> "**8. 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
>
> (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 -
>
> (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.
>
> (5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say—
>
> (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;
>
> (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty."

29. Sections 12 and 13 FA 1994 provide, so far as relevant, as follows:

> "**12. Assessments to excise duty**
>
> (1) Subject to subsection (4) below, where it appears to the Commissioners-
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

…

(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say-

(a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

(5) Subsection (4) above shall have effect as if the reference in paragraph (a) to 4 years were a reference to twenty years in any case falling within subsection (5A)(a) or (b).

(5A) The cases are-

(a) a case involving a loss of duty of excise brought about deliberately by the person assessed (P) or by another person acting on P's behalf, and

(b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of duty of excise.

13. Assessments to penalties

(1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty."

30. In respect of penalties for unpaid import VAT (a "relevant tax or duty" for these purposes), ss25 to 32 Finance Act 2003 ("FA 2003") provide, so far as relevant, as follows:

"**25. 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),

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 -

(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.

(2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are-

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

(b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

…

30. Demands for penalties

(1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person or his representative a notice in writing (a "demand notice") demanding payment of the amount due by way of penalty.

(2) An amount demanded as due from a person or his representative in accordance with subsection (1) is recoverable as if it were an amount due from the person or, as the case may be, the representative as an amount of customs duty. This subsection is subject to-

(a) any appeal under section 33 (appeals to tribunal); and

(b) subsection (3).

(3) An amount so demanded is not recoverable if or to the extent that-

(a) the demand has subsequently been withdrawn; or

(b) the amount has been reduced under section 29.

…

31. Time limits for demands for penalties

(1) A demand notice may not be given-

(a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or

(b) in the case of a penalty under section 26, more than 3 years after the conduct giving rise to the liability to the penalty ceased.

(2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

(3) A demand notice-

(a) may be given in respect of a penalty to which a person was liable under section 25 or 26 immediately before his death, but

(b) in the case of a penalty to which the deceased was so liable under section 25, may not be given more than 3 years after his death.

…

33. Right to appeal against certain decisions

…

(2) Where HMRC give a demand notice to a person or his representative, the person or his representative may make an appeal to an appeal tribunal in respect of -

(a) their decision that the person is liable to a penalty under section 25 or 26, or

(b) their decision as to the amount of the liability.

…

(6) The powers of an appeal tribunal on an appeal under this section include-

(a) power to quash or vary a decision; and

(b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section-

(a) the burden of proof as to the matters mentioned in section 25(1) or 26(1) lies on HMRC; but

(b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established."

31. Provisions relating to forfeiture are set out in the Customs and Excise Management Act 1979 ("CEMA 1979") as follows:

"49. Forfeiture of goods improperly imported

(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,

those goods shall …be liable to forfeiture.

…

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

…

(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.

…

139. 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.

(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

(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.

(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-

(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;

(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.

(7) If any person, not being an officer, by whom anything is seized or detained or who has custody thereof after its seizure or detention, fails to comply with any requirement of this section or with any direction of the Commissioners given thereunder; he shall be liable on summary conviction to a penalty of level 2 on the standard scale.

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

32. Paragraph 5 of Schedule 3 of CEMA 1979 states:

"If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given

> to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied."

33. The Travellers' Allowances Order 1994 provides that persons travelling from a "third country", which would include Iran and Turkey, are relieved from payment of VAT and excise duty on a personal allowance of 200 cigarettes.

SUBMISSIONS OF HMRC

34. HMRC submit that the test for dishonesty is set out in the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords Club* [2017] UKSC 67. This makes it clear that it is first necessary to establish the actual state of the individual's knowledge or belief as to the facts. Once his actual state of mind as to knowledge or belief as to facts is established, the 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 appellant must appreciate that what he has done is, by those standards, dishonest.

35. Mr Dorafshanian was stopped in the green channel, thereby indicating that he had nothing to declare to Border Force. This proved to be a false indication, as he was found to be carrying 4,500 cigarettes. According to the Travellers' Allowance Order 1994, the maximum amount of cigarettes permitted to be imported from a third country is 200.

36. It is the responsibility of a traveller to make themselves aware of the permitted allowances when bringing goods into the UK. There are signs at all UK airports which outline the restrictions and allowances on bringing goods into the UK. The signs are visual aids with pictures of dutiable goods, including tobacco products. There are also clear signs showing the location of the green channel. HMRC submit that Mr Dorafshanian chose to ignore these signs.

37. Ignorance of the many signs and information available is indicative that Mr Dorafshanian acted dishonestly by the standards of ordinary and honest people.

38. HMRC contend that as Mr Dorafshanian had travelled through Customs controls on a number of occasions, one would likely be aware of the customs allowances and their existence.

39. HMRC contend that it is not the responsibility of the airport staff to advise the travellers, many of whom are travelling to various countries around the world, as to what restrictions there are on importing tobacco products into their destination country. It is Mr Dorafshanian's responsibility as a traveller to ensure that he does not exceed his dutiable allowance, and it would have been advisable to ask an appropriate official if he were in any doubt.

40. As Mr Dorafshanian did not appeal the seizure of the goods, the goods have been condemned as forfeit. It is not open to the Tribunal to consider if the goods were imported for a commercial purpose; that is held as fact as the goods have been condemned (*HMRC v Jones* [2011] EWCA Civ 824).

41. HMRC and, on appeal, the Tribunal "may reduce any penalty to such amount (including nil) as they think proper". Public Notice 300 details a maximum of 40% reduction for disclosure and 40% for co-operation. The policy has no statutory force, and is therefore not binding on the Tribunal. However, HMRC contend that this policy provides for a consistent approach for the reduction of penalties and should normally be respected. In this case, HMRC have allowed a 30% reduction for disclosure and 35% for co-operation.

DISCUSSION

42. The issue in this appeal is whether or not the Penalty was properly imposed. The duty evaded was £1,542 and the penalties were imposed under s8 FA 1994 and s25 FA 2003, both of which can only apply where a person's conduct involves dishonesty. The burden of proof to establish conduct involving dishonesty is on HMRC; once this has been met, the burden is

on Mr Dorafshanian to demonstrate that the grounds on which his appeal is brought have been established. The standard of proof is the balance of probabilities.

43. The test for dishonesty when issuing a civil evasion penalty is, as HMRC say, an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The test to be applied is as stated by the Supreme Court in *Ivey v Genting*:

> "62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] Bus LR 220; [2007] 1 Lloyd's Rep 115 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480, who had been a party also to *Twinsectra*: "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 state of the law and their Lordships agree."
>
> 63. Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose.
>
> …
>
> 74. …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*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (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 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."

44. Mr Dorafshanian's grounds make it clear (by denying that he knew or should have known the limits, referring to his having asked about limits when purchasing nine boxes of cigarettes at the airport, and stating that this is a misunderstanding which has not occurred before) that he is denying dishonesty. He is essentially arguing that he believed the duty free limits to be much

higher than they actually were and, accordingly, he had not acted dishonestly in exceeding them.

45. HMRC submit that it is Mr Dorafshanian's responsibility to make himself aware of the permitted allowances, and that it is not the responsibility of airport staff (impliedly those overseas) to advise travellers who will be travelling to various countries around the world.

46. It is well known that tax and duty is payable on imported cigarettes, and that the numbers permitted varies according to whether they are being brought in from within or outside the UK. There are clear signs at Heathrow airport which describe the allowances, which are designed to inform travellers of the restrictions.

47. Mr Dorafshanian brought 4,500 cigarettes into the UK, a quantity far in excess of the personal allowance of 200 cigarettes. I have found (see [20] above) that Mr Dorafshanian had asked about limits for bringing cigarettes into the UK when he bought them (in either Iran or Turkey). This demonstrates that he was aware that there were restrictions on the number of cigarettes that could be brought into the UK. A reasonable person would check the allowances before importing such a large number of cigarettes. Mr Dorafshanian's answer to this would be that he had checked, when buying the cigarettes. The difficulty with this argument is that the answer he had been given should have appeared incredibly high, and it is not realistic or reasonable to assume that those working in airports overseas have an accurate knowledge of the restrictions applicable in countries across the world. Furthermore, it is not clear that any answer given would have been confined to limits that may be imported duty free, rather than being allowed provided additional duty was declared and paid. Applying the test in *Ivey*, and by the standards of "ordinary decent people", I have concluded that Mr Dorafshanian acted dishonestly in bringing 4,500 cigarettes into the UK.

48. As Mr Dorafshanian dishonestly attempted to evade customs and excise duties, a penalty is due under s8(1) FA 1994 and s 25(1) FA 2003. The Penalty was correctly calculated; Mr Dorafshanian challenges the level of mitigation which has been applied by HMRC.

49. HMRC's policy on the reduction or mitigation of penalties (which is not legally binding) is set out as follows in Notice 300 (customs civil investigation of suspected evasion):

> "2.4 <u>Penalty for evasion of the relevant tax or duty</u>
>
> 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 <u>By how much can the penalty be reduced?</u>
>
> 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."

50. HMRC's Notice 160 (compliance checks into indirect tax matters) sets out similar information:

"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."

51. HMRC had initially issued penalties (on 12 September 2018) at the maximum amount of £1,542 having failed to receive any response from Mr Dorafshanian to their letters of 1 August 2018 or 15 August 2018. However, Mr Dorafshanian wrote to HMRC on 7 October 2018 explaining that he had replied to the initial letter and signed the relevant declarations. HMRC did not challenge this, and instead set Mr Dorafshanian a copy of the earlier correspondence from them and on 27 October 2018 (within the response time set by HMRC) he replied with his explanation. HMRC issued the reduced penalties on 19 November 2018, applying a 30% reduction for disclosure and 35% for cooperation.

52. The review conclusion letter notes:

"You have answered most but not all of the listed enquiry points in the initial letter. You have not explained why you attempted to carry the goods into the UK and although you have admitted the offence you maintain that it was a

"genuine misunderstanding" and not a deliberate attempt to evade the duties due."

53. Having considered the explanations provided by Mr Dorafshanian and the grounds of appeal, I have concluded that the 65% reduction for disclosure and co-operation is the appropriate level of reduction.

54. I do, however, differ from HMRC as to the appropriate levels for each of these two bases for mitigation (albeit that this does not make any difference to the total amount of reduction). Whilst HMRC did not receive any response from Mr Dorafshanian prior to his letter of 7 October 2018, they have not challenged his statement that he had replied to the initial letter from August 2018. He did then respond again once HMRC re-sent him the earlier correspondence. I consider it is appropriate to apply the full 40% reduction for co-operation. However, there are deficiencies in the level of disclosure provided (including the omission of details as to the place of purchase of the cigarettes, whether he had made it clear when asking airport staff that he was asking about duty free allowances, and the number of previous trips which had been made outside the UK). I would therefore only allow a reduction of 25% for disclosure. Taken together with the reduction for co-operation, this gives a total reduction of 65%, as given by HMRC.

55. Mr Dorafshanian has stated that he has a disability, is not working and does not have any income. No evidence has been provided in support of any of these assertions. In any event, hardship is not a valid ground of appeal or basis for reduction of the Penalty (s8(5)(a) FA 1994 and s 29(3)(a) FA 2003).

56. The appeal is accordingly dismissed and the Penalty of £538 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

JEANETTE ZAMAN

TRIBUNAL JUDGE

RELEASE DATE: 25 AUGUST 2020