



TC06200

Appeal number: TC/2017/00547

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

ABEERA CHAUDARY

Appellant

- and -

HM REVENUE AND CUSTOMS

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER SHAMEEM AKHTAR**

Sitting in public at Leeds ET, City Exchange, Albion Street, Leeds on 22 September 2017

Mr Ibaad Chaudary, brother of the Appellant

Ms Kelly Bond, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Ms Abeera Chaudhary (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 24 October 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £1,142 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 and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

2. The Appellant did not attend the hearing. She was however represented by her brother, Ibaad Chaudary.

Background

3. On 12 September 2015, the Appellant was stopped and questioned by a UK Border Force Officer on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Karachi, Pakistan via Abu Dhabi in the United Arab Emirates.

4. 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. India 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.

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

6. The Appellant was travelling with her mother and brother. Officer Sykes’s evidence is that the Appellant confirmed she had travelled from Karachi. The Appellant confirmed when asked that the bags she had with her were hers and confirmed 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.

7. She was asked if she understood the allowances in respect of cigarettes, alcohol and tobacco from outside the EU. She replied that she did. Officer Sykes advised the Appellant of the allowance of 200 cigarettes or 250 grams of tobacco. The Appellant made no comment.

5 8. The Officer undertook a bag search and within the luggage discovered 7,800
Player Gold Leaf KSF cigarettes and 1.8Kg of Ghee sweets. The Appellant
acknowledged ownership of the goods.

9. The total tobacco being carried by the Appellant was 38 times over her allowance
as set out in the Travellers' Allowances Order 1994 (as amended). As the goods had
10 not been declared and were over the personal allowance the Appellant was advised
that the cigarettes 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 £2,286 in excise duty and import VAT would
15 have been evaded, in addition to any potential sale value of the goods.

10. 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.

11. On 6 September 2016, HMRC's Officer Sophie Goodrum, a post detection audit
officer of HMRC's International Trade and Compliance Unit, wrote to the Appellant
20 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 potential penalty. The letter
25 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.

12. The letter from Officer Goodrum explained that if the Appellant was willing to
30 co-operate with the enquiry he 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”.

13. Officer Goodrum 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.”
- 20

14. On 12 September 2016 HMRC received a telephone call from the Appellant’s brother, Ibaad Chaudary. He stated at that time the Appellant was out of the country and requested an extension to respond the letter issued on 6 September 2016.

25

15. On 23 September 2016 HMRC received an undated letter from the Appellant. In the letter the Appellant stated she had received some legal advice but was happy to represent herself at that stage.

16. The Appellant stated that the day prior to travelling back to the United Kingdom she and her family were taken sick. She had asked her uncle for 40 cigarettes (2 x 20 packets). However, due to a miscommunication her uncle packed “*a load more cigarettes into my suitcase*”. The Appellant states she was unaware of this and unable to check due to her ill health.

30

17. She also state that she has financial constraints in meeting any payment as she is soon to be married. The Appellant included photocopies of stamped pages of her passport and said that her travel had been solely for leisure purposes and no commercial purpose. She returned a signed receipt, indicating that she had read and understood the enclosures sent with HMRC’s letter dated 6 September 2016. She said that she was a young professional who would have not benefited from the cigarettes in any commercial sense. She now understood allowances and would ensure it did not happen again.

35

40

18. On 24 October 2016, having reviewed all the available evidence and information, Officer Simpson issued to the Appellant a ‘civil evasion penalty - notice of assessment’ in the sum of £1,142 (£226 custom civil evasion penalty and £916 excise civil evasion penalty). Officer Simpson allowed a 50% reduction, made up of a 25% reduction for disclosure (out of a maximum of 40%) and a 25% reduction for co-

45

5 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.

19. On 17 November 2016, the Appellant wrote to HMRC in response to the issue of the civil evasion penalty. The Appellant stated that she had complied as much as she could and requested a review.

10 20. On 8 December 2016, HMRC wrote to the Appellant to confirm that a full independent review had been carried out by Officer Christopher Dakers, an Officer not previously involved in the original decision. A full explanation was given to the Appellant of the review. Officer Dakers said that :

- 15 • He did not find it credible that the Appellant was unaware of what was contained in her bags as 7,800 cigarettes would not only add a considerable amount of additional bulk to her bags but also add an additional weight which would be unlikely to go unnoticed. Furthermore, the Border Force Officer's notes show that the Appellant was asked and understood the 'usual questions' which would include the question "have you packed these bags yourself". If
20 the Appellant had answered 'no', the Officer would have asked further questions and taken note of this.
- Additionally, the Appellant claimed ownership for all of the cigarettes. If she was genuinely unaware of what was contained within her bags, it was reasonable to expect her to have contested to whom the goods belonged.
- 25 • The Appellant has indicated that she is an experienced traveller, having travelled frequently prior to the seizure. It was considered that her travel history indicated that she would have developed an awareness of the red and green channels and 'duty free' allowances. Travelling abroad is commonplace. Duty free shops and the attraction of buying cheaper excisable goods abroad
30 are matters that one would find hard to miss. The volume of cigarettes is substantial. Even if the Appellant was not aware of the exact allowance, it is very unlikely she, knowing there are such things as allowances, could seriously believe it would be within the law to import such a large quantity of tobacco products into the United Kingdom without making a declaration to
35 Customs.
- The quantity of goods was 39 times the personal allowance and there is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK. It would be prudent to question this when returning to the UK; especially upon noting the signs at both the
40 baggage reclaim area and upon entering the 'green' channel. These signs are visual aids which include pictures of dutiable goods, including tobacco products. It would have been sensible for the Appellant to have sought assistance from Border Force officials if there was any confusion over the signage. Choosing to ignore the signs and enter the 'green' channel is implicit
45 that the Appellant had acted dishonestly.

- 5 • The Appellant had stated that the goods were not intended for a commercial purpose; 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.

10 21. On 29 December 2016 the Tribunal Service received the Appellant’s Notice of appeal. Included with the Notice of Appeal was a signed authority which advised that Ibaad Chaudary, her brother, had full authority to act for her in this matter.

Evidence

15 22. The combined bundle of documents included the witness statement of Officer Robert Sykes, including a copy of his notebook entries, the witness statement of Officer Claire Gibson [on behalf of Officer Simpson, the decision maker who had moved to another Department with HMRC and was unable to attend] and the review by Officer Dakers. Officers Sykes and Gibson both gave oral evidence under oath to the Tribunal. We were also provided with copy correspondence, copy relevant
20 legislation and case law authority.

The Law

23. The legislation relevant to this appeal is:

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

‘In this Act “tobacco products” means any of the following products, namely -

- 25 (a) Cigarettes;
- (b) Cigars;
- (c) Hand-rolling tobacco;
- (d) Other smoking tobacco; and
- (e) Chewing tobacco,

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

24. 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.

35 25. 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

5 regulation determines the classification of goods entering the European Community for customs duty purposes.

26. Chapter 24 of the CN for 2014 is headed “Tobacco and Manufactured Substitutes”. The notes to this Chapter provide inter alia as follows:

‘Subheading note

10 1. For the purposes of subheading 2403 11, the expression “water pipe tobacco” means tobacco intended for smoking in a water pipe and which consists of a mixture of tobacco and glycerol, whether or not containing aromatic oils and extracts, molasses or sugar, and whether or not flavoured with fruit. However, tobacco-free products intended for smoking in a water pipe are excluded from this subheading.’

15 27. Shisha tobacco is classified under CN code 2403 11 00 as:

‘2403 Other manufactured tobacco and manufactured tobacco substitutes; ‘homogenised’ or ‘reconstituted’ tobacco; tobacco extracts and essences

Smoking tobacco whether or not containing tobacco substitutes in any proportion

2403 11 00 - - Water-pipe tobacco specified in subheading note 1 to this chapter’

20 It is subject to customs duty at the rate of 74.9% and VAT at the standard rate, again as confirmed in the UK Tariff.

25 28. 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 (I) to Schedule 1 of the Order).

30 29. 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.

35 (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),

5 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

10 (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. (...)

15 33. 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 Schedule 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 2009/571 further provides that para 21 Schedule 40 only repeals s 8 FA 1994 in respect of
20 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 Schedule 41 FA 2008.

25 34. 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 their own decision for one quashed on appeal. Section 16(6)(a) states the following in
30 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.’

35 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

40 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-

5 (a) customs duty; ...

(d) import VAT...?’

35. The penalty itself is imposed under Finance Act 2003, Sections 25(1) and 29(1)(a)

s 25 Penalty for evasion.

(1) in any case where

10 (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),

15 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. (...)

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

37. 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
20 appealed to the Tribunal. Section 33(6) again provides that the Tribunal has power to quash or vary any decision on appeal.

38. 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
25 grounds on which the appeal is brought.

39. 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-

30 a) except as provided by or under the Customs and Excise Acts 1979, any imported goods, being chargeable on their importation with customs or excise duty, are, without payment of that duty-

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

35 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

- 5 (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.
- 10 (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
 - (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.
- 15 (3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.
- 20 (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-
- (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
- 25 Excise;
- (b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;
 - (c) nothing in [section 31 of the Police (Northern Ireland) Act 19987 shall apply in relation to that thing.
- 30 (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.
- 35 (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.
- 40 (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.
- (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.
- 45 Paragraph 5 Schedule 3 CEMA states:
- 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

5 Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

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

Travellers' Allowances Order 1994

10 1. This Order may be cited as the Travellers' Allowances Order 1994 and shall come into force on 1st April 1994.

15 2. (1) Subject to the following provisions of this Order a person who has travelled from a third country shall on entering the United Kingdom be relieved from payment of value added tax and excise duty on goods of the descriptions and in the quantities shown in the Schedule to this Order obtained by him in a third country and contained in his personal luggage,.

(2) For the purposes of this article-

20 (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;

(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;

25 (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

30 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.

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

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

- 40
- a person engages in any conduct for the purpose of evading any relevant tax or duty; and
 - his conduct involves dishonesty (whether or not such as to give rise to any criminal liability).
 - The penalty that the law imposes is an amount equal to the relevant tax or duty
- 45 evaded or sought to be evaded.

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

3.2 By how much can the penalty be reduced?

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

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

- Up to 40 per cent -early and truthful explanation as to why the arrears arose and the true extent of them.
- 15 • Up to 40 per cent - fully embracing and meeting responsibilities under the procedure by, for example: supplying information promptly, providing details of the amounts involved, attending meetings and answering questions.

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

HMRC Notice 160 Compliance checks into indirect tax matters

2.3 How can penalties be reduced?

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

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

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.

30 2.3.1 Reductions under Civil Evasion Penalty Rules

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

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

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

The Appellant's Case

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

- 5
- The day prior to travelling she was taken ill with diarrhoea and vomiting. She asked her uncle for 40 cigarettes, meaning two packs of 20. Due to a miscommunication and maybe generosity her uncle packed more cigarettes into her suitcase. She was unable to check her suitcase due to her condition at the time.
- 10
- HMRC have made ‘assumptions’. She was not being dishonest.
 - She has complied with HMRC’s requests for disclosure and co-operation to the best of her ability.
 - The financial loss of the cigarettes seized has not been deducted from the penalty.
- 15
- The penalty is too harsh.

42. At the hearing, Mr Ibaad Chaudary on behalf of his sister reiterated the above grounds of appeal.

HMRC’s Case

20 43. On 12 September 2015, by entering the Green ‘nothing to declare’ channel at Manchester Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- 25
- 30
- 35
- 40
- a) It is inherently improbable that the Appellant did not know she was carrying a substantial number of cigarettes. The Appellant was fully aware of the contents of her bags. She did not offer any explanation at the time of the seizure. She subsequently stated in her letter received by HMRC on 23 September 2016 that her uncle had packed her bags. It is not credible that she was unaware of the contents of her bags as the amount of goods would not only have added considerable bulk to the bags but also considerable weight, which was highly unlikely to go unnoticed. If the Appellant was totally unaware of the contents of her bags, she would have brought this up with the Border Force Officer at the time of seizure. However, she claimed full ownership of the goods at that time.
 - b) She entered the Green channel, indicating that she had nothing to declare despite significant signage present.
 - c) She does not deny that the amount of cigarettes imported was over the permissible limits.
 - d) She told the UKBF Officer that she was aware of the allowances relating to cigarettes and tobacco.
 - e) The Appellant was carrying 7,800 cigarettes which was 39 times her personal allowance. If she had not been stopped the loss of Customs and

5 Excise Duty to the Crown would have been £2,286, in addition to any potential sale value of the goods.

10 f) 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.

15 g) It is well known that Pakistan 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 and that she made a clear attempt to clear customs without paying the duty on a very significant amount of cigarettes.

20 h) She would have been aware that there were limits on the amount of tobacco she could import. Although she may not have been aware of the exact allowance she would have known that 7,800 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
25 importing such a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.

44. 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.

30 45. A finding of dishonesty requires that act undertaken (entering the Green channel with an amount of excise goods above the allowance) was dishonest by the standards of an ordinary, reasonable person and that the Appellant realised that what she was doing was, by those standards, dishonest.

35 46. 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 put forward valid grounds of appeal: Finance Act 1994, s 16(6) and Finance Act 2003 s 33(7).

40 47. 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 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).

5 48. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the
10 meaning of the word ‘dishonesty’.

15 ‘It seems to us clear that in such a context, where a person has, ex
hypothesi, done, or omitted to do, something with the intention of
evading tax, then by adding that the conduct must involve dishonesty
before the penalty is to attach, Parliament must have intended to add a
further element in addition to the mental element of intending to
evade tax. We think that that element can only be that when he did, or
omitted to do, the act with the intention of evading tax, he knew that
according to the ordinary standards of reasonable and honest people
that what he was doing would be regarded as dishonest.’

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

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

50. ‘Dishonest’ should be given its ordinary English meaning, namely ‘not honest,
trustworthy, or sincere’. The correct test for establishing dishonesty as stated in the
35 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*
9951 2 AC 378 was the correct test and was summarised as follows:

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

51. The Appellant’s actions as set out above demonstrate that she acted dishonestly
and deliberately took the action to positively evade duty and tax. Her attempt to clear
import controls without paying any duties by walking through the Green channel

5 'nothing to declare' with the concealed cigarettes demonstrates her intent to positively evade duty and tax.

52. 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.

10 53. 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 £1,142, being 50% of the culpable arrears because HMRC exercised its discretion as to the amount of discount to be allowed. A 25% deduction was allowed for disclosure and a further 15 25% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Dakers who undertook the review gave comprehensive reasons why HMRC had not been able to give the full 40% allowance for either disclosure or co-operation

54. The Appellant has submitted in correspondence and in her Notice of Appeal that she would struggle to afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and 20 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.

Conclusion

55. The Appellant imported the cigarettes from Karachi, Pakistan. There are strict 25 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. The airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. Pakistan is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are 30 applicable when importing from EU countries. 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.

56. The Appellant is an experience traveller and would, on the balance of 35 probabilities, have known of the allowances for importing cigarettes. The limit is 200. In any event, a reasonable person would check the allowances before importing such a large amount of tobacco.

57. 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 40 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.

58. The Appellant says that because of miscommunication and also because she was unwell, she did not know that her uncle had packed 7,800 cigarettes in her luggage.

5 For the reasons put forward by HMRC and set out at paragraph 43(a) above we find that the Appellant was aware that she was carrying a substantial number of cigarettes significantly in excess of her allowance.

59. 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
10 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 (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687
15 (Ch.), [2009] 1WLR 398 at [25].

60. 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]:

‘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
20 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 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
25 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
30 requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.’

61. 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
35 ordinary honest people, we have to conclude that the Appellant acted deliberately and dishonestly, taking action to positively evade duty and tax.

62. 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.

40 63. 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.

45 64. 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,

5 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 50%. Based upon the information
provided there is no basis upon which the Appellant can reasonably expect to qualify
10 for any greater reduction of the penalties. We therefore concur with the decision and
assessment of the penalty.

65. The appeal is accordingly dismissed and the penalties totalling £1,142 confirmed.

66. 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
15 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.

20

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 06 NOVEMBER 2017