



TC05091

Appeal number: TC/2015/00345

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

IMRAN RASHID

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ANN CHRISTIAN**

Sitting in public at Alexandra House, 14 -22 The Parsonage, Manchester on 6January 2016

The Appellant in person

Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

1. This is an appeal by Mr Imran Rashid (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 15 August 2014, as revised on 8 October 2014, and again on 16 June 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £2,285 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

15 **Background**

2. On 7 April 2013, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Islamabad, Pakistan via Dubai on flight EK019.

3. From disembarkation to clearing Customs there are displayed a number of notices advising which countries fall inside/outside the European Union (EU) and also the duty free allowances for excise dutiable products acquired outside the EU. Pakistan is not in the EU and therefore, returning travellers, for the purposes of the Travellers’ Allowances Order 1994, have a personal allowance of 200 cigarettes.

4. Despite the notices, which are also situate in the baggage reclaim area and just before the Customs channel entrances, the Appellant chose to exit through the ‘nothing to declare’ Green channel, indicating that he had no goods to declare, at which point the Appellant was intercepted by Officer Martin Little, a UKBF Officer.

5. Officer Little’s evidence is that the Appellant confirmed he had travelled from Islamabad in Pakistan. He was then asked if he understood that there are certain goods travellers are not allowed to bring into the United Kingdom such as drugs, offensive weapons or indecent/obscene material. The Appellant confirmed that he understood and that he was not carrying any such items. He was asked if he understood his allowances and replied “Not really”.

6. Officer Little asked Mr Rashid if he had been stopped by the Customs before. He replied that he had a few sleeves of cigarettes taken off him about two years previously.

7. The Appellant confirmed when asked that the bags he had with him were his and confirmed that he had packed them himself. He was asked whether he was aware of the contents of his luggage and he stated “Yes”.

8. On conducting a search of the Appellant’s luggage, 13,800 Gold Leaf Cigarettes were found. In total, the overall quantity of goods seized was sixty-eight times over the Appellant’s personal allowance.

5 9. A further 2,400 Gold Leaf cigarettes were found in abandoned luggage from the same flight that was linked to the Appellant. These were initially thought to be the Appellant's, but were later removed from the calculation.

10. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended), Officer Little seized the goods as
10 liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice C156 and Warning Letter BOR162, both of which the Appellant signed.

11. The legality of seizure was not challenged in the Magistrates' court and the
15 seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

12. On 22 April 2014, HMRC's Officer Denison of HMRC's International Trade and Compliance Unit, wrote to the Appellant at the address he had provided, informing him that HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, under s 25(1) of the Finance Act 2003 and
20 under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice 160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made
25 it clear that any reduction in the penalty was contingent on the Appellant's response and co-operation with HMRC's enquires.

13. The letter from Officer Denison explained that if the Appellant was willing to co-operate with the enquiry he should provide the following within 30 days of the date of her letter:

- 30
- "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
 - Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and 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, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
 - 40 • Confirmation of the quantities of goods involved on each occasion.
 - Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
 - Details of all international travel during the period under enquiry, including the reasons for travel.
 - An explanation of what you did with, or intended to do with, the smuggled goods.
 - 45 • 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

14. Officer Denison referred the Appellant to Public Notice 300, s 3 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

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

- 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.”

20

15. On 8 May 2014 the Appellant telephoned HMRC seeking information as to why he had been sent the letter of 22 April 2014. The reason was explained to him and he stated that he had been given the option to pay the duty or have the cigarettes seized. He also stated that he had been advised by the duty free shop in Islamabad that it was
25 OK for him to purchase the goods as they were duty-free.

16. On 15 May 2014, in the absence of anything further from the Appellant, HMRC sent a reminder letter to the Appellant.

17. On 20 May 2014 HMRC received a letter from the Appellant dated 6 May 2014 seeking further information about the events referred to in the Commissioners’
30 enquiry. He stated that he would be happy to co-operate with the enquiry if he were given more details.

18. On 21 May 2014 HMRC replied to the Appellant’s letter of 6 May 2014 providing the date of the seizure in question. The reply also reiterated that the enquiry sought details of any other journeys and importations of Excise goods in the period 22 April
35 2012 to 22 April 2014.

19. On 3 June 2014 HMRC received a further letter also dated 6 May 2014 (the Appellant confirmed this was misdated in error by him) in which the Appellant stated that the shop owner at Islamabad airport had convinced him that he would have no
40 problem with Customs and so he purchased the cigarettes as they were cheaper than in the UK. He said that he was told by Officer Little that he would not have to pay the duty if he did not wish to keep the cigarettes. He apologised for his mistake and advised of one previous trip to Turkey in May 2013 when he did not bring back any alcohol or tobacco products.

20. On 15 August 2014 Officer Denison issued a Civil Evasion Penalty - Notice of
45 Assessment in the sum of £3,585, being £711 Customs civil evasion penalty and

5 £2,874 Excise civil evasion penalty which was calculated on the combined total of
16,000 cigarettes - (16,200 seized less personal allowance of 200). The Notice of
assessment explained how the penalty had been calculated and advised that a 20%
reduction from the maximum penalty had been made which included a 20% discount
10 (10% for disclosure and 10% for co-operation) of the total evaded duty of £4,482
reflecting the degree of disclosure and co-operation given by the Appellant in the
course of the enquiry.

21. On 28 August 2014 the Appellant wrote to HMRC asking them to reconsider the
penalty. The letter enclosed copies of his previous letters and reiterated that he had
been deceived by the sales rep at Islamabad Airport. The letter also stated that he had
15 not smuggled the goods; that he had been advised by the seizing Officer that he would
not have to pay the duty; that he was unable to afford to pay the penalty and he had
provided all the information required. He accepted that he had committed an offence
but he was unaware that he was doing so as he had been misled.

22. HMRC reconsidered the penalty following the additional information provided
and wrote to the Appellant on 8 October 2014. They advised him that the penalty was
to be reduced but pointed out that the Appellant should have been aware that he had
exceeded the duty free allowance, as he had been stopped and had goods seized on 4
December 2011. HMRC issued a revised Civil Evasion Penalty - Notice of
20 Assessment in the sum of £2,688, being £533 Customs civil evasion penalty and
£2,155 Excise civil evasion penalty. The Notice of assessment explained how the
penalty had been calculated and advised that a 40% reduction from the maximum
25 penalty had been made reflecting the degree of disclosure and co-operation given by
the Appellant in the course of the enquiry.

23. On 28 October 2014 HMRC received a letter from the Appellant, dated 17
30 October 2014. He stated that he had fully co-operated with the enquiry and could not
afford to pay the penalty. He could not understand why the duty amount evaded was
so high as he was sure he only had about 400 packets of cigarettes (8,000). He
requested an independent review of the matter.

24. Officer Dakers, who had not previously been involved in the decision, carried out
35 a review of the penalty and on 1 December 2014 wrote to the Appellant notifying him
that the penalty was to be upheld.

25. Officer Dakers said that he had noted the Appellant's assertion that the cigarettes
were for personal use and gifts to his family and explained that the issue was not the
intended use of the goods. The Officer said that it was clear from the Appellant's
40 travel history that he had previously travelled to "third countries". Additionally, he
had stated to UKBF that he had cigarettes seized from him around two years prior to
the seizure. Officer Dakers therefore considered that the Appellant had travelled
frequently and recently enough to have experience of the procedures and allowances
when passing through Customs. The volume of cigarettes the Appellant was carrying
45 was substantial and it was not credible that the Appellant thought he could import

5 such a substantial quantity of tobacco, into the UK from Pakistan, without making a declaration to Customs.

26. Officer Dakers said that additionally, the quantity of goods was substantially higher than the personal allowance and there is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK. Whilst
10 not disputing that the Appellant was misled by a shopkeeper in Islamabad Airport, the Officer did not consider a shopkeeper to be the most appropriate person to offer qualified advice, given that it is his job to sell cigarettes. The Appellant had said in correspondence that he believed his allowance to be two packets of cigarettes but was misled by the shopkeeper. It would have been prudent to have questioned this when
15 returning to the UK, especially upon noting the signs at both the baggage reclaim area and upon entering the 'Green' channel. The signs are visual aids which include pictures of dutiable goods, including tobacco products. The Appellant had demonstrated a prior awareness that cigarettes are likely to have restrictions; it would have been sensible for him to seek assistance from UKBF officials if there was any
20 confusion over the signage, rather than taking the word of a shopkeeper whose job it is to sell cigarettes and tobacco. In choosing to ignore the signs and enter the 'Green' channel it was implicit that he had acted dishonestly.

27. Officer Dakers noted the Appellant's statement that he was unable to pay the liabilities imposed and explained that it is specifically stated in legislation that the
25 ability to pay a civil penalty cannot be considered in determining the liability to such penalties. The Appellant's representation with regard to his financial position could not therefore not be considered.

28. Officer Dakers further explained that s 29 of the Finance Act 2003 and s 8(4) of the Finance Act 1994 allowed HMRC to reduce a penalty as they think proper. He
30 explained that there are two factors, disclosure and co-operation, which determine 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.

29. Officer Dakers said that whilst the Appellant had responded to Officer Denison's
35 enquires within the appropriate timescales, he had not fully responded to the questions outlined in the letter of 22 April 2014, nor was it considered that he provided fully truthful information. For that reason Officer Hatcher had allowed a 20% reduction for disclosure and a 20% reduction for co-operation, which Officer Dakers considered reasonable and correct. In his view, a total penalty reduction of 40%, given the level
40 of disclosure and co-operation, was appropriate. The Appellant had not offered any additional information in his request to have the case reviewed. The Appellant was advised that if he did not agree with the decision he could appeal to the Tribunal within thirty days.

30. By Notice of Appeal dated 16 December 2014, but received by the Tribunal
45 Service on 12 January 2015, the Appellant appealed the penalty to the First-tier

5 Tribunal. Included with his grounds of Appeal was an assertion that the abandoned baggage was not his.

31. On 16 June 2015 HMRC wrote to the Appellant to notify him that the penalty in respect of the 2,400 cigarettes in the unclaimed baggage was to be withdrawn and the total penalty was reduced to £2,285.

10 Evidence

32. The combined bundle of documents included the witness statement of Officer Martin Little, and a copy of his notebook notes, and also the witness statement of Officer Jaqueline Coral Leach, the manager to Officer Denison who had retired. Both gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence to the Tribunal under oath. We were also provided with copy correspondence, copy relevant legislation and case law authority.

The Law

33. 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

40 (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—

35 (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.

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—

45 (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,

5 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 there under; 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

5 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

15 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
- 20 • 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.

25 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.

30 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.
- 35 • 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.

40 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.

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

5 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:

- 10
- 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.

15 In most cases, therefore, the maximum reduction obtainable will be 80% of the tax on which penalties are chargeable. In exceptional circumstances however, consideration will be given to a further reduction, for example, where you have made a full and unprompted voluntary disclosure.

The Appellant's Case

20 34. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £2,285 on the following grounds:

- 25
- he has been fully co-operative with the investigation;
 - he had been told that the cigarettes were duty free and he did not have to declare them;
 - he was given the option of paying the duty or having the cigarettes seized. As he could not afford the duty he opted for seizure;
 - as he does not have the goods he considers that he should not be required to pay a penalty;
 - the penalty is unjust and he cannot afford to pay it;
 - the additional bag was not his so those cigarettes should not be included in the calculations.
- 30

35 35. At the hearing, the Appellant repeated his earlier grounds of appeal but also challenged the discount he had been given of 40% on the basis that he had provided full disclosure and cooperation.

HMRC's Case

40 36. On 7 April 2013, by entering the Green 'nothing to declare' channel at Manchester Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- a) The Appellant entered the Green channel, indicating that he had nothing to declare despite significant signage present.
- b) The Appellant does not deny that the amount of cigarettes imported was over the permissible limits.

- 5 c) The Appellant told the UKBF Officer that he was not really aware of the allowances relating to cigarettes and tobacco.
- d) The Appellant was carrying 13,800 cigarettes – sixty-nine times his personal allowance.
- 10 e) A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods.
- 15 f) It is well known that Pakistan is outside the EU for excise purposes. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them.
- 20 g) The Appellant had previously had cigarettes seized following interception on his return from Islamabad carrying 4,800 cigarettes. On that occasion also he had been issued with Notices 1 and 12A, a Seizure information notice and Warning letter. He would have been aware after that occasion that there were limits on the number of cigarettes he could import. Although he may not have been aware of the exact allowance he would have known that sixty-nine sleeves was too much. That knowledge should have prompted an honest traveller to check the allowances before entering the Green channel.
- 25 h) Not doing so in the belief that the amount was likely over the allowances constitutes dishonest behaviour. A reasonable and honest person would check the allowances before importing a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.
- 30 37. HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty because he acted dishonestly and deliberately took action to positively evade duty and tax.
- 35 38. A finding of dishonesty requires that act undertaken (entering the Green channel with an amount of excise goods above the allowance) was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what he was doing was, by those standards, dishonest.
39. The appropriate standard of proof is the balance of probabilities: *Re B (Children)* [2008] UKHL 35.
- 40 40. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word ‘dishonesty’.

‘It seems to us clear that in such a context, where a person has, ex hypothesi, done, or omitted to do, something with the intention of

5 evading tax, then by adding that the conduct must involve dishonesty
before the penalty is to attach, Parliament must have intended to add a
further element in addition to the mental element of intending to
evade tax. We think that that element can only be that when he did, or
10 omitted to do, the act with the intention of evading tax, he knew that
according to the ordinary standards of reasonable and honest people
that what he was doing would be regarded as dishonest.’

15 41. Dishonesty in this context follows the guidance given by the Court of Appeal in *R v. Ghosh* [1982] 1 QB 1053, CA, where a two-step test for showing dishonesty was set out:

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

30 42. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest, trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* [2005] UKPC. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan*
35 9951 2 AC 378 was the correct test and was summarised as follows:

40 ‘...although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards, a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct statement of the law and their Lordships agree.’

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

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

45. The legislation at s 8(1) of the Finance Act 1994 and s 29(1) (a) of the Finance Act 2003 provide that the Commissioners, or on appeal an appeal Tribunal, may
10 reduce the penalty up to nil.

46. The penalty is based on the amount of Customs Duties, Import VAT and assessed excise duty that was involved in the offence. In this case the penalty is £2,285, being 60% of the culpable arrears.

47. HMRC exercised its discretion as to the amount of discount to be allowed. A 20%
15 deduction was allowed for early disclosure and a further 20% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Dakers who undertook the review said that he had not been able to give the full 40% allowance for either disclosure or co-operation because the Appellant had failed to provide the information requested. He believed it was inherently
20 improbable that the Appellant, having previously travelled to the UK from a non-EU country, believed he was entitled to import 13,800 cigarettes, which represented sixty-nine times his allowance.

48. The Appellant has submitted in correspondence and in his Notice of Appeal that he cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act
25 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.

49. The Appellant has not shown grounds to successfully appeal the decision to issue the penalty.

30 **Conclusion**

50. The Appellant imported the cigarettes from Pakistan. 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
35 importation restrictions. Pakistan is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable when importing from EU countries.

51. It is clear from the Appellant's own evidence that he knew Customs duty was an issue. That was the reason why he explained he had purchased the cigarettes at
40 Islamabad airport. We found, on the balance of probabilities, that the Appellant would have known of the existence of the allowances for importing tobacco and cigarettes.

5 52. The Appellant had previously travelled to the UK from a non-EU country on at least one occasion and it is more likely than not that he would have been aware of the allowances. In any event, a reasonable person would check the allowances before importing such a large number of cigarettes.

10 53. The issue as to whether or not the cigarettes were for personal use does in any event not arise. The facts of the matter are not in dispute and the Appellant did not challenge the legality of seizure of the goods within the statutory time limit. Where there is no timely challenge, the law provides that the goods are deemed to be condemned as forfeited and what that means in practice, is that, in law, the Appellant is deemed to have imported the goods for commercial use. That is a final decision and
15 the Tribunal has no jurisdiction to consider that issue any further.

20 54. The issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

25 55. It is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. 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 European Union and the duty free allowances for excise goods. The Appellant should have been fully aware that he was bringing more goods into the
30 country than he was entitled to without declaring them. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.

35 56. The Appellant has not offered any grounds on which he could successfully challenge the decision to issue the penalty. 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.

40 57. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

45 58. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account, the fact that the Appellant did not provide the information Officer Denison requested, the penalty has in our view

5 been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 40%. We concur with Officer Dakers' assessment of the penalty.

59. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld.

10 60. No challenge has been brought to the calculation of the duties and the Appellant has not in any event shown why the penalty has not been calculated correctly and to best judgment.

61. The appeal is accordingly dismissed and the penalties totalling £2,285 confirmed.

15 62. 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)"
20 which accompanies and forms part of this decision notice.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

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