

[2017] UKFTT 820 (TC)



**TC06215**

**Appeal number: TC/2016/07259**

*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**

**RUKIYA ESA**

**Appellant**

**- and -**

**HM REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER JO NEILL**

**Sitting in public at Taylor House, 88 Rosebery Avenue, London on 25 September 2017**

**The Appellant in person**

**Ms Edward Waldegrave, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

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**DECISION**

1. This is an appeal by Ms Rukiya Esa (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 30 August 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £11,548 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 she failed to declare cigarettes which she was importing into the United Kingdom above the personal allowance of 200 cigarettes.

**Background**

2. On 18 July 2015, the Appellant was stopped and questioned by a UK Border Force Officer on entering the Green ‘nothing to declare’ channel at Gatwick Airport arriving from Dubai, United Arab Emirates.

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. Dubai 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 situated 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 she had no goods to declare, at which point the Appellant was intercepted by Officer Andrew Young, a UKBF Officer.

5. The Appellant was travelling with another adult and a child. Officer Young’s evidence is that the Appellant confirmed she had travelled from Dubai and that when asked she confirmed that the bags she had with her were hers and that she had packed them herself. She was asked whether she was aware of the contents of her luggage and she stated that she was. She was then asked if she 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 she understood and that she was not carrying any such items.

6. She was then asked by Officer Young if she understood the allowances in respect of cigarettes, alcohol and tobacco from outside the EU. He advised the Appellant that the allowance was 200 cigarettes or 250 grams of tobacco. In response the Appellant stated: “We do have cigarettes”. Officer Young asked the Appellant how many cigarettes she had. The Appellant replied: “A few. We bought them. [They’re] for me, for my use, also as presents”. The Appellant said that she had cigarettes in her luggage and produced receipts for the goods which she had purchased duty free in Dubai.

- 5 7. The Officer undertook a bag search and within the luggage discovered 50,400 Benson & Hedges Gold cigarettes. The Appellant claimed full ownership of the goods.
8. The total number of cigarettes being carried by the Appellant was 252 times over her allowance as set out in the Travellers' Allowances Order 1994 (as amended). As  
10 the goods had not been declared and were over the allowance the Appellant was advised that they would be seized under CEMA 1979 s 139 and she was given Notice 1 and 12A and ENF156 (Seizure Information Notice) and BOR 162 (Warning letter). The Officer asked the Appellant to sign the notebook. If the Appellant had not been stopped and the goods seized, a total of £19,249 in excise duty and import VAT  
15 would have been evaded, in addition to any potential sale value of the goods.
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. On 20 July 2016, HMRC's Officer Sam Easton, a post detection audit officer of HMRC's International Trade and Compliance Unit, wrote to the Appellant at the  
20 address she had provided, informing her that she 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 she could take to reduce any  
25 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 it clear that any reduction in the penalty was contingent on the Appellant's response and co-operation with HMRC's enquires.
11. The letter from Officer Easton explained that if the Appellant was willing to co-  
30 operate with the enquiry she should provide the following within 30 days of the date of her letter:
- "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.
  - 35 • 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.
  - 40 • Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
  - 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,  
45 including the reasons for travel.
  - An explanation of what you did with, or intended to do with, the smuggled goods.

- 5
- 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”.

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

10 “Disclosure

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.

15 Co-operation

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.”
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13. On 8 August 2016 the Appellant wrote to the Officer Easton issuing an apology and informing her that she was unaware of the rules and regulations relating to the number of cigarettes she could bring into the UK. The Appellant said that she purchased the cigarettes for her own personal use, her three brothers, her husband, her father and her father-in-law.

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14. On 30 August 2016, having reviewed all the available evidence and information, Officer Easton issued to the Appellant a ‘civil evasion penalty - notice of assessment’ in the sum of £11,548, made up of a £3,568 customs civil evasion penalty and £7,980 excise civil evasion penalty. Officer Easton had allowed a 20% reduction for disclosure (out of a maximum of 40%) and a 20% reduction for co-operation out of a (maximum of 40%) reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry. In the calculation of the penalties, the Appellant was given credit for the 200 cigarettes she could legally have imported without payment of duties and tax.

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15. On 28 September 2016, the Appellant wrote to HMRC in response to the issue of the notice of assessment of civil evasion penalty requesting a review.

16. On 3 November 2016, HMRC wrote to the Appellant to confirm that a full independent review had been carried out by Officer Brian McCann, an Officer not previously involved in the enquiry. A full explanation of the review was given to the Appellant. Officer McCann said that :

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- From disembarkation when arriving on a flight from a Third Country [that is outside the EU] to clearing official controls, there are displayed a number of notices advising travellers of restrictions and the duty free allowances relating to excise dutiable products acquired outside the EU. The Appellant stated that
- 45

5 she had travelled outside the EU before but had not brought back any cigarettes. She would however, on each occasion, have walked past the notices and should have made herself aware of the allowances in relation to cigarettes, prior to her trip.

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- In her correspondence the Appellant had not answered all the questions raised in the letter of 20 July 2016. She had not made a full disclosure in relation to the offence. In particular, she failed to advise of the actual quantities of cigarettes which she had brought into UK.
  - The Appellant had stated that the goods were for the personal use of members of her family. However, the issue was not the intended use of the goods. The penalties had been issued as it was considered that she dishonestly attempted to import an amount of excisable goods above the statutory allowance, in order to evade paying the attracted duties.
  - As a result the full 80% discount could not be offered. The 40% reduction afforded by Officer Easton (20% for disclosure plus 20% for co-operation) was in line with departmental guidance. It demonstrated that HMRC had exercised discretion in the calculation of the penalty and had been reasonable in its dealings with the Appellant.
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17. On 1 December 2016 the Tribunal Service received the Appellant's Notice of appeal.

25 **Evidence**

18. The combined bundle of documents included the witness statement of Officer Andrew Young, including a copy of his notebook entries and the witness statement of Officer Samantha Easton. Officers Young and Easton both gave oral evidence under oath to the Tribunal. The Appellant also gave evidence under oath. We were provided with copy correspondence, including the review by Officer McCann and copy relevant legislation and case law authority.

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**The Law**

19. The legislation relevant to this appeal is:

Section 1 of the Tobacco Products Duty Act 1979 provides in so far as material:

35 '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

5 (e) Chewing tobacco,

which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco...’

20. Section 2 then provides that tobacco products imported into or manufactured in the UK are chargeable to excise duty at the rates shown in the table in Schedule 1 to the Act.

21. The liability of cigarettes and tobacco to customs duty arises under Chapter 24 of the UK Tariff, which reproduces the Combined Nomenclature (“CN”) as amended each year. The CN forms Annex 1 to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. That regulation determines the classification of goods entering the European Community for customs duty purposes.

22. Under the Travellers’ Allowances Order 1994, an individual who has travelled to the UK from a country outside the EU is entitled to bring in certain goods free of VAT and excise duty in his personal luggage. The allowance for tobacco products is for “200 cigarettes or 100 cigarillos or 50 cigars or 250 grams of smoking tobacco”. Each of these amounts represents 100% of the total relief provided for tobacco products but for any one person, the relief applies to any combination of tobacco products provided that the aggregate of the percentages used up from the relief the person is afforded for such products does not exceed 100% (notes (k) and (l) to Schedule 1 of the Order).

23. The excise duty penalty has been imposed under s 8 FA 1994, the relevant parts of which are as follows:

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

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

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

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

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

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

5 24. This section was repealed by paragraph 21(d)(i) of Schedule 40 to the Finance Act  
2008 (“FA 2008”). However, article 4 of SI 2009/511 provides that para 21 Sch 40  
only repeals s 8 FA 1994 in so far as it relates to conduct involving dishonesty which  
gives rise to a penalty under Schedule 41 to FA 2008. Article 6, SI 2009/511 further  
10 provides that para 21 Sch 40 only repeals s 8 FA 1994 in respect of conduct involving  
dishonesty which relates to an inaccuracy in a document, or a failure to notify HMRC  
of an under-assessment by HMRC. Section 8 FA 1994 therefore remains in force in  
relation to any other conduct involving dishonesty entered into for the purpose of  
evading excise duty and which is not subject to Sch 41 FA 2008.

15 25. Section 13(1) FA 1994 provides that where any person is liable to a penalty under  
this Chapter, HMRC may assess the amount due by way of penalty and notify that  
person, or his representative, accordingly. A decision by HMRC that a person is liable  
to a penalty is a ‘relevant decision’ (s 13A(2)(h)). Section 16(5) provides that the  
Tribunal has the power to quash or vary any such decision and power to substitute  
20 their own decision for one quashed on appeal. Section 16(6)(a) states the following in  
relation to the burden of proof in such an appeal:

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

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

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the  
grounds on which any such appeal is brought have been established.’

25 Part III of FA 2003 imposes penalties in relation to taxes and duties on importation  
and exportation. Section 24(1) and (2) provides:

‘(1) This Part makes provision for and in connection with the imposition of liability to a  
penalty where a person-

a) engages in any conduct for the purpose of evading any relevant tax or duty, or

30 b) engages in any conduct by which he contravenes a duty, obligation, requirement  
or condition imposed by or under legislation relating to any relevant tax or duty.

(2) For the purposes of this Part “relevant tax or duty” means any of the following-

(a) customs duty; ...

(d) import VAT...’

35 26. The penalty itself is imposed under 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

5 (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. (...)'

27. Section 29 is in identical terms to s 8(4) and (5) FA 1994 set out above.

10 28. Section 30(1) provides that where a person is liable to such a penalty, HMRC may give to that person or his representative a notice in writing demanding payment of the penalty amount and s 30(2) provides that the amount demanded is recoverable as if it were an amount of customs duty. Section 33 provides that the penalty decision can be appealed to the Tribunal. Section 33(6) again provides that the Tribunal has power to  
15 quash or vary any decision on appeal.

29. Section 33(7) provides that the burden of proof in an appeal in relation to the matters referred to in s 25(1) is on HMRC and is on the Appellant in relation to the grounds on which the appeal is brought.

20 30. The relevant provisions relating to forfeiture are contained in the 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-

25 (i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

30 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

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

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

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

40 (b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

(3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in



5 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—

10 (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;

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

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

20 (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.

25 (6) Schedule 3 to this Act shall have effect for the purpose of forfeitures, and of proceedings for the condemnation of anything as being forfeited, under the Customs and Excise Acts.

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

30 (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:

35 ‘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.’

31. Provisions relating to a person who has travelled from a third country on entering the United Kingdom

40 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.

45 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,.

- 5 (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;
- 10 (b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;
- (c) "third country", in relation to relief from excise duties, shall mean a place to which Council Directive 92/12/EEC of 25th February 1992 does not apply; and, in relation to relief from value added tax, shall have the meaning given by Article 3(1) of Council Directive 77/388/EEC of 17th May 1977 (as substituted by Article 1.1 of Council Directive 91/680/EEC of 16th December 1991
- 15

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.

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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

25 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
- 30 • 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.

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##### 3.2 By how much can the penalty be reduced?

You should tell us about anything you think is relevant during the investigation. At the end of the investigation we will take into account the extent of your co-operation.

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

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- Up to 40 per cent - early and truthful explanation as to why the arrears arose and the true extent of them.
- 45 • 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.

5 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

10 2.3 How can penalties be reduced?

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

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

15 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.

### **The Appellant's Case**

20 32. In the Appellant's Notice of Appeal she does not deny that the number of cigarettes imported was over the permissible limit. She appeals HMRC's decision to issue the penalties saying that:

- She had made a genuine error in bringing in tobacco over the limit and it was the first time she had ever brought goods into the UK.
- 25 • She pleads hardship. She is a mother and works as a teaching assistant to support herself and her child. She has no money to pay the penalties as her income is less than her outgoings. She is not on good terms with her husband who is unwilling to help. She produced evidence of her income and expenditure including copy bank statements.
- The penalty is in any event too harsh.
- 30 • She had co-operated with HMRC throughout their enquiry, and replied to their questions promptly. If a penalty is payable she believes that a greater discount should have been given.

35 33. At the hearing, the Appellant reiterated the above grounds of appeal. She said that she was very tired when arriving with her husband and child at the airport, and had not seen the notices advising travellers of their allowances. She had been open and honest with the UKBF officer who stopped her.

34. She agreed that she had not provided HMRC with answers to all their questions but said that was because she thought they already had most of the information which they seemed to be requesting.

40 35. She said that she had been given money by her family and others to buy the goods and it never occurred to her that there may be restrictions on bringing cigarettes into the UK. She was given £900 in total. The cigarettes cost £1,000 to buy. She and her

5 husband had made up the balance of £100. None of those giving her money to buy the  
cigarettes warned her that duty may be payable. She knew that cigarettes would be  
cheaper to buy in Dubai but had not realised by how much. She had no prepared plan.  
When stopped in the Green channel she did not hesitate to confirm that she was  
10 carrying cigarettes in her luggage, and produce receipts. That was because she had no  
idea that there would be duty payable.

36. The Appellant said that she smokes about 20 cigarettes, and her husband about 30  
cigarettes a day.

### **HMRC's Case**

15 37. On 18 July 2015, by entering the Green 'nothing to declare' channel at Gatwick  
Airport, it was implicit that the Appellant was acting dishonestly and deliberately  
taking action to positively evade duty and tax given that:

- 20 a) The Appellant was fully aware of the contents of her bags.
- b) A number of notices are visible to passengers entering the UK, both in the  
baggage reclaim area and at the entrance to Customs channels. These  
explain which countries are inside and outside the EU and the duty free  
allowances for excise goods.
- 25 c) It is well known that Dubai is outside the EU for excise purposes. The  
Appellant should have been fully aware that she was bringing more goods  
into the country than she was entitled to, without declaring them. She is an  
experienced traveller. She would have been well aware of the allowances  
for bringing goods into the United Kingdom. She had made a clear attempt  
to clear Customs without paying duty on a very significant number of  
cigarettes.
- 30 d) Although she may not have been aware of the exact allowance, she would  
have known that 50,400 was too much. An honest and prudent traveller  
would check the allowances before entering the Green channel. Not doing  
so whilst knowing that the amount was very likely to be over the  
allowance constitutes dishonest behaviour. A reasonable and honest person  
would check the allowances before importing such a large amount of  
35 cigarettes. Failing to declare under those circumstances constitutes  
dishonest behaviour.
- e) She entered the Green channel, indicating that he had nothing to declare  
despite significant signage present which informed travellers that the limit  
for cigarettes was 200.
- 40 f) 50,400 cigarettes was 252 times her personal allowance. If she had not  
been stopped the loss of Customs and Excise Duty to the Crown would  
have been £19,249, in addition to any potential sale value of the goods.

45 38. 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 she acted dishonestly  
and deliberately took action to positively evade duty and tax.

- 5 39. 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.
40. The burden of proof is on HMRC to show that the statutory grounds for imposing a penalty are established but otherwise the burden is on the Appellant to make out her  
10 grounds of appeal: Finance Act 1994, s. 16(6) and Finance Act 2003, s. 33(7).
41. The appropriate standard of proof is the balance of probabilities: *Re B (Children)* [2008] UKHL 35. See also *Han (t/a Murdishaw Supper Bar) v CCE* [2001] EWCA Civ 1048, [2001] 1 WLR 2253 the Court of Appeal held that civil penalties for the dishonest evasion of VAT under s 60 of the Value Added Tax Act 1994 and excise  
15 duties under s 8 FA 1994 were ‘criminal charges’ for the purposes of Article 6 of the European Convention on Human Rights. However, both Potter LJ and Mance LJ stated that this did not mean that the proceedings were criminal for other domestic purposes (see [84] and [88] of the judgment).
42. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest,  
20 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. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan*  
25 9951 2 AC 378 was the correct test and was summarised by Lord Hoffman as follows:
- ‘...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  
30 Court of Appeal held this to be a correct statement of the law and their Lordships agree.’
43. 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.
- 35 44. 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 £11,548, being 60% of the culpable arrears.
45. HMRC exercised its discretion as to the amount of discount to be allowed. A 20%  
40 deduction was allowed for disclosure and a further 20% for co-operation which in the circumstances was considered reasonable. Officer McCann who undertook the review gave reasons why HMRC had not been able to give the full 40% allowance for either disclosure or co-operation
46. The Appellant has submitted in correspondence and in her Notice of Appeal that she cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act

5 2003, s 29(2) and (3)(a) precludes the Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

### **Conclusion**

10 47. The Appellant imported the cigarettes from Dubai. There are strict limits on the amount of tobacco that can be brought into the UK and it is well known that tax and duty is payable on imported cigarettes and tobacco. As HMRC say, the airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. The signs are large, prominent visual aids, which include pictures of dutiable goods, including tobacco products. The Appellant was travelling with her husband and is saying that neither of them knew that there were any restrictions on the importation of cigarettes into the UK, and neither of them noticed any of the signs at the airport.

20 48. We find that 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. Travelling abroad is commonplace. Duty free shops and the attraction of buying cheaper excisable goods abroad are matters that one would find hard to miss. She is an experienced traveller and would, on the balance of probabilities, have known of the restrictions and allowances for importing cigarettes. In any event, a reasonable person would check the allowances before importing 50,400 cigarettes, which at a minimum would fill two large suitcases which the Appellant would have had to take out of the UK empty, or purchased in Dubai.

49. When advised by Officer Young that the allowance was 200 cigarettes, the Appellant responded that she had “A few ..”. Clearly that was untrue.

30 50. The UAE 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.

35 51. 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.

40 52. 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 ordinary standards of reasonable 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.

5 53. In the recent case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*, released on  
25 October 2017, the Supreme Court said [at paragraph 74 of the judgment]:

10 ‘These several considerations provide convincing grounds for holding that the second leg  
of the test propounded in *Ghosh* does not correctly represent the law and that directions  
based upon it ought no longer to be given. 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*  
15 *Clowes*. 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  
20 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.’

54. The Appellant would have been fully aware that there are restrictions on the  
importation of cigarettes and that she was bringing more cigarettes into the country  
than she was entitled to without declaring them. Applying the objective standards of  
ordinary honest people, we have to conclude that the Appellant acted deliberately and  
25 dishonestly, taking action to positively evade duty and tax.

55. 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.

30 56. Hardship is not a valid ground of appeal. Finance Act 1994, s 8(5)(a) and Finance  
Act 2003, s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from  
taking into account the insufficiency of the funds available to pay when considering  
reduction of the penalty.

35 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. Taking these factors into account, the penalty was in our view  
calculated correctly resulting in a total reduction of 40%. Based upon the information  
40 provided there is no basis upon which the Appellant can reasonably expect to qualify  
for any greater reduction of the penalties. We therefore concur with the decision and  
assessment of the penalty.

58. The appeal is accordingly dismissed and the penalties totalling £11,548  
confirmed.

5 59. This document contains full findings of fact and reasons for the decision. Any  
party dissatisfied with this decision has a right to apply for permission to appeal  
against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax  
Chamber) Rules 2009. The application must be received by this Tribunal not later  
10 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.

15 **MICHAEL CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 13 NOVEMBER 2017**