



Neutral Citation: [2023] UKFTT 284 (TC)

Case Number: TC08758

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2022/00777

*Importation of cigarettes and hand rolled tobacco – customs and excise duty penalties – import VAT– not passing through green channel – whether conduct involving dishonesty - no – appeal allowed*

**Heard on:** 1 February 2023  
**Judgment date:** 8 March 2023

**Before**

**TRIBUNAL JUDGE IAN HYDE  
NOEL BARRETT**

**Between**

**KARL BLAKE**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: the Appellant appeared in person

For the Respondents: Thomas Holt, litigator of HM Revenue and Customs’ Solicitor’s Office

## DECISION

### INTRODUCTION

1. The form of the hearing was V (video) on the Tribunal video hearing system. A face-to-face hearing was not held because it was considered that a remote hearing was appropriate. The documents to which we were referred are the hearing bundle of 278 pages, the Travellers Allowances Order 1994 (as amended) and the decision of this Tribunal in *William v Reed* [2018] UKFTT 0749.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This appeal concerns whether the Appellant imported cigarettes and hand rolled tobacco (“HRT”) in excess of the permitted amounts with conduct involving dishonesty resulting in the Appellant being liable for excise duty, customs duty and import VAT penalties.

### THE FACTS

4. The Appellant represented himself in the appeal and gave evidence as did his wife, Jeramie Blake (travelling under the name Jeramie Abing), at the request of the Tribunal. Ms Natasha Sultman, an HMRC officer in HMRC’s Customs International Trade and Excise team gave evidence for HMRC.

5. There is some disagreement between the parties as to the facts in this appeal but, having heard the parties and considered the evidence we find the facts as set out below.

### **The Appellant and Mrs Blake**

6. The Appellant is 60 years old and by his own admission not a well man, with a number of medical conditions including ischemic (coronary) heart disease, nerve damage, hypertension and type 2 diabetes. He does not work and claims universal credit of £316 a week. He is a heavy chain smoker, takes painkillers and finds reading and writing difficult.

7. The Appellant accepted that he had brought in large amounts of cigarettes and HRT on four previous foreign trips, including from Muscat on the return leg of a visit to the Philippines. On these visits he did not declare the importation, going through the green ‘nothing to declare’ channel at the airport. According to the Appellant, on the one occasion when he did get caught he was allowed through with 20 packets of cigarettes and on another he paid the relevant duty and was allowed to keep the goods. We make no finding as to the specifics as to what happened on such previous occasions but do find that he has done so on several occasions and failed to declare the importation, evading customs and excise duties.

8. Mrs Blake is a Filipino national. Neither party called Mrs Blake as a witness but we asked during the hearing for Mrs Blake to provide oral evidence as it appeared to us relevant to the matters in the appeal, specifically what happened to the cigarettes and HRT in her possession at Manchester airport, as we describe below.

### **Ms Sultman, Mr Ford and Mr Trentham**

9. Ms Sultman’s duties include dealing with referrals from Border Force relating to the seizure of tobacco products from individuals travelling into the UK and conducting enquiries as to the imposition of civil evasion penalties in relation to the seizure of tobacco goods.

10. Ms Sultman provided an account of the progress of the matter from the referral to HMRC from Border Force on 3 March 2020 and to that extent we accept her evidence.

However, Ms Sultman could not assist as to what happened at Manchester airport as she was not there.

11. Mr Adrian Ford, the Border Force officer who made the seizure of the goods carried by the Appellant did not give evidence although his notebook was produced. When Mr Ford's absence was raised in the hearing Mr Holt made enquiries and it appears an email had been sent to Mr Ford with a view to him giving evidence but there was no reply and so no further efforts made. Mr Trentham, the Border Force officer who made the seizure of the goods carried by Mrs Blake, was also not present at the hearing although again his notebook was produced.

### **The seizures**

12. In 2020 the Appellant and Mrs Blake flew back from the Philippines where they had been visiting Mrs Blake's family. The return flight to Manchester airport involved a change at Muscat airport.

13. At Muscat airport the Appellant bought 5,400 cigarettes and 18 kilogrammes of HRT. The shop from which he bought the goods gave him four cases to carry the cigarettes and tobacco, these cases, a sample of which was produced to the Tribunal, were of a size that could be carried on an aeroplane in hand luggage. They were black, made of a hard plastic shell and had "Johnnie Walker" printed in small letters across the front. The Appellant explained that the shop would normally give them to anyone buying large amounts of whisky.

14. On 3 March 2020 the flight arrived at Manchester airport.

15. No evidence was adduced to the Tribunal as to the extent of the warning signs at Manchester airport as to the limits for importation of dutiable goods, including tobacco products. However, the Appellant did not deny there were signs and we find that there were sufficient signs alerting travellers as to the relevant limits.

16. The Appellant claimed that he did not know the importation limits. His evidence as to his state of mind was vague, claiming that the limit was personal use, which for him as a heavy chain smoker was very considerable. He also said that he had been told by the sales assistant at the shop at Muscat airport that he could buy as many as he liked as long as they were for personal use. We find that, as a frequent flyer the Appellant did know the importation limits but chose to ignore them. Further, we doubt he was told in Muscat that he could import into the UK as many as he liked. Even if he had been told that, we do not believe he relied on that advice over and above what he knew about the limits.

17. Mrs Blake as a non-UK national had to go through immigration control at Manchester airport which, we were told, was on a different floor. Mrs Blake took with her two of the black cases containing 2,400 cigarettes and 9kg of HRT. She went through the nothing to declare green channel and was stopped by a Mr Trentham, a Border Force officer. She was taken to an interview room, the black cases inspected and the cigarettes and HRT found.

18. Mr Trentham's notebook included the following notes:

"RT: Do you understand your  
customs allowances when  
returning to the UK from outside the EU?"

JA: yes

RT: what do you understand  
them to be?

JA: I'm not sure"

19. Further entries in Mr Trentham's notebook included:

"Notice 1,12A, BOR156 &162  
Issued"

20. HMRC's case is that the Appellant, in possession of the other two black cases containing 3,000 cigarettes and 9kg of HRT, also went through the green channel, failing to declare the importation, whereupon he was challenged by Mr Ford, a Border Force officer. In support of that argument HMRC rely upon Mr Ford's notebook which reads:

"intercepted in green channel T2-  
Baggage, ..."

21. The Appellant's case is that he was stopped by Mr Ford in the baggage reclaim area not the green channel. On his account, having collected their two suitcases from the luggage carousel, the Appellant put the suitcases and the two black carry on cases on a luggage trolley. He was pushing the trolley towards the red and green channels when he was approached by Mr Ford. In the Appellant's words the Border Force officers were "lined up and waiting for us". When Mr Ford approached, he pointed at the clothes cases and asked what was in them. The Appellant said clothes. Mr Ford then pointed to the black cases and told the Appellant he had cigarettes and tobacco in the cases. The Appellant was then taken into the green channel and into a room where Mrs Blake was already, the black cases in the Appellant's possession opened, and the cigarettes and HRT seized. The Appellant argued very forcefully that Border Force knew he was importing tobacco, either because they had a CCTV video from the shop or someone ("a large white man") was watching him buy the goods in Muscat.

22. These two accounts of what happened at Manchester airport are contradictory and this Tribunal must make a finding of fact as to whether the Appellant was confronted by Mr Ford having entered the green channel or before then. We dismiss the Appellant's theories as to whether and how Mr Ford knew the black cases contained tobacco as being irrelevant to the issues in this appeal, which are not concerned with how he was detected but whether he was dishonest.

23. HMRC protested that the first time the Appellant has given this account was at the hearing, they had no notice of the point. Mr Holt further suggested to the Appellant in cross examination that, based on the Appellant's comments in correspondence, the Appellant's recollection was clouded by having been in total flying for 20 hours and by his own admission in correspondence confused by being drunk and on painkillers.

24. In our view, Mr Ford could have given evidence on the point but did not attend the hearing and, it appears to us, HMRC did not make more than a token effort to secure his attendance. Ms Sultman was not there and so could not assist. The only evidence produced by HMRC was Mr Ford's notebook and, without Mr Ford's witness evidence, we find HMRC's evidence as to what happened unsatisfactory.

25. We recognise Mr Holt's point that the Appellant did not raise this argument before the hearing. We also find the Appellant an unsatisfactory witness with a history of illegally importing large quantities of tobacco, but he is also unsophisticated, particularly in understanding technical issues, and we do not believe he mentioned the point about being challenged before the green channel as a defence but merely as background to what happened.

26. On this point we are on balance persuaded the Appellant is telling the truth. We accept the Appellant's account that he was in the baggage area and not the green channel when he was challenged by Mr Ford.

27. The Appellant was also asked in the hearing what was his intention had he not been stopped and the Appellant said that he would have gone through the green channel. We find that he was prepared to do so based on his previous experience of either not being detected or being allowed to pay the relevant duty. We also find that he intended the cigarettes and HRT taken by Mrs Blake through the green channel should be brought into the UK without payment of duty.

### **The seizure forms and subsequent correspondence**

28. When the cigarettes and HRT were seized both the Appellant and Mrs Blake were issued with forms BOR156 (seizure information notice) and BOR162 (warning letter about seized goods) which both signed.

29. Form BOR162 includes the words:

“the goods ...have been seized under Section 139 of the Customs and Excise Management Act 1979. This is without prejudice to any further action that may be taken against you in connection with this matter...”

30. The Appellant's case is that after the goods were seized Mr Ford shook him by the hand and said that due to the Appellant's co-operation there would be no further action. The Appellant accepts he signed the forms without reading them but screwed them up and threw them away as he believed based on Mr Ford's comments that there would be no further action.

31. Mr Ford's notebook includes the following:

“BOR156,12A, notices, warning  
letter issued  
Pax informed HMRC would be  
Notified”

32. Notices 1 and 12A were also issued to the Appellant. Notice 12A explains that any claim that the goods were not liable to seizure (including any claim that goods were for personal use) should be appealed to the Magistrates' Court within 30 days of the seizure. The Appellant did not challenge the seizure of the goods within the time limits advised in the notice.

33. On 21 May 2021 HMRC wrote to the Appellant informing him HMRC were enquiring into customs duty, import VAT and excise duties in the period 3 March 2019 to 19 May 2021. The letter advised that cooperation could reduce any penalties. Factsheets CC/FS9, Public Notice 160 and Public Notice 300 were enclosed with the letter explaining the Appellant's rights and how cooperation would affect any penalty decision. The Appellant and Mrs Blake were asked to sign, date and return a copy of the letter.

34. On 25 May 2021 the Appellant telephoned HMRC, confirmed his involvement in the importation but claimed he had been told by the Border Force officer at the time of the seizure that the matter was finished. The Appellant said he was unwell. The Appellant was offered further time to respond but he said he did not need it.

35. On 4 June 2021, no response having been received, a reminder letter was sent to the Appellant.

36. On 10 June 2021 the Appellant called HMRC, conceded he had brought the cigarettes and HRT into the UK but he had been encouraged to do so by staff at the shop in Muscat. His wife did not know what he had done but he had been drunk and on painkillers so this impacted his decision.

37. On 23 June 2021 the Appellant sent a letter dated 15 June 2019 providing information. He was shocked to receive the letter from HMRC as he had understood the matter to have been closed. He had been informed by the shop assistant in Muscat that he could import unlimited amounts provided they were for his personal use. As Covid 19 was ongoing, it was reasonable for him to buy the goods as they were cheap and for his own consumption as an addicted smoker. The Appellant also provided medical evidence of his medical conditions and his financial position. The Appellant also stated:

“My wife Jeramie Abing is a total innocent party in this matter she only carried those bags for me. My wife does not even smoke.”

38. Ms Sultman concluded that based on the evidence the Appellant should be issued a civil penalty notice for the following reasons:

(1) The Appellant entered the green ‘nothing to declare’ channel at Manchester airport.

(2) When his luggage was examined by Border Force, the Appellant was found to be carrying 99 times the allowance for tobacco products. The Appellant also took responsibility for the goods his wife was carrying.

(3) At all ports of entry there was essential customer information, at both the baggage reclaim and the customs declaration areas, detailing which countries are within the European Union and advising the allowances for tobacco products for countries outside the European Union. Ms Sultman was therefore satisfied that the Appellant was aware of the customs allowances and made a dishonest attempt to bring in more than the allowance.

(4) Ms Sultman did not believe it credible that the Appellant could have believed that being in possession of over 5400 cigarettes and 18kg of HRT would have been within his allowances.

(5) Ms Sultman believed a reasonable and honest person would not find it acceptable to import such a large quantity of goods without the payment of the relevant duties.

(6) Ms Sultman also believed a reasonable person would have checked their allowances prior to trying to import 5,400 cigarettes and 18kg of HRT.

(7) The Appellant provided medical evidence of his underlying conditions but he did not say that these conditions affected him at the time of the seizure.

(8) Based on the evidence available to her Ms Sultman concluded a penalty should be raised as there was sufficient evidence to demonstrate that the Appellant intended to evade UK duty and taxes.

39. On mitigation of penalties Ms Sultman concluded that the Appellant had provided a high level of cooperation and disclosure attracting a higher level of reduction in the penalties.

40. Ms Sultman calculated the excise duty and import VAT at £8,284 using the lowest known UK value for that brand or, in respect of the unbranded HRT, the lowest known UK price for the brand of HRT the Appellant was carrying.

41. On 6 July 2021 HMRC issued the Appellant with a notice of assessment for a civil evasion penalties of £3,313 being customs civil evasion penalties of £983 and excise evasion

penalties of £2,330. These penalties reflected a reduction of 60% of the total evaded duty and import VAT being a 30% reduction for disclosure and a 30% reduction for co-operation, less than the full 80% available as the Appellant had not supplied all the information requested by HMRC.

42. On 29 July 2021 the Appellant called HMRC to say he could not afford to pay the penalty and that he found the situation very stressful.

43. On 30 July 2021 in a letter from Mrs Blake but signed by both her and the Appellant the Appellant requested a review of the decision.

44. On 16 December 2021 (originally and erroneously dated 16 September by HMRC) a review conclusion letter was issued to the Appellant upholding Ms Sultman's decision to charge a penalty of £3,313.00 and explaining the Appellant's rights of appeal.

45. On 23 January 2021 the Appellant appealed to this Tribunal. This appeal was in time due to the three-month extension under Covid.

#### **THE LEGISLATION**

46. Section 8 Finance Act ("FA") 1994 provides insofar as relevant:

##### **"8 Penalty for evasion of excise duty**

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

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

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

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

...

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

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

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

(5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say-

(a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;

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

##### **16 Appeals to a tribunal**

...

(6) 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”

47. FA 2003 provides insofar as relevant:

**“25 Penalty for evasion**

(1) In any case where—

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

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

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

**29 Reduction of penalty under section 25 or 26**

(1) Where a person is liable to a penalty under section 25 or 26—

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

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

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

(3) Those matters are—

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

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

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

**33 Right to appeal against certain decisions**

(1) If, in the case of any relevant tax or duty, HMRC give a person or his representative a notice informing him—

(a) that they have decided that the person has engaged in conduct by which he contravenes a relevant rule, and

(b) that the person is, in consequence, liable to a penalty under section 26, but

(c) that they do not propose to give a demand notice in respect of the penalty,

the person or his representative may make an appeal to an appeal tribunal in respect of the decision mentioned in paragraph (a).



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

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

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

...

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

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

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

(7) On an appeal under this section—

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

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

48. Customs and Excise Management Act 1979 provides insofar as relevant:

**“78 Customs and excise control of persons entering or leaving the United Kingdom**

(1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom; or

(b) being dutiable goods or chargeable goods, he has obtained in the United Kingdom without payment of duty or tax, and in respect of which he is not entitled to exemption from duty and tax by virtue of any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

....

(3) Any person failing to declare any thing 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.

...

49. The Travellers Allowance Order 1994 (SI 1994/955 (“the Travellers Order”)) provides:

“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.”

...

schedule 3

...

“Cigarettes

200

...

Smoking tobacco

250 gramme”

50. Equivalent relief is provided for customs duty purposes.

#### RELEVANT CASE LAW

51. The test as to whether there has been dishonesty for the purposes of s.8 FA 1994 and s.25 FA 2003 is set out in *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC 67:

62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest...Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] UKHL 12 ; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 : see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 ; [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 ; [2007] Bus LR 220; [2007] 1 Lloyd’s Rep 115 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314 ; [2011] Lloyd’s Rep FC 102. The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480, who had been a party also to *Twinsectra*:

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

63. Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose.”

...

74...The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the

question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

#### **THE ARGUMENTS**

52. The Appellant raised a number of arguments and, together with other issues we believe need to be addressed, can be conveniently grouped as follows:

- (1) Whether there was dishonesty:
  - (a) As regards the goods in his possession, the Appellant arguing that he did not enter the green channel before he was challenged by Mr Ford, the Border Officer
  - (b) As regards the goods in Mrs Blake's possession
- (2) Specific arguments raised by the Appellant:
  - (a) It was his understanding that when the cigarettes and tobacco was confiscated the matter was closed as this is what Mr Ford had told him
  - (b) The cigarettes were for his own personal use
  - (c) The shop keeper at Muscat airport told him he could bring unlimited amounts of cigarettes and tobacco into the UK provided it was for his own use
  - (d) He is very ill and cannot afford to pay the penalty.

53. The Appellant did not contest either the amount of the penalties or the amount of the reduction allowed for co-operation and disclosure save to the extent the point was implicit in the above arguments. We do not therefore consider these points further. Specifically, we see no other reason to interfere with the reductions allowed by HMRC.

#### **The customs and excise regime**

54. The customs duty and excise duty penalty regimes are set out under differing legislative regimes which are for current purposes substantively the same.

55. Section 8(1) FA 1994 provides:

“8 Penalty for evasion of excise duty

- (1) Subject to the following provisions of this section, in any case where—
  - (a) any person engages in any conduct for the purpose of evading any duty of excise, and
  - (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability)...

56. To be liable under s.8 a person must therefore:

- (1) engage in conduct for the purpose of evading duty: and
- (2) that conduct must involve dishonesty

57. Section 25 of FA 2003 provides near identical wording in respect of customs duty and import VAT.

58. The amount of cigarettes and HRT that an individual can import is limited to 200 cigarettes and 250 grammes of tobacco. If those limits are exceeded then excise duty, customs duty and import VAT are payable. There is no “personal use” allowance.

59. The purpose and importance of the red and green channels at an airport was not debated at the hearing but we were referred to s.78(1) CEMA as providing the authority for channels, being a place directed by the Commissioners for travellers to declare dutiable goods:

**“78 Customs and excise control of persons entering or leaving the United Kingdom**

(1) Any person entering the United Kingdom shall, at such place and in such manner as the Commissioners may direct, declare any thing contained in his baggage or carried with him which—

(a) he has obtained outside the United Kingdom...”

60. We also adopt the summary set out at paragraphs 69 to 70 of Judge Poon’s decision in this Tribunal in *William Reed*:

“69. By design, the uniform customs clearance channels are used in airports to streamline the process of proving a person’s engagement in any conduct for the evasion of duty and tax. If a traveller is found to be in the green channel in possession of excess dutiable goods, then this element is readily proved.

70. The green channel is merely a mechanism for proving the engagement of conduct for the evasion of duty by establishing two essential facts: (i) being in possession of excess duty goods; (ii) no intention of declaring the duty on the excess.”

61. In short, the red and green channels are a decision point for travellers as to whether they wish to declare goods on importation. If they go through the green channel and are found in possession of dutiable goods then dishonesty can be inferred. Absent going through the green channel dishonesty may be shown but it must necessarily be harder to show.

62. In this appeal the burden of proof is on HMRC to establish on the balance of probabilities that there has been 'conduct involving dishonesty' (s. 16(6) FA 1994 in respect of excise duty and s.33(7)(a) FA 2003 in respect of customs duty and import VAT).

63. As set out in *Ivey*, in determining whether there has been dishonesty, the tribunal must first ascertain the actual state of the individual’s knowledge or belief as to the facts, a subjective test. Having done so the tribunal must determine whether that conduct was honest or dishonest by applying the objective standards of ordinary decent people. It is not necessary that the defendant for a finding of dishonesty that the Appellant appreciates that what he has done is, by those standards, dishonest.

64. Once dishonesty has been established it is for the Appellant to prove their case, again on a balance of probabilities.

65. Where a penalty has been correctly raised then HMRC is empowered to reduce that penalty to nil. On appeal to the tribunal, the tribunal is entitled to reduce the penalty to nil or cancel in whole or in part any reduction in the penalty allowed by HMRC (s.8(4) FA 1994 and s.29(1) FA 2003).

**CONDUCT INVOLVING DISHONESTY**

66. In applying the test of dishonesty for the purposes of the conditions for imposing penalties under s.8(1) FA 1994 or s.25 FA 2003 the position is different as regards those cigarettes and HRT imported by the Appellant and Mrs Blake.

**The Appellant’s imports**

67. The Appellant’s argument is that he was approached by Border Force before he made the decision as to whether to go through the red or green channel. Whilst not expressed in

such terms, this raises the question as to whether the conditions for the application of s. 8(1) FA 1994 or s. 25 FA 2003 have been satisfied.

68. As we have set out above, we accept the Appellant's evidence that he was approached by Mr Ford whilst still in the baggage area and immediately before entering either the red or green channel. The question then is whether, based on that finding and applying the dual stage test in *Ivey*, there has been conduct which involved dishonesty.

69. The first stage of the test in *Ivey* requires us to determine what were the Appellant's intentions. The question must be judged in this appeal at the point that the Appellant was approached by Mr Ford in the baggage area before entering the green channel point.

70. The Appellant claimed he did not know the limits on importation but we have found that he did. Further, the Appellant conceded in evidence that had he not been challenged he would have gone through the green channel. In our view therefore, had the Appellant done so he would have satisfied the subjective test of dishonesty in *Ivey*. Further, the objective test would have been met. By the objective standards of ordinary decent people walking through the green channel in those circumstances would be dishonest.

71. However, the Appellant did not do so and was challenged at a point where he could still have decided to declare the goods. Further, when asked about the contents of the black cases by Mr Ford he agreed he had cigarettes and tobacco in the cases. In short, the Appellant did not mislead the Border Force officer nor did he represent he had no dutiable goods by going through the green channel.

72. Mr Holt referred us to the decision in *William Reed* on this point. In that case the Appellant was caught importing cigarettes in his hand luggage as he walked through the green channel, but the Tribunal found he had previously abandoned on the luggage carousel a suitcase containing 10,000 cigarettes which had split open. The Appellant said he had abandoned the luggage because he could not afford the duty on the cigarettes.

73. The Tribunal's findings on this point were as follows:

"84. In relation to the contents in the suitcase, Mr Reed's explanation why he did not collect the suitcase was consistent with the situation he found himself in on clearing customs. Mr Reed could see the officers on duty at the customs channel; he could see that the suitcase had become damaged and being tied up in string; he could see that the contents of the suitcase had become visible from the damage. It was plain to him that if he had taken the damaged suitcase with the exposed contents down the green channel, he would have been intercepted.

85. The subjective element we take into consideration includes: (i) Mr Reed is a regular traveller to Tenerife; (ii) he is aware of the duty-free allowance for cigarettes, (iii) he knew he was carrying excess in the suitcase and hand luggage; (iv) he knew duty was payable as he said he could not afford to pay it; (v) he understood the significance of choosing the green channel to clear customs.

86. By ordinary standards, Mr Reed's behaviour would be characterised as dishonest. HMRC have met the burden of proof required in establishing dishonesty on the balance of probabilities for the penalties to be imposed."

74. Mr Holt for HMRC argued that the same logic applied in this appeal.

75. The two cases have a number of similarities, both Appellants had intended to bring the goods through the green channel but due to unforeseen events did not do so. In the current appeal the Appellant did not walk through the green channel as he never had the opportunity.

Mr Reed did walk through the green channel but not with the cigarettes in the damaged suitcase.

76. The Tribunal in *William Reed* felt able to conclude that the behaviour up to abandoning the suitcase amounted to “conduct for the purpose of evading any duty” and, applying the test in *Ivey*, that the conduct “involves dishonesty”.

77. Whilst not bound by *William Reed*, we are reluctant to disagree with the Tribunal’s reasoning by such a respected panel. Nevertheless, we have difficulty accepting that the Appellant’s conduct up to the point of being challenged by Mr Ford amounted to conduct involving dishonesty. The Appellant intended to evade duties but at the point he was challenged his conduct (stripping away the history of evasion and his intention), was entirely consistent with declaring the goods. His conduct at the relevant point included intended dishonesty rather than actual dishonesty. Imposing penalties at this point appears to us to be bringing forward the point of liability to include intention, rather like criminalising a shoplifter who carries goods openly but puts the goods back when challenged by the security guard before leaving the store. If intention prior to entering the green channel is the test to be applied then the limits of the penalty are unclear.

78. We would add that no submission was made in this appeal (or, so far as we can determine, in *William Reed*), that the importation had happened by the time the cigarettes were in the baggage area.

79. We therefore determine that, as regards the cigarettes and HRT in the Appellant’s possession, the conditions for imposing penalties under s.8 FA 1994 and s.25 FA 2003 have not been met.

### **Mrs Blake’s imports**

80. Nearly half the cigarettes and HRT were taken through the green channel by Mrs Blake. As mentioned above, no point was taken on that by either party in the hearing, the Appellant took responsibility for the penalties and, to the extent either party considered the issue, the assumption appeared to be that it was the Appellant’s intention and knowledge that mattered. However, we need to address the issue.

81. Mrs Blake walked through the green channel with the cigarettes and HRT. We have found that she knew of the import limitations and so, had the penalty in respect of those imports been issued to Mrs Blake we would have found there was conduct involving dishonesty for the purposes of s.8 FA 1994 or s.25 FA 2003.

82. However, the notice was issued to the Appellant and so in our view whether there was any conduct involving dishonesty must be determined by reference to the Appellants’ actions and intentions. No authority was produced to us that accepting responsibility for a third party’s actions after the event in correspondence renders someone liable whether under the instant legislation or otherwise. Having decided to raise penalties against the Appellant, HMRC must demonstrate on the balance of probabilities that he has been engaged in conduct involving dishonesty.

83. As with the Appellant’s own imports and the discussion of *William Reed*, the Appellant did not take the cigarettes and HRT through the green channel and so his acts and state of mind have to be judged at an earlier stage. In our view the latest moment when the Appellant’s actions could have amounted to conduct involving dishonesty was when Mrs Blake left to go to the non-UK arrivals area, or conceivably if there was a later telephone call or message between them. The Appellant was not cross examined as to what he did or said up to this point. We have found that the Appellant intended all the cigarettes and HRT to be smuggled into the UK without duty being paid however, we have no evidence as to what the

Appellant did to further that intention. It may have been the case that he told his wife to take the cigarettes and HRT through the green channel. On the other hand, Mrs Blake may have made the decision herself, perhaps knowing what her husband wanted. In our view the Appellant taking responsibility for her imports after the event is not enough and specifically, is not a confession that he engaged in conduct involving dishonesty. The Appellant may simply have meant that as they were his cigarettes and HRT he ought to pay the penalty but that is not the same thing.

84. The burden of proof is on HMRC to show conduct involving dishonesty on the part of the individual issued with the penalties. HMRC issued the penalties to the wrong person and, having done so failed in their investigation and the hearing either to consider the point or establish the evidence necessary to sustain the penalties against the Appellant. If there is authority for the point that someone in the Appellant's position is liable without adducing such evidence, HMRC did not produce it. It is not for this Tribunal to correct that error by glossing over that elementary mistake. In our view HMRC have not discharged that burden in respect of the penalties raised on the Appellant in respect of Mrs Blake's imports.

#### **SPECIFIC ARGUMENTS**

85. The Appellant raise a number of specific arguments which would apply to both the Appellant's and Mrs Blake's imports. As we have already found in favour of the Appellant on the central issue of there being acts of dishonesty, it is not necessary for us to address these points but we do so for completeness.

#### **It was the Appellant's understanding that the matter was closed**

86. No submissions were made by either party as to whether such a statement would have prevented HMRC from raising penalties or whether this tribunal's jurisdiction extended to hear such an argument as to the exercise of administrative discretion.

87. However, irrespective of whether Mr Ford could bind the Border Force and HMRC, (which, without argument, we doubt), we have found that both the Appellant and Mrs Blake were given and signed Form BOR162 and we do not accept that Mr Ford told the Appellant that there would be no further action taken. We also note Mr Ford did not conduct the seizure of the cigarettes and HRT from Mrs Blake and it is not clear Mr Ford could have been speaking in respect of that seizure.

88. We therefore reject the Appellant's argument.

#### **The cigarettes were for his own personal use**

89. The Appellant argued that, notwithstanding the large amounts imported, he was only buying cigarettes and HRT for his own use. As described above the allowance for imports from third countries is 200 cigarettes and 250 grammes of tobacco. This argument must therefore fail.

#### **The Appellant was advised by the shop assistant at Muscat airport**

90. We are not persuaded that the Appellant (or, for completeness, Mrs Blake) was so advised and in any event have found that the Appellant and Mrs Blake were aware of the limits for importing cigarettes and HRT. We therefore reject the argument.

#### **The Appellant is very ill and cannot afford to pay the penalty**

91. We accept that the Appellant is very ill but we do not accept that as a defence in this appeal.

92. As to the Appellant not being able to afford to pay, the relevant legislation specifically provides that inability to pay cannot be taken into account in determining whether a penalty should be reduced.

93. Thus s. 8 FA 1994 provides:

“(5) Neither of the following matters shall be a matter which the Commissioners or any appeal tribunal shall be entitled to take into account in exercising their powers under subsection (4) above, that is to say-

(a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;

(b) ...”

94. Section 29(2) and (3) FA 2003 contains similar wording.

95. We therefore reject this argument.

#### **DECISION**

96. For the reasons set out above, we allow the appeal.

97. In respect of the cigarettes and HRT imported by the Appellant we have determined that the Appellant did not commit any act of dishonesty and so the appeal is allowed.

98. For the cigarettes and HRT imported by Mrs Blake, we have determined that Mrs Blake did import the goods dishonestly. However, as the penalties the subject of this appeal were issued to The Appellant and HMRC have not demonstrated he committed acts of dishonesty, the appeal is allowed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

99. 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.

**IAN HYDE  
TRIBUNAL JUDGE**

**Release date: 08<sup>th</sup> MARCH 2023**