Neutral Citation: [2025] UKFTT 30 (TC)

Case Number: TC09402

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2022/13288

CUSTOMS & EXCISE DUTY – civil evasion penalty – tobacco products seized – no challenge to legality of the seizure – goods duly condemned as forfeit – whether penalty correctly applied – yes – appeal solely on the basis of inability to pay the penalty – Appeal dismissed

Heard on: 12 December 2024
Judgment date: 9 January 2025

Before

JUDGE NATSAI MANYARARA
LESLIE HOWARD

Between

MARIUSZ LYCZKOWSKI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: No Appearance

For the Respondents: Mr Max Schofield of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (Marius Lyczkowski) appeals against HMRC's decision, dated 21 February 2022, to issue a Customs & Excise Civil Evasion Penalty ("**the Penalty**") following the discovery of 10,000 Marlboro cigarettes ("**the Goods**"), which had not been declared by the Appellant upon his arrival in the United Kingdom. The Penalty was issued pursuant to s 8 (1) of the Finance Act 1994 ("**FA 1994**") and s 25 (1) of the Finance Act 2003 ("**FA 2003**"), for the dishonest evasion of customs and excise duty. The Penalty is in the total sum of £4,926 (of which £1,497 represents the customs civil evasion penalty and £3,429 represents the excise civil evasion penalty).

2. The Goods were seized and the legality of the seizure was not challenged by the Appellant in the Magistrates' Court. The Goods are, therefore, deemed to have been held for a commercial purpose, under Schedule 3 of the Customs & Excise Management Act 1979 ("**CEMA**"). Whilst an Assessment was also issued, the Appellant is only contesting the amount of the Penalty on the basis of an inability to pay.

3. HMRC submit that by bringing the Goods to the United Kingdom, the Appellant exceeded his allowance by 50 times the permitted amount. The Travellers Allowance Order 1994 SI 1994/955 (as amended) gives the allowances for cigarettes and hand-rolling tobacco brought into the United Kingdom. Those allowances are 200 cigarettes and 250 grammes of hand rolling tobacco.

4. Prior to the United Kingdom's withdrawal from the European Union ('EU'), a traveller arriving from the EU was allowed to bring an unlimited amount of goods if they were for "personal use", or intended as "gifts". From 1 January 2021, the same duty-free allowance applies whether the traveller was returning to the United Kingdom from the EU, or a third country (outside of the EU).

ISSUES

5. The issue under appeal is whether the Penalty has been correctly applied. This, in turn, requires consideration of whether:

   (1) HMRC have established conduct involving dishonesty; and

   (2) the Appellant has provided an innocent explanation.

6. This is despite the fact that the Appellant is only appealing against the Penalty. Section 8(1) FA 1994 and s 25(1) FA 2003 provide for a penalty to be imposed in relation to "dishonest conduct" for the purposes of evading excise duty and customs duty.

BURDEN AND STANDARD OF PROOF

7. The burden of proof in establishing conduct involving "dishonesty" lies with HMRC, pursuant to s 16 (6) FA 1994 (in respect of excise duty) and s 33(7)(a) FA 2003 (in respect of customs duty and import VAT). The burden of proof then shifts to the Appellant to provide an innocent explanation.

8. The Appellant bears the burden of proving that the Penalty should be reduced.

9. The standard of proof is the ordinary civil standard; that of a balance of probabilities.

DOCUMENTS

10. The documents to which we were referred to were: (i) the Hearing Bundle consisting of 315 pages; (ii) the Appellant's Bundle consisting of 97 pages; and (iii) HMRC's Skeleton Argument dated 3 December 2024.

BACKGROUND FACTS

11. On 4 February 2021, the Appellant was stopped by a Border Force Officer in the Import Freight Control Lanes - whilst attempting to clear customs controls for a Polish haulier - having travelled from Calais to Dover Eastern Docks. The Appellant was driving a Volvo HGV ("the Vehicle"). A search of his cab revealed that he was carrying the Goods. The Border Force Officer explained that he was seizing the Vehicle and the Goods. The Vehicle was subsequently restored upon the payment of £4,164.70. The Appellant challenged the fee charged for the restoration, but the fee was upheld on review.

12. When the Goods were seized, the Appellant was issued with a Notice 1, which sets out the allowances and restrictions, Notice 12A ("What you can do if things are seized"), Seizure Information Notice ("**form BOR156**") and a warning letter about seized goods ("**form BOR162**"), which he signed. Border Force then referred the matter to HMRC.

13. On 30 December 2021, an initial letter was issued to the Appellant by the Post Detection Audit Team ("**the PDA team**"), informing the Appellant of HMRC's enquiry into his customs duty, import VAT and excise duty affairs as they had reason to believe that he had engaged in conduct involving dishonesty. The letter asked the Appellant to confirm that he had received the letter. The letter further invited disclosure of information in relation to the seizure and explained that co-operation with the enquiry could significantly reduce any penalties that may become due. Form CC/FS9; Public Notice 160; and Public Notice 300 were also enclosed with the letter.

14. On 18 January 2022, a reminder letter was issued to the Appellant. The letter requested the Appellant to reply to the initial letter by 1 February 2022.

15. On 21 February 2022, Officer Entwisle issued a Notice of Assessment for a civil evasion penalty, in the sum of £4,926, as no response had been received from the Appellant. The Notice of Assessment explained how the Penalty had been calculated. No reduction had been applied to the Penalty as the Appellant had not provided the information that had been requested of him. The letter enclosed a copy of the "Duty Schedule" and factsheet "HMRC1".

16. On 28 April 2022, a letter dated 6 April 2022 requesting a review of the decision to charge the Penalty was received by HMRC from the Appellant.

17. On 24 May 2022, Review Officer Reid upheld Officer Entwisle's decision of 21 February 2022.

18. On 15 July 2022, the Appellant appealed to the First-tier Tribunal ("FtT").

19. HMRC confirm that they do not oppose the late appeal. Applying the principles set out in *Martland v HMRC* [2018] UKUT 0178 (TCC) and giving particular weight to the lack of any opposition by HMRC, and the degree of prejudice to the Appellant if we did not admit the late appeal, we give permission for the appeal to be notified late.

RELEVANT LAW

20. The Travellers' Allowances Order 1994 provides that:

> "1. This Order may be cited as the Travellers Allowances Order 1994 and shall come into force on 1st April 1994.
>
> 2.—(1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of 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—

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

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

(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(2)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(3)(as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991(4)).

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..."

21. The quantity for tobacco products under Schedule 1 is 200 cigarettes.

CEMA

22. Section 139 and Schedule 3 CEMA provide for seizure of anything liable to forfeiture. If the legality of the seizure is not challenged (or is challenged unsuccessfully) in the Magistrates' Court, the products are deemed in law to have been seized legally as illegal imports (for a commercial purpose) liable to forfeiture.

Excise Duty

23. Chapter II of Part I FA 1994 is headed "Appeals and Penalties". Section 8 comes under subheading "civil penalties". Section 8 FA 1994 provides for a penalty to be imposed in relation to excise duty, as follows:

"**Penalty for evasion of excise duty**

8(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 duty or 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.…

24. Section 8(4) FA 2003 provides for the reduction of a penalty, as follows:

"(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."

25. Section 8(1) and (4) FA 1994 are preserved by art. 6 SI 2009/571.

26. Under s 8(4) FA 1994, the Tribunal can reduce an excise duty penalty to such amount (including nil) as they think proper.

Customs Duty and Import VAT

27. Section 25(1) FA 2003 provides (in very similar terms to the excise duty) for a penalty to be imposed in relation to customs duty and import VAT 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…"

28. Section 29 FA 2003, similarly, provides for the reduction of a penalty, as follows:

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."

29. Import VAT is to be charged and payable as if it were a duty of customs: see s 1(4) of the Value Added Tax Act 1994 ('VATA').

30. Section 33 FA 2003 is headed "Right to appeal against certain decisions and subsection (2) provides that:

"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."

31. Subsection (6) provides that:

> "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."

32. The Tribunal may, therefore, reduce a penalty to such an amount (including nil) as it thinks proper. The Tribunal can also cancel the whole or part of any reduction of a penalty previously made by HMRC.

APPEAL HEARING

Preliminary matters

33. There was no appearance before us on behalf of the Appellant at this hearing. The Appellant had previously requested a remote hearing, as he is in Poland. This request was refused by Judge Bailey as Poland had not given permission for a person to take part in a hearing in the United Kingdom whilst in its jurisdiction.

34. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules") makes provision for proceeding with a hearing in a party's absence. Rule 33 is set out in the following terms:

> "**Hearings in a party's absence**
>
> **33.-** If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal-
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

35. We are satisfied that the Appellant has received notification of the hearing. We are further satisfied that it is in the interests of justice to proceed with the hearing in the Appellant's absence. This is because the Appellant has engaged with the Tribunal since the notice of hearing was issued. He is, therefore, aware of the hearing. Furthermore, the Appellant has not attempted to deny the allegation that he engaged in conduct involving dishonesty. It is clear that the sole issue for consideration before us is the Appellant's ability to pay the Penalty. With this in mind, we were satisfied that it was in the interests of justice to proceed with the hearing, having regard to the terms of the Procedure Rules.

36. We proceeded to hear HMRC's case.

HMRC's case

37. Whilst Officers Phillips and Entwisle were in attendance at the hearing, Mr Schofield submitted that he would not be calling any evidence and would be asking us to consider the contents of their witness statements. We did not have any questions to ask the officers.

38. Mr Schofield's submissions can be summarised as follows:

(1) The Appellant, when stopped at Dover Eastern Docks, was found to be in possession of 50 times his permitted allowance of tobacco. According to the Travellers Allowance Order 1994, the maximum amount of tobacco permitted to be imported is 200 cigarettes or 250g of Hand-Rolling Tobacco. The Appellant had 10,000 cigarettes, thus exceeding his allowances by 50 times.

(2) The Goods were hidden in the cab of the Vehicle and the Appellant denied having any dutiable goods prior to the seizure. The Appellant did not challenge the legality of the seizure and the Goods are duly condemned as forfeit.

(3) Dishonest conduct for the purposes of evading customs duty and/or import VAT and/or excise duty renders a person liable for a penalty under s 25 (1) FA 2003 and s 8 (1) of FA 1994, respectively.

(4) There are signs at UK ports 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. The ordinary and honest person would have sought out these signs, or sought advice from a Border Force Officer if there was any doubt about allowances.

(5) The Appellant was provided with Notice 12A at the time of the seizure. The Appellant did not appeal against the seizure of the Goods. The Goods have been condemned as forfeit and are, therefore, no longer considered to be the Appellant's Goods. 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.

(6) The Appellant's contention that the Border Force Officer explained that immediate payment of the fine would end the case was in relation to restoration of the Vehicle, which is a separate matter to this appeal. The Appellant signed the BOR156 and BOR162 forms, taking responsibility for the Goods.

(7) If it is accepted by the Tribunal that the Appellant genuinely did not appreciate that he was acting dishonestly, then the Appellant's behaviour was nevertheless dishonest by the standards of ordinary decent people.

(8) HMRC have not applied any reduction to the penalty amount, as the Appellant provided no responses to the information that was requested of him in the questions posed in HMRC's letter dated 7 February 2021.

(9) The customs civil evasion penalty raised under s 31 FA 2003 is in time. There are no statutory time limits for HMRC to issue the excise civil evasion penalty raised under s 8 FA 1994. However, HMRC have complied with their internal policy and issued proceedings within 12 months of the seizure.

39. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

40. On 4 February 2021, Border Force Officer Timothy Phillips intercepted the Appellant at the inbound freight lanes at Dover Eastern Docks. When asked by Officer Philips whether he had any cigarettes, the Appellant answered "*no*". Border Force Officers then conducted a search and the Goods were found concealed in the cab of the Vehicle (including in the fridge). Forms BOR156 and BOR162 were issued to the Appellant by Officer Phillips, as well as a Notice of Seizure form and Seizure of Vehicle form. The Appellant signed these.

41. Form BOR162 is set out in the following terms:

> "**WARNING**
>
> The goods listed on the attached schedule (as detailed on Form BOR156) have been seized under Section 139 of the Customs and Excise Management Act 1979. This is without prejudice to any further action that may be taken against you in connection with this matter. This may include, but is not limited to, Border Force 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 and a wrongdoing penalty, and or
>
> Other agencies or organisations who may wish to take action (which may include prosecution) in relation to this seizure."

42. On 30 December 2021 and 18 January 2022, HMRC wrote to the Appellant enquiring into the Appellant's affairs, explaining that co-operation could significantly reduce any penalties. The Appellant did not provide any further information.

43. On 21 February 2022, HMRC issued the Penalty. The Penalty was 100% of the total evaded customs duty, excise duty and import VAT calculated on the Goods seized on 4 February 2021. Enclosed with the Notice of Assessment was the Duty Schedule and Factsheet HMRC1. The Duty Schedule showed how the Penalty had been calculated; providing an individual breakdown of the customs duty, excise duty and import VAT. The Penalty for £4,926 is based solely on the value of the cigarettes that the Appellant was attempting to import. There is no additional "wrongdoing" penalty charged.

44. We have had the benefit of seeing various witness statements which HMRC rely on in support of their case, as follows:

45. Officer Phillips has prepared a witness statement, dated 11 May 2023. Officer Phillips has been designated as a General Customs Official and a Customs Revenue Official, pursuant to ss 3 and 11 of the Borders, Citizenship and Immigration Act 2009. He was on duty when the Appellant was intercepted. In his witness statement, he states that the Appellant denied that he had any tobacco when he was questioned. He explained to the Appellant that the Goods and the Vehicle were seized under s l39 and s 141 CEMA because:

(1) the Goods were concealed;

(2) the Goods were undeclared; and

(3) the Goods were in excess of the allowances.

46. Officer Phillips proceeded to issue forms BOR156 and BOR162 to the Appellant. The Appellant was, therefore, notified that the matter may be referred to HMRC.

47. Officer Andrew Entwisle is an officer of HMRC in the Customs International Trade and Excise ("CITEX") Operations team. He has worked for HMRC for 9 years, and has worked as a Tobacco Post Detection Audit Officer for the CITEX Operations team since January 2018. In his witness statement, dated 27 April 2023, he says that he decided to issue the Penalty based on dishonesty and used the following information to support his decision to charge the Penalty:

(1) At all ports of entry there is essential customer information detailing the allowances for tobacco products.

(2) When asked by Officer Phillips if he had any cigarettes or tobacco, the Appellant responded "No".

(3) The Appellant also appeared dismissive during other questioning from Officer Phillips. For example, when asked where his delivery was destined, he shrugged his shoulders and looked elsewhere.

(4) It was not credible that the Appellant could have believed 10,000 cigarettes were within his UK customs allowances.

48. Officer Entwisle established the customs and excise duty, and import VAT, due on the Goods seized from the Appellant on 4 February 2021 with reference to the value of the Marlboro Gold cigarettes was calculated using the UK Recommended Retail Price ("RRP") at the time of the seizure taking place. Therefore, the Goods found in the Appellant's possession were assessed by HMRC. The Penalty was applied at the same rate as if the Appellant had purchased the Goods in a UK shop on the date of the seizure.

49. We are satisfied that we can place reliance on the witness statements, having regard to all of the circumstances of the appeal. We, therefore, make these material findings of fact.

DISCUSSION

50. The Appellant appeals against a Penalty charged for the evasion of customs duty and excise duty. The Penalty was charged in relation to Goods which had not been declared and upon which duty had not been paid. The Appellant has, however, clarified that he is only contesting the amount of the Penalty, and is asking for it to be reduced or waived. This is on the basis of his income.

51. An incontrovertible fact in this appeal is that the Appellant did not challenge the legality of the decision to seize the Goods within the 30-day time-limit to do so. This brings the deeming provisions in Schedule 3 CEMA into play. The result of the statutory deeming is that having been bought into the United Kingdom, the Goods held cannot be considered to have been held for personal use in a way which exempted the Goods from duty. If a challenge to the legality of a seizure is not pursued, we must proceed on the basis that the Goods were legally seized. In consequence, any facts relating to the legality of the seizure must be taken to have been proved and there can be no attempt to re-adjudicate these facts: *HMRC v Jones & Jones* [2011] EWCA Civ 824 ("*Jones*").

52. HMRC are permitted to issue penalties, equivalent to the amount of duty evaded, where a person has engaged in conduct (involving dishonesty) for the purposes of evading any customs or excise duty.

Whether dishonesty has been established and whether the Appellant has provided an innocent explanation

53. In *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 ('*Abou-Ramah*'), the Court of Appeal clarified the test for dishonesty in civil breach of trust cases. Arden LJ, giving the leading judgment, first considered the Privy Council decisions in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 and *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, as well as the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] UKHL 12.

54. In *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC, at [74] ('*Ivey v Genting*'), the Supreme Court said this, at [62] and [63]:

> "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...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."

55. The test we adopt in determining whether dishonesty is established is that set out by the Supreme Court in *Ivey v Genting*, at [74]:

> "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."

56. Therefore, there is no requirement that HMRC prove dishonesty by establishing that a person knew that what he was doing was dishonest. However, it is necessary to consider whether the person's behaviour was dishonest according to normally accepted standards of behaviour, having regard to circumstances known to the person at the time and his personal attributes, experience and intelligence.

57. HMRC submit that:

(1) subjectively, the Appellant knew that the Goods were over the legal-limit and intended not to declare them; and that any assertion that he did not know this could not be reasonably held; and

(2) objectively, the importation of the Goods for a commercial purpose while evading excise duty and import VAT would be regarded as dishonest by the standards of ordinary people.

58. In his Notice of Appeal and his letter of appeal, the Appellant submits that:

(1) He did not understand the content of the letter(s) received from HMRC due to a language barrier. He thought the letters were not important because he had been re-assured that immediate payment of the fine will be the end of the matter.

(2) After receiving the Penalty letter, he realised he had to pay a large sum of money. He called a professional company providing comprehensive tax consultancy services. Having received a fee quotation for their services, he did not appoint them to assist.

(3) He is not challenging the illegal importation of the Goods. He is asking for total remission of the Penalty as he cannot afford it. He is the sole breadwinner in his family.

59. On 26 May 2023, the Appellant sent a PDF bundle to HMRC. A number of the documents included in that bundle are in Polish, without any translation into English. The bundle included Document 1, dated 24 May 2023, which states:

> "*I want to clarify that my decision to appeal to the Tribunal is not based on a claim of innocence in this matter. I fully acknowledge my responsibility for the illegal importation of the cigarettes. However, I am seeking recourse because I am unable to afford the payment of the excise duty*"

60. We are satisfied that whilst the Appellant has explained his failure to engage with HMRC, he has not denied the conduct that he has engaged in and he was clearly able to communicate with Border Force on the day of the seizure. We are satisfied that it would have

been a relatively simple and straightforward matter for the Appellant to engage the services of a professional translator in his country of origin or habitual residence in seeking to completely understand the correspondence that was sent to him by HMRC. We are satisfied that the Appellant's belief that payment of the fee for restoration of the Vehicle would conclude the matter was misconceived as the information that was provided to him made clear that the matter may be referred to HMRC.

61. Having considered all of the information before us, we are satisfied that:

(1) The Appellant knew he had the Goods in his Vehicle and he did not declare them.

(2) The Appellant denied having any cigarettes or tobacco when asked by Officer Philips and, therefore, made no attempt to declare them.

(3) The Goods were concealed in the cab, including in the refrigerator.

(4) The Appellant accepts his wrongdoing.

(5) Information is available at all ports of entry and that information sets out the allowances for tobacco products. The Appellant passed through this signage on at least one previous occasion.

(6) The number of cigarettes brought by the Appellant is significantly more than would be permitted for personal importation. Even if the Appellant did not know the exact amount, the Appellant did not try to establish the legal limit.

(7) The Appellant was generally dismissive and/or evasive under questioning.

(8) The Appellant is in the freight / cross-border transportation industry and is required to be vigilant.

(9) The Goods were not included in, or the subject of, any import documentation.

(10) Although not claimed to be for personal use, the Goods are deemed to have been imported illegally for a commercial purpose owing to the lack of a challenge to the seizure (and art. 3 of the Travellers' Allowances Order 1994). The deeming effect has the consequence that the Appellant cannot argue that the Goods were for personal use.

62. We, therefore, find that dishonesty has been established in this appeal. We further find that the Appellant has failed to provide an innocent explanation for the circumstances that have arisen.

Whether the Penalty has correctly been applied

63. Under s 8(4) FA 1994, the Tribunal can reduce an excise duty penalty to such amount (including nil) as they think proper. Despite the wording of s 33(2) FA 2003, it follows that HMRC do not make a decision that a person is liable to a penalty. Instead, HMRC decide whether or not to *charge* a penalty once a liability exists. Section 33(2) must be read in that way, so that it is compatible with s 25(1). Since an import VAT penalty is deemed to be a customs duty penalty at the demand stage, HMRC do not make a separate decision to levy an import VAT penalty. Instead, they make a single decision as to the amount of the customs duty penalty, taking into account the person's liability both to a customs duty penalty and to an import VAT penalty

64. The decision over which the Tribunal has jurisdiction on appeal is, therefore, HMRC's decision to charge a penalty once liability has been established. We have found that the Appellant engaged in dishonesty when he failed to declare the Goods that he had bought to the United Kingdom, when specifically asked about those Goods by Border Force.

65. The Appellant seeks a reduction of the Penalty. HMRC's policy, contained in Public Notices 300 and 160. Public Notice 300 provides, *inter alia*, that:

> "**Notice 300: customs civil investigation 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 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. How can I reduce the penalty?**
>
> It is for you to decide whether or not to co-operate with our investigations, but if you do you should be truthful as making a statement to us you know to be false may render you liable for prosecution.
>
> If you chose 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 conducting the investigation. At the end of the investigation we will take into account the extent of your co-operation.
>
> …
>
> **3.2 By how much can the penalty be reduced?**
>
> You should tell us about anything you thing 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% import duties 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 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% 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."

66. Notice 160 provides that:

> "**HMRC Notice 160 Compliance checks into indirect tax matters**
>
> 2.3 How can penalties be reduced?
>
> It's for you to decide whether or not to co-operate with our check, but if you do, you should be truthful. If you make a statement to us you know to be false during our check, 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 how much you have co-operated.

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."

67. The notices show that there can be:

(1) Up to 40% discounted for disclosure, for an early and truthful admission; and

(2) Up to 40% discounted for co-operation,[5] providing information promptly, answering questions truthfully, co-operate with the investigation until its conclusion.

68. The reductions are based on the level of disclosure and co-operation received during the enquiry. Officer Entwisle explains in his written evidence that PDA officers are guided by a framework that allows reductions to any penalty issued to a person. We bear in mind that the HMRC's Guidance is not an exhaustive code, or a comprehensive edict. It is trite law that guidance and kindred instruments do not have the status of law and, thus, are subservient to primary legislation and secondary legislation.

69. The Appellant did not reply during the period of time the enquiry was open, therefore no reductions were offered. Having considered all of the evidence, we find that the Appellant was advised of the actions that he could take in order to reduce any penalty. He did not, however, engage with HMRC until a reminder letter was sent and he became aware of the amount that he would have to pay if he continued to fail to co-operate. The reminder letter prompted a response from the Appellant.

70. The Appellant appeals solely on the basis of his ability to pay the Penalty as the only breadwinner in his family. There is no statutory definition of mitigating circumstances, but there is some statutory guidance to be found at s 29(3) FA 2003, which provides that the following matters cannot be taken into account when considering a mitigation appeal:

(1) The insufficiency of funds available to any person for paying any VAT due or for paying the amount of the penalty;

(2) 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 VAT; and

(3) The fact that the person liable to the penalty or any person acting on his behalf has acted in good faith.

71. As a matter of law, neither HMRC nor, on an appeal, a tribunal, can take into account a person's financial position when considering penalties. This is specifically prohibited. The Appellant basis for appealing is, therefore, one of the matters that we cannot take into account when considering any mitigation. Having considered all of the evidence, and having regard to the applicable law, we find that the Penalty has been properly applied and we uphold the Penalty.

CONCLUSIONS

72. We find, on the balance of probabilities, that:

(1) the Appellant was aware that there was a limited allowance for tobacco products, even if he did not know the precise quantities.

(2) It is reasonable to conclude that his purpose in failing to declare tobacco in excess of the allowances was to seek to evade the taxes and duties chargeable.

(3) His conduct involved dishonesty in that he knew that he was attempting to evade duties and taxes on the tobacco he was carrying.

(4) His conduct would be regarded as dishonest by the standards of ordinary people.

(5) Insufficiency of funds does not provide any relief for the Appellant in relation to the Penalty.

73. Accordingly, therefore, the appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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.

Release date: 09th JANUARY 2025