[2017] UKFTT 718 (TC)

TC06132

Appeal number: TC/2016/04959

EXCISE DUTY and CUSTOMS DUTY– civil evasion penalties – s 8 of FA 1994 and s 25 of FA 2003 – the test of dishonesty in civil cases – whether reduction sufficient – appeal dismissed – penalty amount upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

JAMES HUGHES **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
MR IAN MALCOLM

Sitting in public at the Tribunal Centre, 126 George Street, Edinburgh on 2 May 2017

The Appellant in person

David Thomson, Counsel, instructed by the Office of Advocate General for the Respondents

DECISION

Introduction

1. The appellant, Mr Hughes, appeals against civil evasion penalties of £939 (with 15% reduction) imposed by notice of assessment issued on 21 June 2016. Of the total penalties charged, £741 relates to excise duty evasion, and £198 relates to customs duty evasion.

2. The principal issue in this appeal is to determine whether the burden of proof has been discharged by HMRC in imposing the penalties for "dishonest" evasion of:

(a) excise duty under s 8 of Finance Act 1994, and

(b) customs duty under s 25 of Finance Act 2003.

3. The secondary issue for the Tribunal to decide is whether the mitigation applied of 15% against the chargeable penalties at the discretion of HMRC is sufficient.

The Relevant Law

Excise duty penalty

4. Section 8 of FA 1994 provides as follows:

> **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.

5. Under s 16(1B) FA 1994, there is a right of appeal to the Tribunal against a "relevant decision", which is defined to include a decision that a person is liable to a penalty under s 8.

6. Under s 8(4) of FA 1994, on an appeal the Tribunal "may reduce any penalty to such amount (including nil) as they think proper", but not on the grounds of inability to pay.

Customs duty and import VAT penalties

7. The provisions for the imposition of penalties for the evasion of customs duty and import VAT under s 25 of FA 2003 are, in all material respects, identical to those set out above for the evasion of excise duty under s 8 of FA 1994.

Burden of proof

8. Section 16(6) of FA 1994 (for excise duty) and s 33(7)(a) of FA 2003 (for customs duty and import VAT) provide that the burden of proof is on HMRC to establish that the appellant has engaged in conduct for the purpose of evading the duty or VAT and that his conduct involved dishonesty. Otherwise the burden of proof is on the appellant "to show that the grounds on which any such appeal is brought have been established".

9. The standard of proof is the ordinary civil standard, that is, proof on the balance of probabilities (*Khawaja v HMRC* [2008] EWHC 1687 (CH) at [25]).

Travellers' Allowance Order 1994 (SI 1994/955)

10. The statutory instrument provides for the personal allowances for dutiable goods to be imported from a third country. The duty-free quantity for smoking tobacco is 250 grams.

Oral evidence

11. Mr Thomson, counsel for the respondents, led the evidence of Officer Colin Maxfield of the UK Border Force, and was cross-examined by Mr Hughes. Mr Hughes also gave evidence and was cross-examined by Mr Thomson.

Officer Maxfield's evidence

12. Mr Maxfield is an officer of the UK Border Force. He was based at the Immigration Office from 1994 to 2009, when his duty was to check passports of passengers arriving in the UK. He has been a general customs officer since 2009, and one of his duties is to select individuals for search.

13. On 27 April 2015, the appellant arrived at Edinburgh airport on a flight from Lanzarote, Spain.

14. The Tribunal was taken through photographs showing the layout at Edinburgh airport. From disembarkation to clearing at customs, there are a number of notices advising which countries are within the European Union ("EU") and which are outside the EU. Notices stating the duty-free allowances for excise dutiable goods acquired outside the EU are also displayed in the baggage reclaim area and just before the customs control entrances at the airport.

15. On approaching customs control, a passenger can either turn left as directed by a sign prominently marked in **red** for "Customs enquiries/ Goods to declare", or proceed forward under one combined sign for **green** "Nothing to declare" and **blue** "Arrivals from the EU".

16. If a passenger chooses to proceed forward, he will come to a second control point where a choice has to be made between turning left for the green channel with

the signage "Nothing to declare" *and* "Arrivals originating from outside the EU", or turning right for the blue channel sign-posted as "Arrivals from within the EU *only*".

17. Officer Maxfield informed the Tribunal that it is customary for the customs officer to be standing between the green and blue signage panels at the second customs control point.

18. For customs clearance, the appellant entered the green "Nothing to Declare" and "Arrivals originating from outside the EU" channel, and was intercepted by Officer Maxfield, who asked the appellant a standard set of questions regarding duty-free allowances before the bag search.

19. The appellant's luggage was found to contain 4.95kg of hand-rolling tobacco (HRT), and this was seized. The overall quantity of 4.95kg of HRT exceeded the personal allowance of 0.25kg for a traveller coming in from a third country. The appellant was issued with Public Notices 1 and 12A, and he signed both the Seizure Information Notice BOR156 and Warning Letter BOR162.

20. The notebook entry from Officer Maxfield recorded the time of the appellant being stopped as 12:25 and the entry was made at 15:45. The section of entry that the appellant stated that he had "quibble" with is as follows, where CM and JH being the respective initials of Officer Maxfield and the appellant:

> "CM: Are you aware of your allowances for cigarettes, tobacco and alcohol?
>
> JH: Erm 200-400
>
> CM: Its [sic] 200 per adult
>
> JH: Oh right"

21. In cross-examination, the appellant challenged the accuracy of Officer Maxfield's recall of his alleged reply of "Erm 200-400" some 3 hours after the exchange took place, and questioned whether Officer Maxfield could have mistaken another passenger's reply as the appellant's.

22. Officer Maxfield's reply was that while he was unable to recollect the specific interview which took place nearly two years ago, he confirmed that "if that had formed part of the answer then it would be in the notebook". He further informed the Tribunal that there were only two entries made on the day, one being in relation to the seizure of the appellant's HRT and the other being a police matter unrelated to customs. For that reason, Officer Maxfield stated that it was unlikely that he would have mistaken the identity of the passenger giving the reply.

The appellant's evidence

23. The appellant works for Transport Scotland, which is an agency for gathering data on road use and the flow of traffic all around Scotland. His job requires him to travel extensively around Scotland, including to remote areas, to carry out maintenance service of the solar panel units used for data collection.

24. He informed the Tribunal that the trip to Lanzarote in April 2015 was the first holiday since the birth of his son two and a half years ago. On this occasion, he was travelling with his wife and their infant son.

25. He then informed the Tribunal that he formerly smoked cigarettes, and "had stopped smoking for a good few years".

26. The Tribunal asked the appellant how long his break from smoking had been. He said something about meeting his wife in 2006, who was also a smoker; that he stopped "perhaps around 2008 or 09"; that it took him "a good few months to pick up smoking"; and that he "tried the electronic cigarettes". We asked what made him stop smoking, and he replied that it was "money and health"; that his (former) wife "died of cancer".

27. The Tribunal asked the appellant when he actually started smoking again. He said he restarted "after his son was born, ie after August 2012", or "perhaps a year later", and that he "would have picked up around Christmas of 2014"; that he decided on HRT because it is cheaper than cigarettes.

28. When asked how much he paid for the HRT, he said he bought 10 packets of 500 grams at euro 4.45 each.

29. The respondents' statement of case stated that the appellant had previously visited Lanzarote. The appellant confirmed that Lanzarote is his favourite destination; "I love it there", he told the Tribunal. When asked how many times he had previously been to the island, he said "five" because it was "cheap" to have a holiday there.

30. He went on to tell the Tribunal, "As far as I was concerned, [Lanzarote] was in the EU", and within the EU, "one can have unlimited allowance for tobacco products". He qualified his statement by saying, that he had heard "if more than 3,200 cigarettes", "there may be questions about the limit"; that he "would not have taken that much anyway".

31. When asked about the issue he had with the notebook entry, the appellant informed the Tribunal that he would have replied: "Erm, I think so"; that in his mind there is no allowance limit as it was within the EU; that it is "unlimited for anything because of the legal stuff"; that "bear in mind, if you split the allowance, 4.95kg is not that much if within the EU"; that there should be "two allowances", and that it was not that much since "I don't have cigarettes". (We understand the reference to "two allowances" was to the fact that he was travelling with his wife, who, the appellant believed, should have been entitled to her own personal duty-free allowance.)

32. When asked what he understood to be the tobacco allowance for entry from outside the EU, he said 500 grams.

33. In cross-examination, the appellant answered that the 5 kg HRT would have taken him "a couple of years to smoke through".

34. Accepting "the difference of view" as regards whether the appellant did say "200-400" as the allowance, Mr Thomson then questioned why the appellant had said nothing to Officer Maxfield that there was no limit or nothing about Lanzarote being in the EU. The appellant's reply was: "No quibble" about that now because he had since checked the internet due to the proceedings.

35. Mr Thomson then questioned the appellant, "On the belief you held at the time, should you not have gone down the blue channel?" The appellant's reply was: "What difference would it have?"

36. Mr Thomson reiterated the point to the appellant: that if "based on the assumption of not checking", you "held a genuine belief that you were honest" that Lanzarote was outside the EU, and when "your belief turned out to be mistaken" on being challenged by Officer Maxfield, yet "the one thing you didn't say is that you are not aware of Lanzarote being outside the EU"; that you "failed to disclose". The appellant made no reply.

37. The Tribunal then asked the appellant whether he had ever bought cigarettes in Lanzarote, his reply was: "Had we been smoking, I would have done; would have bought a lot more than I would have been allowed."

Correspondence between HMRC and the appellant

38. On 10 May 2016, HMRC Officer Harwood wrote to the appellant informing him that he was investigating whether civil evasion penalties were to be imposed following the seizure of the tobacco. Public Notice 300 on Customs Duty and Import VAT, and Public Notice 160 on Excise Duty were enclosed with the letter. The appellant was invited to make disclosure by responding to a list of 10 questions. It was explained that any reduction in the penalty amount was contingent on the response and co-operation with HMRC's enquiries.

39. On 25 May 2016, Officer wrote again to chase for a reply, indicating that in the absence of any co-operation, the appellant could be liable for the full penalty amount imposable of £1,235.

40. On 26 May 2016, after the opening paragraph apologising for the delay, the appellant's *full* reply is as follows:

> "The incident in question arose because I mistakenly assumed that because the Canary Islands are part of Spain then the allowance for goods was the same. The goods were seized and I was made aware of the amounts that could be brought into the UK from the Canary Islands. There are no other instances to be considered."

41. On 21 June 2016, Officer Harwood issued the penalty assessment notice. Officer Harwood concluded that the reduction for disclosure would be 5% and the reduction for co-operation would be 10%. The overall 15% reduction was applied to the full penalty amount chargeable of £1,106 (after giving the appellant the 0.25kg allowance) to reach an assessment of £939.

42. On 7 July 2016, the appellant wrote to Officer Harwood in respect of the penalty assessment and made the following points:

> (a) "I did however believe that Lanzarote, being part of Spain, was part in turn of the EU. I admit that it was a mistake on my part not to have checked and to have relied on assumption but a mistake nonetheless."
>
> (b) "I made no attempt to conceal the amount I had, it was simply packed in my suitcase not, in my opinion, a dishonest action."
>
> (c) "Although I had visited Lanzarote prior to this holiday I had not then restarted smoking and so the issue did not arise."
>
> (d) "This case was a first office and I agree that any subsequent issues would indeed have been dishonest as I had then clearly been given the necessary information."
>
> (e) "I cannot see how you could only allow a deduction of 15% out of a maximum of 80% as you have received both a response from me and my co-operation in answering your questions."

43. On 20 July 2016, the appellant requested a review of Officer Harwood's decision. By letter dated 16 August 2016, the review decision was issued, upholding the assessment.

44. The review conclusion addresses in some length the level of reduction contended by the appellant. For disclosure, it is stated that "an early and truthful admission of the extent of the arrears and why they arose will attract a considerable reduction", namely: what has happened and over what period of time, along with any information about the value involved, and not necessarily the precise quantification.

45. What HMRC consider to be co-operation includes:

- 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.

The review officer stated that while the appellant had responded to HMRC's enquiries within the appropriate timescales, "Officer Harwood did not consider his disclosure credible when compared to the information supplied by Border Force at the time of the seizure".

The appellant's grounds of appeal

46. On 15 September 2016, the appellant lodged an appeal with the Tribunal, and the main ground of appeal is:

> "I believe the crux of the matter rests with proof of dishonesty. If a penalty only applies when dishonesty is proved, then there should be no penalty as I have not been, nor proved to have been dishonest. To

> the charge of stupidity, I am culpable, however incredible HMRC may find it."

47. The appellant supplemented his grounds of appeal with a letter dated 12 September 2016, attached to the Notice of Appeal. The letter addresses the points made in the review conclusion decision; the salient points are as follows.

48. First, in respect of Officer Maxfield's notebook entry, the appellant stated:

> "It has been reported that during Border Forces [sic] questioning I was asked whether I knew my allowances to which I allegedly replied, 'Erm, 200-400'. This is totally inaccurate. What I actually said was, 'I think so', possibly, 'Erm I think so,' in a quizzical manner for as far as I was concerned it was unlimited, though I had heard that anything over 3200 cigarettes may be questioned as to whether you intend to sell it. My tobacco however was for personal use."

49. Secondly, in respect of signage of what it means to enter the green channel:

> "HMRC have also stated that by entering the green channel was evidence that I had ignored all signage and was therefore proof that I was acting dishonestly. I admit to not being the most observant of people as I truly believed I was within my rights to bring in the tobacco I wasn't paying any particular attention to the signs."

50. Thirdly, regarding his conduct being dishonest, the appellant responded:

> "Their accusation still hinges of [sic] their being convinced of my dishonesty. They have also stated that as I was aware of the restriction on cigarettes then I must also be aware of the restrictions on tobacco. **I actually am aware of the restrictions outside of the EU,** but as I thought Lanzarote was part of the EU knowing that was, to me, irrelevant. They seem to be basing their judgment on "Erm, 200-400" statement that I never said." (emphasis added)

51. Fourthly, the appellant stated his strong disagreement that it is irrelevant that this being the first offence:

> "… A second offence after having been told this would indeed have been dishonest. There is in my mind a big difference between ignorance and dishonesty."

52. Fifthly, regarding the discount allowed, the appellant contended that he had co-operated fully and given all the information asked for. Furthermore, he contended:

> "It seems … that if I had admitted that I knew my allowance and ignored it then I would have received a bigger discount. I am not, however, going to admit to an act of dishonesty when one was not committed in order to save myself some money. That to my mind would indeed be a dishonest act."

53. Sixthly, the appellant more than once stated at the hearing, that there should be "two lots of allowances" for the fact that he and his wife should each be entitled to a personal allowance.

HMRC's submissions

54. In submissions, Mr Thomson emphasised the objective, "obtainable" facts in this case, namely:

> (1) The appellant entered the Green Channel which is only for persons entering the UK with goods not exceeding their personal "duty-free" allowances.
>
> (2) The appellant was carrying 4.95 kg of HRT which was nearly 20 times over the duty-free allowance.
>
> (3) A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to customs channels. The notices explain which countries are inside and outside the EU and the duty-free allowances for excise goods. The notices also explain that passengers should speak to an Officer in the Red Channel or at the Red Point if they have goods over their allowances.
>
> (4) The appellant had travelled prior to the event to which the penalty relates and could reasonably be expected to be fully conversant with the regulations relating to duty-free allowances for goods imported into the UK.

55. Based on these obtainable facts, Mr Thomson submitted that:

> (1) It was unlikely that the appellant did not know or suspect that there were restrictions on the HRT he brought into the UK, in view of the quantity he brought, which exceeded the allowance by some 20 times.
>
> (2) The only evidence from the appellant was that he held a mistaken belief but did not elaborate on the basis of his belief; nor did he do anything to enquire about the basis of his belief.
>
> (3) Based on the appellant's mistaken belief, he was in the "wrong" channel, and should have been clearing customs in the blue channel.
>
> (4) The "curious fact" remains that the main reason, as the appellant claimed to be, he did not say it to the officer that he had just returned from an EU country, and this was not consistent with an honest belief.

The appellant's submissions

56. First, Mr Hughes stated that he "was not being dishonest, objectively or subjectively". He submitted that subjectively, the standard should be judged according to an ordinary person like himself. Objectively, he was not being dishonest just because he had failed to state he believed that Lanzarote was in the EU. He averred that "What I didn't say is not relevant"; that it was "a stressful situation", and that if the question had been put to him, "any questions would have been answered".

57. Secondly, he considered the reduction of 15% given was too low; that he was "not directed correctly"; and that he had "disclosed everything I want to disclose".

Discussion

The tests of dishonesty distinguished

58. The penalty in this case concerns civil evasion of excise and customs duties. It is a civil liability, and is to be distinguished from a criminal liability.

59. A central requirement of both s 8 of FA 1994 and s 25 of FA 2003 is that the conduct of the person being charged the penalty "involves dishonesty". In two significant respects, the civil test of dishonesty differs from the test of dishonesty in respect of criminal liabilities.

60. First, the standard of proof HMRC are required to discharge is that applicable in civil proceedings, namely proof on a balance of probabilities, and not the higher standard of "beyond reasonable doubt" as applicable in criminal proceedings.

61. Secondly, the test of dishonesty applicable to civil liabilities is primarily an objective test. It differs from the two-stage test for criminal dishonesty as formulated in *R v Ghosh* [1982] 1QB 1053, which involves establishing both the guilty act (the objective element), and the guilty mind (the subjective element).

The civil test of dishonesty

62. In the words of His Honour Judge Pelling QC (sitting as a Judge of the High Court) in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported):

> "In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* [1] as reconsidered in *Barlow Clowes*[2]. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is ***knowledge of the transaction sufficient to render his participation dishonest*** according to normally acceptable standards of honest conduct. ***In essence the test is objective*** – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were." (emphasis added)

63. That the civil test of dishonesty is essentially objective is referential to the judgment in *Barlow Clowes*, where it is stated at [10]:

> "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."

64. While the civil test of dishonesty is primarily objective, there is a subjective element to be taken into account, which is formulated by Lord Nicholls in the leading

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[1] *Royal Brunei Airlines v Tan* [1995] 2 AC 378

[2] *Barlow Clowes v Eurotrust International Ltd* [2006] 1 WLR 1476

judgment of *Tan*. Having stated that the test of dishonesty is by "an objective standard", Lord Nicholls remarks on the subjective element relevant to the test in the following terms:

> "Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart, dishonesty are mostly concerned with advertent conduct, not inadvertent conduct."

65. In respect of how this "subjective element" is to be taken into account by the court, Lord Nicholls' guidance is:

> "Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did."

66. The question for the Tribunal to determine is: was the appellant's behaviour dishonest according to normally accepted standards of behaviour, having regard to his personal attributes, experience and intelligence?

Tribunal's findings of fact

67. The test of dishonesty needs to be applied to the facts of the case. From the oral evidence of Officer Maxfield and the appellant, and from the documents provided, we make the following findings of fact which are relevant to our decision.

(1) The appellant's job requires him to travel extensively around Scotland to service the data gathering devices. Quite apart from the ability to read maps to locate these devices, his awareness of road signage, and his ability to read and interpret notices are among the core skills essential to his employment. It is reasonable to expect that the appellant's cognitive awareness for signs and notices would be at least average (if not above average) because of his daily employment.

(2) The appellant's written grounds of appeal as related above demonstrate a far above average level of awareness of the legal issues involved in the appeal. His intelligence in engaging with the issues is not in doubt, nor is his ability to find any information which he considers necessary.

(3) The appellant's submissions put forward nuanced points such as: (a) two personal allowances should have been given as his wife was entitled to a personal allowance too; (b) the subjective and objective aspects to the test of dishonesty. A traveller of his attributes would have been able to grasp the status of the Canary Islands being outside the customs union, notwithstanding the fact that the islands belong to Spain.

(4) He was a regular visitor to Lanzarote, and had made at least 5 trips to his favourite destination prior to the event. It is reasonable to expect a

traveller with his attributes to have ascertained Lanzarote is outside the EU customs union, with different regulations for personal allowances.

(5) On 27 April 2015, when he cleared customs control, at the first control point, he proceeded forward instead of stopping at the red point.

(6) At the second control point, he turned into the green channel instead of the blue channel.

(7) As a seasoned traveller, he would have understood what it meant to go through customs by the Green Channel. The choice of the green channel would have involved making a decision at two control points; it was unlikely to have been an inadvertent act.

(8) Officer Maxfield is an experienced customs officer. On the balance of probabilities, an experienced officer can be relied upon to have recorded accurately a *specific* reply in the form of: "Erm; 200-400".

(9) On 27 April 2015, Officer Maxfield had made only two entries in his notebook, with one being on a police matter. It is unlikely that Officer Maxfield would have mistaken the identity of the traveller who made that specific reply on that day, or to have conjured up this specific reply out of nowhere.

(10) The quantity of goods was 20 times of the allowed limit; the excess was not insubstantial, and that it was improbable that the limit was inadvertently exceeded.

68. The test of dishonesty is essentially objective for a civil evasion penalty. For the purposes of this appeal therefore, there is no requirement that HMRC prove dishonesty by establishing that the appellant *knew* what he was doing was dishonest. Based on our findings of fact, and by ordinary standards, the appellant's behaviour would be characterised as dishonest, and on the balance of probabilities, HMRC have established it to be so. HMRC have met the burden of proof required in this case.

69. We should add that even if the appellant's reply to Officer Maxfield had been "Erm, I think so", that would have made no difference to our conclusion that the appellant's knowledge of what it meant to clear customs by the green channel was sufficient to render his action dishonest, according to normally acceptable standards of honest conduct.

70. Finally, the appellant advanced the argument that this was his first offence, and that whilst he could be held ignorant for his first offence, he could not be held dishonest. We do not consider this to be a valid ground of appeal. In the first instance, it is a well-established principle in common law that ignorance of the law can be no defence, otherwise the law would be favouring those who choose to stay in ignorance over the prudent person who chooses to find out what the law requires of him. Secondly, a first offence can still be held "dishonest" on applying the relevant test to the facts of the case, as we have found in this case. Thirdly, whether it is a first offence or not makes no difference to the imposition of the penalties; the statute does not provide for any specific dispensation for the commission of a first offence.

Whether reduction sufficient

71. Officer Harwood did not consider the appellant's disclosure to be "credible when compared to the information supplied by Border Force at the time of the seizure" and had given an overall reduction of 15% to the penalties. The appellant, on the other hand, has averred at various junctures that the reduction of 15% applied to his penalty assessment is too low.

72. We have documented the correspondence to highlight the responses and the level of disclosure and co-operation that the appellant had given. We are of the view that the reduction of 15% applied by HMRC has been reached after fair consideration.

73. In determining that 15% represents a fair reduction, we have regard to the quality of evidence we heard from the appellant. We consider the appellant to be intelligent, astute, and of good understanding. It is in the context of these personal attributes that we evaluate his evidence.

74. The appellant focused his cross-examination by challenging Officer Maxfield's recall of his reply after a 3-hour lapse between the interview and the recording of the notebook entry on 27 April 2015. He averred in his grounds of appeal (in his letter dated 12 September 2016) that his response was no more than "I think so". We wonder why the appellant's recall of his alleged reply some 18 months after the event could have been more credible than Officer Maxfield's recall of the appellant's reply some 3 hours after the event.

75. As stated in our findings of fact, the specificity of Officer Maxfield's recall makes it more probable that it was a reply that was given. In contrast, when considered in the round, the appellant's evidence strikes us as lacking in specificity and consistency.

76. There was vagueness in his account about giving up smoking, of a wife dying of cancer, of his genuine belief that Lanzarote was in the EU and yet not choosing to clear customs by the blue channel, of never mentioning his mistaken belief to the customs officer when intercepted, of his awareness of duty-free allowances, though of various specifications. For example, the appellant was able to be specific in respect of the 3,200 cigarettes being the "limit" for passengers arriving from the EU or questions could be asked by customs control, and of the importance to maintain that any import was for "personal use" (see §48). His nuanced answer suggests a general awareness of the issues concerning allowances, and indicates an ability to find out the relevant information should he have chosen to do so. We find that it is unlikely that his awareness of allowance issues was confined only to goods coming in from the EU, and that to clear customs by the green channel (and not the blue channel) was inconsistent with his belief that Lanzarote was in the EU.

77. The quality of the appellant's evidence, considered as a whole, sits at odds with the good understanding and astuteness he has demonstrated in other aspects of the proceedings. We cannot find any reason to justify a higher reduction to that already given of 15%.

Decision

78. For the reasons stated, the appeal is dismissed.

79. The overall penalty in the sum of £939 is confirmed.

80. 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.

DR HEIDI POON

TRIBUNAL JUDGE
RELEASE DATE: