



TC07572

Appeal number: TC/2019/00168

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 – no – reduction to penalties increased – otherwise appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MARK ANDREW LOCKEY

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
NOEL BARRETT**

**Sitting in public at Darlington County Court, 4 Coniscliffe Road, Darlington, on
15 November 2019**

The Appellant in person

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

DECISION

1. This is an appeal by Mr Mark Andrew Lockey (“the appellant”) against a decision by the Respondents (“HMRC”) notified on 20 November 2018, to issue Excise and Customs Civil Evasion Penalties in the total sum of £2,611, being a penalty of £634 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and £1,977 under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the relevant personal allowance.

Background

2. On 28 November 2017, the appellant arrived at Gatwick Airport from Hurghada International Airport, Egypt.

3. From disembarkation to clearing Customs, there are displayed a number of notices advising which countries fall inside/outside the European Union (“EU”) and also the duty-free allowances for excise dutiable products acquired outside the EU. Egypt is not in the EU and therefore, travellers, for the purposes of the Travellers’ Allowances Order 1994 (as amended) have a personal allowance of 200 cigarettes or 250g of hand rolling tobacco.

4. The appellant, who was travelling with a co-traveller (Zoe Alana Loughman) despite the notices, which are also situated in the baggage reclaim area and just before the Customs channel entrances, chose to exit through the ‘nothing to declare’ green channel, indicating that he had no goods to declare,

5. HMRC say that the appellant did not stop even after his co-traveller was initially intercepted by Boarder Force Officer Mataj. When the Officer got the appellant’s attention, he turned and attempted to exit the green channel, resulting in Officer Mataj having to run after and intercept the appellant before he exited the Customs channel.

6. Officer Mataj’s evidence is that at approximately 02:40 am hours he opened and examined a large red suitcase and a small suitcase belonging to the appellant and found 7,800 cigarettes, and 500g of hand rolling tobacco.

7. Zoe Alana Loughman was carrying a rucksack and a small suitcase. 2kg of hand rolling tobacco was found in the rucksack.

8. Officer Mataj asked the appellant and his co-traveller whether they were aware that there are limits on the number of cigarettes that can be imported into the UK. They answered “No”.

9. During the questioning the appellant’s co-traveller initially claimed that the goods were a 50/50 split, however the appellant took full ownership of the goods when Officer Mataj established ownership for the purpose of issuing the seizure notices.

10. As the goods had not been declared and were 49 times over the allowances as set out in the Travellers' Allowances Order 1994, Officer Mataj seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the appellant with Public Notices 1 and 12A, being Seizure Information Notice BOR156 and Warning Letter BOR162, both of which the appellant signed.

11. 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.

12. On 21 August 2018, a post-detection audit officer of HMRC's Individual and Small Business Compliance Unit wrote to the appellant informing him that HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994, for the evasion of Customs and Excise Duty was to be considered.

13. The appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT 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.

14. The letter from HMRC explained that if the appellant was willing to co-operate with the enquiry he should provide the following within 30 days of the date of the 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.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- Confirmation of the quantities of goods involved on each occasion.
- Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
- Details of all international travel during the period under enquiry, including the reasons for travel.
- An explanation of what you did with, or intended to do with, the smuggled goods.
- 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."

15. Public Notice 300, s 3 states that a reduction in penalty may be given as follows:

“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.

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.”

16. On 4 September 2018 HMRC wrote to the appellant reminding him to provide a response by 20 September 2018. The reminder letter advised the appellant that if he did not reply by this date, HMRC would take this as his intention not to help them with their enquiries.

17. On 9 October 2018, as no reply had been received from the appellant Officer Martyn Davies issued a Civil Evasion Notice of Assessment in the sum of £3,483.00 to the appellant. The Notice of Assessment explained how the penalty had been calculated and advised that 0% reduction had been allowed for disclosure out of a maximum 40% and a 0% reduction for co-operation out of a maximum of 40%.

18. On 17 October 2018 the appellant called to advise that he had been out of the country and had only just received HMRC’s correspondence. The Officer who took the call explained to the appellant his options if he disagreed with the decision. The appellant agreed to send information and ask for the penalty to be reconsidered and explain why his disclosure was late.

19. On 30 October 2018 HMRC received a letter from the appellant (undated), giving reasons for his failure to respond to all the letters issued by HMRC:

- He was out of the county. He enclosed boarding passes to show that he had flown to Sofia, Bulgaria on 18 August 2018 and had not returned until 16 October 2018.
- He ‘vigorously and categorically’ denied consciously making any form of error when he entered the UK with the seized cigarettes and HRT.
- He stated that the reason he purchased so much tobacco was due to the duty-free staff at Hurghada Airport informing him that he could purchase as much tobacco as he wanted and judging by other people purchasing vast amounts of

goods he followed suit. He also stated that he did this ‘mainly on the concept of the UK leaving the customs union with Brexit’.

- He is an honest person who believes that he has been ‘taken for a ride’ by the duty-free staff who were ‘obviously making commission on sales’.

20. On 20 November 2018 Officer Stephen Robinson issued an amended Civil Evasion Notice of Assessment in the sum of £2,611 to the appellant. The Notice of Assessment explained how the penalty had been calculated and advised that 10% reduction had been allowed for disclosure out of a maximum 40% and a 15% reduction for co-operation out of a maximum of 40%.

21. On 23 November 2018 the appellant called HMRC to advise that he had received the revised penalty. However, he did not agree with the decision and the reduction awarded. The appellant was advised of the options available if he disagreed with the decision. The appellant stated that he was likely to write in to request a review.

22. On 4 December 2018 the appellant wrote to HMRC and stated that:

- He would like to appeal the decision to an Independent Tribunal as he felt that HMRC had looked at his case with contempt.
- He was ‘duped’ (the Appellant re-iterated this from his previous correspondence) by the Hurchada duty free staff and made an honest mistake by trusting official bodies.
- The duty demanded by HMRC is beyond his remit and would put him in a ‘crisis situation of extreme poverty’.

23. On 10 December 2018 HMRC wrote to the appellant and acknowledged his letter. HMRC enclosed a copy of Notice HMRC1 which explains how to make an appeal directly to the Tribunal Service. The letter went on to advise the appellant the options available to him of either to:

- Accept the penalty decision and discuss a potential payment plan.
- Ask for a review by a person not previously involved in the matter, or
- Appeal to an independent tribunal.

24. The appellant’s Notice of Appeal, dated 1 January 2019, was acknowledged by the Tribunal on 14 January 2019.

Evidence

25. The combined bundle of documents included a copy of Officer Mataj’s notebook notes and the witness statement of Officer Davies. Officer Davies gave oral evidence to the Tribunal. The appellant also gave oral evidence to the Tribunal. We were

provided with copy correspondence, copy relevant legislation and case law authorities.

The Law

26. The legislation relevant to this appeal is:

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

Penalty for evasion of excise duty.

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

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

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

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

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

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

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

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

s25 Penalty for evasion.

(1) in any case where

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

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

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

29 Reduction of penalty under section 25 or 26.

(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. (...)

Customs and Excise Management Act 1979, Sections 49(1), 78(3) and 139

49(1) Where-

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

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

S78(3) Any person failing to declare anything or to produce any baggage or thing as required by this section shall be liable on summary conviction to a penalty of three times the value of the thing not declared or of the baggage or thing not produced, as the case may be, or [level 3 on the standard scale], whichever is the greater. (...)

S139 Provisions as to detention, seizure and condemnation of goods

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

(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.

(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.

(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 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 1998] shall apply in relation to that thing.

(5) Subject to subsections (3) and (4) above and to Schedule 3 to this Act, anything seized or detained under the Customs and Excise Acts shall, pending the determination as to its forfeiture or disposal, be dealt with, and, if condemned or deemed to have been condemned or forfeited, shall be disposed of in such manner as the Commissioners may direct.

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

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

(8) Subsections (2) to (7) above shall apply in relation to any dutiable goods seized or detained by any person other than an officer notwithstanding that they were not so seized as liable to forfeiture under the Customs and Excise Acts.

Paragraph 5 Schedule 3 CEMA states:

If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of anything no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

Travellers' Allowances Order 1994

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

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-

(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;

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

3. The reliefs afforded under this Order are subject to the condition that the goods in question, as indicated by their nature or quantity or otherwise, are not imported for a commercial purpose nor are used for such purpose; and if that condition is not complied with in relation to any goods, those goods shall, unless the non-compliance was sanctioned by the Commissioners, be liable to forfeiture.

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:

- 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 evaded or sought to be evaded.

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

3.2 By how much can the penalty be reduced?

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

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

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

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

HMRC Notice 160 Compliance checks into indirect tax matters

2.3 How can penalties be reduced?

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

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

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

2.3.1 Reductions under Civil Evasion Penalty Rules

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

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

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

The Appellant's Case

27. The appellant's grounds of appeal as set out within his Notice of Appeal are:

- i. He made a genuine, honest mistake as he was duped by the Hurghada airport duty free staff into purchasing the vast amounts of tobacco as they informed him that he could have as much as he wanted.
- ii. Judging by other people's purchases he followed suit and purchased the goods also in part due to the UK leaving the customs union after Brexit.
- iii. He is an honest person and did not deliberately avoid the duty on the goods which if he was made to pay would put him 'in a crisis situation of extreme poverty'.
- iv. He had not attempted to evade Officer Mataj. He was only two meters ahead of the Officer when he spoke to his co-traveller Zoe Loughman and he had not attempted to exit the green channel. He may have hesitated momentarily when Officer Mataj called to him but he certainly did not attempt to evade the Officer.
- v. The cigarettes and tobacco were in plastic carrier bags inside his suitcase and Zoe Loughman's rucksack. There was never any attempt to conceal the cigarettes or tobacco which could be easily seen when their bags were open. Given their understanding that they were entitled to bring into the UK as many cigarettes and as much tobacco as they wanted there was no reason why they should not have gone through the green channel.
- vi. HMRC have looked at his case with contempt.

28. At the hearing, the appellant said that he is a plasterer by trade and that he also undertakes roofing work. He often works in Sofia, Bulgaria where he has a number of established clients. He had previously imported 6,000 cigarettes from Sofia without difficulty. It was pointed out to the appellant that Bulgaria is in the EU and that entirely different 'own use' rules apply.

29. He said that he was unable to afford the assessment and penalties.

HMRC's Case

30. Section 16(6)(a) of the Finance Act 1994 states in relation to the burden of proof:

"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 of which any such appeal is brought have been established."

31. The penalty is civil in nature, and therefore the standard of proof is on the balance of probabilities (*Revenue and Customs Commissioners v. Khawaja* [2008] STC 2880 (and *N'Diaye v. Revenue and Customs Commissioners* TC04562)).

32. The burden of proof in establishing “conduct involving dishonesty” lies with HMRC as provided under s 16 (6) of FA 1994 in respect of excise duty and s 33(7)(a) of FA 2003 in respect of customs duty and import VAT.

33. The correct test to be applied when establishing dishonesty is laid out in *Ivey v Genting Casinos (UK) Limited t/a Crockfords* [2017] UKSC 67, at:

“62 ... 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.”

And

*“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.”*

34. The definition of dishonesty set out in *Ivey* applies equally to civil proceedings and to criminal proceedings.

35. It is first necessary to establish the actual state of the individual's knowledge or belief as to the facts. 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.

36. Once HMRC has established this burden of proof, the onus falls on the taxpayer to provide evidence to rebut HMRC's case.

37. The appellant bought 7,800 cigarettes. This exceeded his personal allowance of 200 cigarettes by 39 times. He also brought in 2.5kg of hand rolling tobacco. The limit is 250g. By walking down, the green channel the appellant satisfied the test for dishonesty.

38. Applying the test as set out in *Ivey*, HMRC submits that the actions of the appellant in failing to declare the cigarettes were dishonest for the following reasons:

- i. The appellant entered the green channel indicating that he had nothing to declare despite significant signage present indicating which countries fall outside the EU and the duty-free allowances for excise dutiable products;
- ii. It is inherently unlikely that he mistook Egypt as being part of the EU;
- iii. He was importing a significant quantity of cigarettes (7,800) and tobacco (2.5kg), which was in total 49 times the limit;
- iv. He attempted to evade the Border Force Officer in the green channel by carrying on walking after being addressed by the Officer;
- v. He does not deny that the cigarettes and tobacco are over the permissible limits;
- vi. A reasonable and honest person would check the allowances before importing such a large quantity of cigarettes.

39. The appellant does not take any issue with the calculation or amount of penalty.

40. Save for accepting that the cigarettes and tobacco belonged to him, the appellant has not provided any other information or co-operated to any extent that justifies a reduction over and above the 15% for co-operation.

41. HMRC do not accept the appellant's contention that he did not try to conceal the cigarettes and tobacco from UK Customs given his actions in the green channel. For those reasons, the decision to reduce the fine by a further 10% for disclosure is justified.

42. As the appellant acted dishonestly and attempted to evade import VAT, excise and customs duties, a penalty is due under sections 8(1) and 8(4) Finance Act 1994 and s 25(1) Finance Act 2003.

Conclusion

43. The issue in this appeal is whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is, as HMRC say, an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The test to be applied is as

stated in *Ivey* (paragraph 33 above). The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities.

44. The appellant imported the cigarettes from Egypt. There are strict limits on the number of cigarettes that can be brought into the UK from non-EU countries. It is well known that tax and duty is payable on imported cigarettes and tobacco. Gatwick Airport has clear signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. Egypt is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable when importing from EU countries such as Bulgaria, from where the appellant had frequently travelled.

45. The appellant had travelled abroad on several previous occasions and it is more likely than not that he would have been aware of the allowances for importing tobacco and cigarettes. In any event, a reasonable person would check the allowances before importing such a large number of cigarettes.

46. 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. Applying the test in *Ivey* and by the standards of ordinary decent people, we have to conclude that the appellant acted dishonestly and deliberately, taking action to positively evade duty and tax.

47. 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.

48. HMRC can reduce a penalty on the basis of the customer's co-operation. No challenge has been brought as to the calculation of the duties and level of mitigation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure.

49. Taking these factors into account, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation, resulting in a total reduction of 25%. We concur with HMRC's assessment of the penalty and mitigation.

50. We do not accept the appellant's contention that he truly believed that he could purchase and bring into the UK any amount of tobacco he wanted. He is a frequent traveller and would have been aware that Egypt is not part of the EU. However, we do accept that he did not attempt to evade Officer Mataj in the green channel. As he says he may have carried on walking momentarily until it became obvious that Officer Mataj wanted to speak to him. We accept his explanation that the cigarettes were not concealed inside his luggage. We also accept that he was late replying to HMRC's initial enquiry when they wrote to him in August 2018 because he was away working in Bulgaria. With regard to disclosure therefore and taking all relevant factors into account we consider that 20% should be given for disclosure and 25% for

co-operation, a total of 45%. The double evasion penalties are therefore reduced to £2,263. (This would reduce the penalties). The civil evasion penalty of £3,483 is therefore reduced to £1,915.

51. The appellant said that he cannot afford the penalties. 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.

52. The appeal is accordingly dismissed and the mitigated penalties are reduced to £1,915 confirmed.

53. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 05 FEBRUARY 2020