



TC05388

Appeal number: TC/2015/04768

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**

HAMZAH MAHMUD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SIMON NEWTON**

**Sitting in public at Manchester ET, Alexandra House, 14-22 The Parsonage,
Manchester on 20 April 2016**

The Appellant in person

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

DECISION

1. This is an appeal by Mr Hamzah Mahmud (“the Appellant”) against a decision
5 by the Respondents (“HMRC”) on 14 May 2015, to issue Excise and Customs Civil
Evasion Penalties in the total sum of £638, 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
10 declare cigarettes and tobacco which he was importing into the United Kingdom
above the personal allowance of 200 cigarettes or 250g of tobacco.

Background

2. On 07 June 2014, the Appellant arrived at Manchester Airport from Dubai,
United Arab Emirates, on flight EY021.

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

4. Despite the notices which are also situate in the baggage reclaim area and just
20 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 and questioned by Officer Peter Alfred
Francis, a UKBF Officer.

5. The Appellant confirmed he had travelled from Dubai and confirmed he was
25 travelling alone. He was asked if he understood his allowances and replied “Yes”. He
was then asked if he had anything in excess of his allowances to which he stated “No”
but said that he was carrying tobacco products. He was then asked if he understood
that there are certain goods travellers are not allowed to bring into the United
30 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.

6. The Appellant confirmed when asked that the bags he had with him were his
and also confirmed that he had packed them himself. He was asked whether he was
35 aware of the contents of his luggage and he stated “Yes” and he said that he was
carrying some tobacco products.

7. On conducting a search of the Appellant’s luggage, 24Kg Al Fakher, shisha
tobacco and 200 Gauloises King Size Filter (KSF) cigarettes were found.

8. As the goods had not been declared and were over the allowances as set out in
40 the Travellers’ Allowances Order 1994 (as amended), Officer Francis seized the
goods as 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 BOR156 and Warning Letter BOR162, both of which the Appellant signed.

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

10 10. On 22 April 2015, HMRC’s Officer Gillian Davison 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 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, Public Notice 160 in respect of Excise Duty and factsheet CC/FS9 and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on the Appellant’s response and co-operation with HMRC’s enquires.

15 11. In her letter, Officer Davison 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:

- 20
- “A copy of this letter, signed and dated by (the Appellant) as acknowledgement that he had read and understood Factsheet CC/FS9, Public Notice 160, and Public. Notice 300. A copy was enclosed for this purpose.
 - Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
 - 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.
 - Details of his travel and how the purchase of goods were financed on each occasion.
 - 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 he did with, or intended to do with, the smuggled goods.
 - Any documentation he thought would support the information he was providing.
 - Any other information or explanations he thought may be of use to the enquiry.”
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- 30
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- 40

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

“Disclosure

5 During the investigation an early and truthful admission of the extent of the arrears and why they arose will attract a considerable reduction (up to 40 per cent). By the extent of the arrears we mean what has happened and over what period of time, along with any information about the value involved, rather than the precise quantification.

Co-operation

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

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

13. On 30 April 2015 Officer Davison received a telephone call from the Appellant
15 requesting general advice regarding her letter of 22 April 2015. Officer Davison provided the advice requested and asked the Appellant to formally respond in writing by sending a signed copy of her letter of 22 April 2015.

14. On 13 May 2015 Officer Davison received written correspondence from the
20 Appellant. Attached to the letter was a copy of Officer Davison’s letter of 22 April 2015, which had been signed by the Appellant and dated 7 May 2015. The signed copy indicated that the Appellant had read and understood the enclosures Public Notices 160 and 300 and the Factsheet CC/FS9 which were enclosed with Officer Davison’s letter of 22 April 2015.

15. In the written response from the Appellant, he stated that on arrival from Dubai
25 he had roughly 24Kg of Shisha tobacco, He said that the manufacturer states that each Kg contains 1% tobacco and that he was therefore under the assumption that if he had 24Kg, and only 1% is tobacco, then he had brought in 240g and was therefore under the 250g limit (although this appeared to ignore the fact that he was also carrying 200 cigarettes .

30 16. In the letter he confirmed that no one else was involved and that he consumes a lot of the tobacco in a short period of time. He stated the 24Kg would only last him one month.

17. On 14 May 2015, Officer Davison issued to the Appellant, a ‘civil penalty -
35 notice of assessment’ in the sum of £638.00 (£154.00 custom civil evasion penalty and £484.00 excise civil evasion penalty). Officer Davison had allowed a 40% reduction for disclosure and 40% reduction for co-operation, the maximum reduction that could be given.

18. In a letter dated 21 May 2015, the Appellant wrote to Officer Davison, stating that he wished for the penalty to be reviewed. He said that this was his first offence and reiterated his belief that Shisha tobacco contains only 1% tobacco, and he was therefore entitled to bring in any amount of the tobacco providing the total tobacco does not exceed 250g. He said that he had read that the company also makes a non-tobacco product and that he may have had that product instead.

19. The Appellant said that he had co-operated at the airport and was told that no further action would be taken. He stated that he was a student and unable to afford to pay the penalty.

20. On 4 June 2015 Officer Davison replied to the Appellant saying that, based on the information provided, there was no reason why she should change her decision. She advised that he had signed the paperwork given to him at the time of seizure, which confirms that HMRC may take action against him, including issuing an assessment (warning letter BOR162) and that the penalty cannot be removed for reasons of a first offence or inability to pay, [she was unable to consider any hardship implications when making her decision - Finance Act 1994, Chapter 9, Section 8 (5).] She advised the Appellant that the maximum 80% reduction had been given; Officer Davison also pointed out the Appeals and Review procedure, including requesting an independent review by an Officer not previously involved in the case.

21. In a letter dated 12 June 2015 the Appellant wrote to Officer Davison requesting an Independent review. He also reiterated the details he had included in his previous letter dated 21 May 2015.

22. On 17 July 2015 Officer Christopher Daker of HMRC Appeals and Reviews, who had not been previously involved in the original decision, undertook a full independent review. He wrote to the Appellant to confirm that a review had been carried out by him but that the decision was to be upheld. A full explanation was given to the Appellant and that he had been given the maximum reduction of 80%. The Appellant was advised that if he didn't agree with the decision he could appeal to the Tribunal within 30 days.

23. Officer Daker explained the legislation relating to what is considered a tobacco product as outlined in Tobacco Products Duty Act 1979 s(1) which states:

*“1 Tobacco products
(1) In this Act “tobacco products” means any of the following products;
namely-*

- a) *cigarettes;*
 - b) *cigars;*
 - c) *hand-rolling tobacco;*
 - d) *other smoking tobacco; and*
 - e) *chewing tobacco,*
- which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco...”*

24. Officer Daker explained that Shisha is considered a tobacco product regardless of the percentage of actual tobacco contained within it. The Appellant was a recreational smoker of Shisha and Officer Daker did not find it credible that the Appellant would be unaware or unsure of the contents of the goods that he was purchasing and consuming.

25. Officer Daker said that when stopped at the airport the Appellant said he was not carrying any goods in excess of his allowance, but a search of his bags revealed 200 cigarettes and 24kg of Shisha tobacco. The Appellant appeared to have some form of understanding of the allowances as he had stated that he believed he could import 24kg of Shisha because the actual tobacco content, being 1%, amounted to less than the 250g allowance. However the quantity of goods (the actual percentage tobacco content is not relevant) was significantly higher than the personal allowance. There is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK and it would have been prudent for the Appellant to have questioned this when returning to the UK. The signs are visual aids which include pictures of dutiable goods, including tobacco products.

26. Officer Daker advised that although the Appellant said that he was unable to pay the liabilities imposed on him, it is specifically stated in legislation that the ability to pay a civil penalty cannot be considered in determining the liability to such penalties. The Appellant's financial position could not therefore be considered.

27. The Officer 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. There are two factors, disclosure and cooperation, which determine the level of any reduction. Firstly there can be a reduction of up to 40% for an early and truthful explanation as to why the arrears arose. Secondly there can be a reduction of up to 40% for fully embracing and meeting responsibilities under the enquiry procedure.

28. Officer Daker said that Officer Davison had offered the Appellant the maximum possible reduction of 40% for disclosure and 40% for cooperation and he was therefore unable to mitigate the penalty further. The Appellant was advised that if he did not agree with the decision he could appeal to the Tribunal within 30 days.

29. By notice of appeal dated 26 July 2015, received by the Tribunal Service on 25 August 2015, the Appellant appealed the decision to the First-tier Tribunal.

30. On 2 February 2016 the Appellant wrote to HMRC stating that the product imported was definitely tobacco-free molasses.

Evidence

31. The combined bundle of documents included the witness statement of Officer Francis, which included a copy of his note book notes and the witness statement of Officer Davison. Both gave oral evidence to the Tribunal. The Appellant also gave

oral evidence under oath. We were provided with copy correspondence, copy relevant legislation and case law authority.

The Law

32. The legislation relevant to this appeal is:

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

Penalty for evasion of excise duty.

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

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

10 (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 -

15 (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. (...)

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

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

25 (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.

30 (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

35 (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. (...)

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-

(i) unshipped in any port,

5 those goods shall ...be liable to forfeiture.

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

s78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case
10 may be, or [level 3 on the standard scale], whichever is the greater. (...)

s139 Provisions as to detention, seizure and condemnation of goods

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

15 (2) Where any thing 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

20 (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 any thing 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,
25 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—

30 (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;

35 (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
40 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 any thing as being forfeited, under the Customs and Excise Acts.

(7) If any person, not being an officer, by whom any thing 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.

5 (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:

10 If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing 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.

The Tobacco Products Duty Act 1979, s.1 provides:

(1) In this Act “tobacco products” products, namely -

- 15 (a) cigarettes;
- (b) cigars;
- (c) hand-rolling tobacco;
- (d) other smoking tobacco; and
- (e) chewing tobacco,

20 which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco, but does not include herbal smoking products.

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.

25 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,.

30 (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;

35 (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;

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

3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a

commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

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

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- 10
- 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).

15 The penalty that the law imposes is an amount equal to the relevant tax or duty evaded or sought to be evaded.

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

3.2 By how much can the penalty be reduced?

20 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:

- 25
- 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.

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

HMRC Notice 160 Compliance checks into indirect tax matters

2.3 How can penalties be reduced?

35 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.

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

2.3.1 Reductions under Civil Evasion Penalty Rules

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

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

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

The Appellant's Case

33. In the Notice of Appeal the Appellant's stated grounds of appeal can be summarised as follows:

- It is not denied that the amount of tobacco imported was over the permissible limits.
- He was told at the airport no further action would be taken.
- HMRC have not considered the probable hardship the Appellant would suffer should he have to pay the assessed duty as he is a student.
- The Shisha tobacco may have contained no tobacco in at all, as opposed to 1% tobacco content.
- HMRC have failed to exercise discretion as it is his first offence.

34. At the hearing the Appellant said that he had been returning from an internship in Dubai. He said that he had been four times previously and had been stopped by Customs on three occasions. When stopped on 7 June 2014 he readily confirmed that he was carrying tobacco products. Although the packets of Shisha contained the word "Tobacco" on the front, the rest of the wording was in Arabic which he did not speak or understand and the packaging was always changing. He said that he had purchased the tobacco in shops in Dubai; part of the Shisha he was told was 1% and the other part 0%. He said that he had "a brief indication" of the allowances/limits, by which he meant that he had undertaken a mental calculation when purchasing the tobacco, that on a worst case scenario most of it contained 1% tobacco. He agreed that it must have been the case therefore that he was aware of the 250g limit, but said that he wasn't sure when stopped exactly what the tobacco content of Shisha was. He said that he therefore had not been deliberately dishonest.

35. He said that he had co-operated fully, but agreed that after only a few questions he had "just walked away from Officer Francis" because he (the Appellant) had "nothing to say", and had "been given no paperwork and therefore just left". He was also very tired after a long flight.

36. The Appellant said that it was almost a year after being stopped that he received a letter from HMRC to the effect that the matter was being investigated and that a penalty may be issued. Although he had replied that the Shisha packets contained only 1% tobacco he had since then researched the matter and now believed that the packets may have contained 0% tobacco.

37. The Appellant said that although he himself was a heavy smoker, the Shisha was a present for his father.

38. He hadn't taken particular notice of the signs which explain the allowances because he was partially blind in one eye and thought he was within his allowances anyway.

HMRC's Case

39. On 7 June 2014 the Appellant was stopped on entering the Green 'nothing to declare' Channel at Manchester Airport. It is implicit that the Appellant acted dishonestly and deliberately took the action to positively to evade duty and tax given that:

- a) the Appellant was entering the Green Channel, indicating that he had nothing to declare despite carrying tobacco products in excess of his allowances.
- b) The Appellant does not deny that the amount of tobacco and cigarettes imported was over the permissible limits. He says that they were for his own personal use and later contradicting this said that they were a gift for his father. Either way the issue is not relevant.
- c) Upon a search of his baggage the tobacco products seized was 96 times the allowed limit.

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 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 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."

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:

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

15 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* 120051 UKPC 37. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* 9951 2 AC 378 was the correct test and was summarised as follows:

25 “..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.”

30 43. The Appellant’s actions as set out in paragraphs 4-6 and 39 above demonstrate that he acted dishonestly. His attempt to clear Customs without paying any duties by entering the Green Channel ‘nothing to declare’ demonstrates his intent to positively evade duty and tax.

35 44. The act undertaken (entering the Green Channel with an amount of cigarettes and tobacco above the allowance) was dishonest by the standards of an ordinary, reasonable person and the Appellant realised that what he was doing was, by those standards, dishonest. It was objectively dishonest by the standards of an ordinary, reasonable person.

45. The Respondent contends that the subjective element of the test is met because:

- 40 i. It is well known that tax and duty is payable on imported cigarettes and tobacco;
- ii. the airport has signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions;

iii. he does not deny knowing his allowances and says he was aware of the 250g limit on tobacco;

iv. in any event the Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes;

v. there is no evidence that the product imported contained only 1% tobacco and therefore that the Appellant genuinely believed that this was the case;

vi. The Appellant has changed his case and is now saying that he definitely imported tobacco-free molasses. These products clearly state that they are tobacco free molasses on the packaging in white writing over a black band. It is unlikely that both the Appellant and the stopping officer would have confused this with tobacco products.

46. 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.

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

48. The penalty is based on the amount of Customs Duties, Import VAT and Excise duty that was involved in the offence. In this case the penalty is £638, being 20% of the culpable arrears.

49. HMRC exercised its discretion as to the amount of discount to be allowed. A 40% deduction was allowed for early disclosure and a further 40% for co-operation (both out of a maximum of 40%), a total of 80% which is the maximum discount.

Conclusion

50. The Appellant imported tobacco and cigarettes from Dubai. We do not accept that the 24Kg Al Fakher, Shisha tobacco product did not contain any tobacco, but the product is caught by the Tobacco Products Duty Act 1979. The Appellant was in any event carrying in excess of his allowance because he was also carrying 200 cigarettes. The Appellant accepted in evidence to the tribunal that he was aware of the personal allowances/limits.

51. There are strict limits on the number of cigarettes and tobacco products that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. The Appellant would, on the balance of probabilities, have known of the allowances for importing tobacco and cigarettes. In any event, a reasonable person would check the allowances before importing such a substantial amount of tobacco products and cigarettes.

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

53. The issue as to whether or not the tobacco product and cigarettes were for personal use does not arise.

54. The issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed and for the correct amount. 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].

55. We have to conclude that the Appellant acted dishonestly and deliberately in taking action to positively evade duty and tax and therefore a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

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.

57. 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. The Appellant has been given the maximum reduction of 80%.

58. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld nor why the penalty may not have been calculated correctly and made to best judgement.

59. The appeal is accordingly dismissed and the penalties totalling £638 confirmed.

60. 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.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 28 September 2016