



TC05051

Appeal number: TC/2014/05839

EXCISE DUTY, CUSTOMS DUTY, VAT – civil evasion penalties – whether appellant dishonest – whether Tribunal should exercise discretion to reduce the penalties – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

RAYMOND MARTIN DYER

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN RICHARDS
DEREK SPELLER FCA**

Sitting in public at The Royal Courts of Justice on 13 April 2016

The Appellant in person

**Sadiya Choudhury, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. On 27 November 2012, the appellant, Mr Dyer, was stopped in the green channel at Newcastle Airport carrying 33,620 cigarettes (33,420 more than his personal allowance). Those cigarettes were seized. HMRC have also imposed penalties connected with that seizure totalling £6,382 under s8 of Finance Act 1994 (“FA 1994”) and s25 of Finance Act 2003 (“FA 2003”). Mr Dyer appeals against those penalties.

Evidence

2. We heard oral evidence from Mr Dyer and Ms Choudhury cross-examined him. We have not accepted all of his evidence for reasons set out in more detail below.

3. We also heard evidence from Victoria Howe, the UK Border Force officer who stopped Mr Dyer and seized the cigarettes. Officer Howe prepared a witness statement even though the Tribunal’s case management directions did not require her to do so. Mr Dyer confirmed that he had read Officer Howe’s witness statement and its contents were familiar to him. In those circumstances, we admitted Officer Howe’s witness statement as evidence and directed that it be taken as read. Mr Dyer cross-examined Officer Howe. We have accepted Officer Howe’s evidence.

4. HMRC also prepared a bundle of documents which were referred to during the hearing. One of those documents was a note, made by Officer Phipps of HMRC of a telephone conversation between her and Mr Dyer. Mr Dyer did not accept that this was a completely accurate record of the conversation and, since Officer Phipps was not present to give evidence, we have only relied on the aspects of that note that Mr Dyer said were accurate.

Facts

5. The facts set out at [6] to [28] below were either agreed or were found by the Tribunal.

Events leading up to the seizure

6. Mr Dyer is 70 years old. He is of modest means, and lives in sheltered accommodation in the UK. He has no source of income other than his old age pension.

7. Mr Dyer makes regular, if not necessarily frequent, international trips. He is well aware that there is a limit on the quantity of cigarettes that can be brought back from non-EU countries on a “duty free” basis, although he thought that the limit was 400 cigarettes, whereas it is actually 200. Each year at around Christmas time he flies to Gambia where he stays at a compound owned by a friend of his for two months or so. As noted in more detail below, during the course of this appeal, Mr Dyer has made a number of allegations about this friend’s activities that may (although we make no determination on the point) amount to allegations of criminal conduct. Since the

gentleman in question did not attend the Tribunal to give evidence, we were not able to consider his response to those allegations. Therefore, since the precise identity of Mr Dyer's friend is not relevant to this decision, we will simply refer to him as "Mr A".

5 8. Mr Dyer's evidence was that during one of his visits to Gambia, Mr A asked him to help to transport some cigarettes back to the UK. Mr Dyer said that one of Mr A's acquaintances had helped in the past but could no longer do so as he had been "caught" on a previous trip. Mr Dyer said that Mr A assured him that, if they were stopped at customs in the UK, Mr A would pay any tax or duty due. Mr A's grandson
10 was due to take part in a boxing bout in Manchester and, in return for his assistance, Mr Dyer said that Mr A promised to provide him with tickets to this bout and an overnight stay in a hotel afterwards. Mr Dyer said in his evidence that, in order to ensure that the cigarettes would bypass checks in Gambia, Mr A paid a bribe to security staff at Gambia's international airport.

15 9. As we have said, we will not make any findings as to whether Mr A was actually the instigator of the scheme (since we have not heard evidence from Mr A). However, from the evidence set out at [8], we have made the following findings of fact:

20 (1) Mr Dyer realised that he was being asked to take part in an attempt to smuggle cigarettes into the UK without payment of tax or duty properly due. Therefore, the essence of the scheme was that tax or duty would not be volunteered, but Mr Dyer's understanding was that Mr A would pay the tax and duty if the pair were stopped at customs.

25 (2) Mr Dyer believed that the scheme involved the payment of a bribe and understood that Mr A paid that bribe.

(3) Mr Dyer realised that the scheme involved wrongdoing since he was aware that duty was payable on the cigarettes being imported, he believed that the scheme involved the payment of a bribe and he believed Mr A's friend could no longer participate having been "caught" in the past.

30 (4) Mr Dyer considered that the scheme was implemented on Mr A's instigation.

35 10. Mr Dyer agreed to help to transport the cigarettes. Mr A packed 33,420 cigarettes in three suitcases that he provided for the purpose. Mr Dyer also packed 200 cigarettes (of a different brand) in his hand luggage that were for his own personal use.

40 11. On 27 November 2012, Mr Dyer and Mr A flew from Gambia, via Brussels, to Newcastle Airport. A luggage label was attached to the suitcases containing the cigarettes indicating that those suitcases belonged to Mr Dyer. There was some dispute as to whether Mr A accompanied Mr Dyer on this trip. We find that he did because we accepted Mr Dyer's evidence that Mr A wanted to see his grandson's boxing bout.

The seizure of the cigarettes

12. On landing, Mr Dyer and Mr A were among the last off the plane and among the last to collect their bags from the carousel. Mr Dyer said that when they were picking up their bags he “knew they were going to be stopped” by customs officers.
5 Of course, Mr Dyer could not know this for certain because it depended on future events. However, we have concluded from his evidence that, from this point onwards, he feared that customs officers would stop them and find the cigarettes in the suitcases and regarded it as likely that they would do so.

13. Having collected their bags, and despite Mr Dyer’s fears, Mr Dyer and Mr A proceeded towards the “green channel”. Mr Dyer was carrying the suitcases containing the cigarettes. Newcastle Airport does not have a “red channel”. Rather, travellers with goods to declare have to approach a “red point” and make a telephone call to customs officers in Manchester. Mr Dyer made no attempt to use the “red point” and accepted in cross-examination that he never had any intention of declaring
15 the cigarettes and paying the duty not least since he did not himself have sufficient money to do so.

14. There was no dispute that Mr Dyer entered the green channel carrying the suitcases containing 33,420 cigarettes. However, the circumstances in which he came to enter the green channel were disputed as follows:

20 (1) Mr Dyer’s evidence was that at the entrance to the green channel they were met by Officer Howe who greeted them by asking them if they were travelling together and then “escorted” them into the green channel.

(2) Officer Howe’s evidence was that she had initially been standing outside the entrance to the green channel so that she had a good view of travellers picking up their bags from the baggage carousel. However, having seen Mr
25 Dyer pick up his suitcases from the carousel she then returned to the green channel and, only once Mr Dyer had entered the green channel of his own volition did she approach him and ask him questions. She had no recollection of even seeing Mr A nor any recollection of asking whether he and Mr Dyer were
30 travelling together.

15. We have concluded that Mr Dyer entered the green channel of his own free will and that he was not escorted or led into it. We have reached that conclusion firstly because Officer Howe was clear in her evidence of the importance of customs officers not interfering with what she described as the “physical declaration” that travellers
35 make when they choose to enter the green channel. We do not consider she would have departed from this standard approach when dealing with Mr Dyer. In addition, we have noted that Mr Dyer’s suggestion that he was “escorted” into the green channel was contradicted by his own evidence where, at points, he said that he “followed” Mr A into the green channel. Moreover, as we have noted at [13], Mr
40 Dyer accepted in cross-examination that he never had any intention of declaring the goods which was a further indication that he made a free choice to enter the green channel.

16. Mr Dyer is a seasoned traveller. We are satisfied that Mr Dyer was aware that, by entering the green channel, he was making a “physical declaration” that he was not carrying goods on which tax or duty could be charged.

17. Once he was in the green channel, he was approached by Officer Howe and asked some questions. He did not seek to conceal that he was carrying a large quantity of cigarettes and made immediate mention of them in response to Officer Howe’s second question (which was whether he had packed the bags himself). Mr Dyer did not offer to pay the duty on the cigarettes (indeed, as we have noted, he did not have the means to do so). We accept Mr Dyer’s evidence that he could hear Mr A (who was being dealt with by an officer other than Officer Howe) offering to pay the duty on the cigarettes that Mr Dyer was carrying.

18. Officer Howe seized the cigarettes and issued Mr Dyer with a Seizure Information Notice and a warning letter about seized goods.

Events following the seizure

19. On 29 November 2013, HMRC wrote to Mr Dyer to explain that they were considering imposing penalties under s25 of FA 2003 and s8 of FA 1994 and that they wished to enquire into his involvement with the “smuggling or attempted smuggling” of alcohol or tobacco. It was explained that, if he co-operated with that enquiry and made a “full and prompt disclosure” and provided full details of his involvement in smuggling, any penalty could be significantly reduced. The letter set out a specific list of questions and information requested and asked for a response within 30 days.

20. Mr Dyer was in Gambia when this letter was sent and he did not respond to it. Mr Dyer was still in Gambia when a further copy was sent on 24 January 2014 requesting a response no later than 7 February 2014.

21. On 27 March 2014, believing that they had not received a response to either letter, HMRC wrote to Mr Dyer imposing penalties and giving only modest reductions for “disclosure” and “co-operation” totalling 10% of the penalty charged and, after applying that reduction, imposed a penalty of £8,255.

22. In fact, on 26 March 2014 HMRC received a response to their letter of 29 November 2013 (albeit in a letter that was dated 10 February 2014). Mr Dyer explained that Mr A wrote that letter for him and that he was not aware of its contents. That letter included the claim that the cigarettes were for Mr Dyer’s own use and the allegation that Mr Dyer had been “stopped from entering the red or green desks” by two police officers and “directed” into the green channel. The letter also gave a brief account of the conversation between Mr Dyer and Officer Howe in the green channel on 27 November 2012 but was in substance a complaint about the conduct of Gambian security officials who were accused in the letter of accepting bribes from tourists but nevertheless tipping off customs officers in the UK as to the presence of cigarettes in their luggage. The letter suggested that the Gambian security officers were guilty of “entrapment”. It did not, to any significant extent, answer the questions that HMRC had raised in their letter of 29 November 2013.

23. On 31 March 2014, HMRC confirmed receipt of the letter dated 10 February 2014 referred to at [22] but stated that it did not alter their conclusions as to the penalties imposed.

24. On 1 April 2014, Mr Dyer himself wrote a further letter to HMRC. That letter stated that he and “the person he was travelling with” (he did not name Mr A) had been led into the green channel. He explained that he had been offered a ticket to Mr A’s grandson’s boxing bout (he named the grandson) in return for transporting the cigarettes. He also explained that he could not afford the penalty that had been charged.

25. HMRC responded to this letter on 17 July 2014 by reducing the penalty to £6,421 to reflect what they regarded as a better quality of disclosure and co-operation. Mr Dyer requested a review of that decision. On 18 August 2014, HMRC acknowledged the request for a review and also stated that the penalty would be reduced from £6,421 to £6,382 to take into account the fact that Mr Dyer was entitled to bring 200 cigarettes into the UK duty free.

26. On 26 September 2014, Officer Farrell of HMRC wrote to Mr Dyer to set out the conclusions of his review. He upheld the principles underpinning the calculation of the penalty (reduced in the manner outlined at [25] above). However, he altered the split of the penalties as between that imposed under s25 of FA 2003 and that imposed under s8 of FA 1994. Prior to Officer Farrell’s review, the penalty under s8 had included a penalty attributable to the evasion of VAT on excise duty. However, that penalty should have been charged under s25 of FA 2003 since it related to import VAT (albeit import VAT calculated on excise duty). Therefore, in essence Officer Farrell reduced the penalty charged under s8 of FA 1994, but increased the penalty charged under s25 of FA 2003 by the same amount so that the total penalty claimed from Mr Dyer remained unchanged.

27. On 21 October 2014, Officer Phipps of HMRC made a note of a telephone call from Mr Dyer. Officer Phipps did not give evidence at the Tribunal and Mr Dyer said that he did not regard Officer Phipps’s notes as completely accurate. However, Mr Dyer agreed that in that telephone conversation he gave Mr A’s name to Officer Phipps, told him that Mr A was in the habit of bribing security officials in Gambia and that he did this “loads of times”.

28. On 22 October 2014, Mr Dyer appealed to the Tribunal against the penalties imposed.

The law

Penalties under FA 1994

29. 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

5 (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.

...

10 (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

15 (b) an appeal tribunal, on an appeal reduced by the Commissioners under this subsection may cancel the whole or any part of the reductions made by the Commissioners.

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

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

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

30. Section 8 of FA 1994 was repealed by paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008. However, under commencement and transitional provisions
25 contained in The Finance Act 2008, Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 and The Finance Act 2008, Schedule 40 (Appointed Day, Transitional Provisions and Consequential Amendments) Order 2009 that repeal takes effect only:

30 (1) insofar as it relates to an inaccuracy in a document or a failure to notify HMRC of an under-assessment; or

(2) insofar as it relates to conduct involving dishonesty which gives rise to a penalty under Schedule 41 of the Finance Act 2008.

35 31. We accepted Ms Choudhury's submissions, which Mr Dyer did not dispute, to the effect that neither of these exceptions applied. Accordingly, we decided that paragraph 21(d)(i) of Schedule 40 of the Finance Act 2008 did not preclude HMRC from issuing the appellant with a penalty under s8 FA 1994.

40 32. Mr Dyer did not seek to argue that either penalty was issued out of time (and he would have the burden of proving this). Therefore, we did not hear any argument as to whether the s8 penalty was in time or not. Our own researches have indicated that there is no statutory time limit for imposing a penalty under s8 although HMRC's published practice is to apply the same time limits as are set out at [39].

33. Under s16(1B) of FA 1994, there is a right of appeal to the Tribunal against a “relevant decision” which, by virtue of s13A(2)(h) of FA 1994 includes a penalty under s8. Section 16(5) of FA 1994 gives the Tribunal power to quash or vary any such “relevant decision” and power to substitute its own decision.

- 5 34. Section 16(6)(a) of FA 1994 provides that, on an appeal to the Tribunal, HMRC have the burden of proving the matters set out in s8(1)(a) and s8(1)(b) of FA 1994, but otherwise the appellant has the burden of proof.

Penalties under FA 2003

35. Section 25 of FA 2003 provides as follows:

10 **25 Penalty for evasion**

(1) In any case where –

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

15 (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.

36. Section 24(2) of FA 2003 defines “relevant tax or duty” as including customs duty and import VAT.

- 20 37. Section 29 of FA 2003 deals with reductions to penalties charged under s25 as follows:

Reduction of penalty under section 25 or 26

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

25 (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

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

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

(3) Those matters are–

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

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

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

38. Section 30 of FA 2003 permits HMRC to give a person or his representative a notice in writing demanding payment of a penalty under, inter alia, s25.

5 39. The combined effect of s31(1)(a) and s31(2) of FA 2003 is that no penalty under s25 can be issued after the earlier of (i) 20 years after the conduct giving rise to the liability to the penalty has ceased and (ii) two years after there has come to the knowledge of the Commissioners of HMRC evidence of fact sufficient in the opinion of the Commissioners to justify the demand for a penalty.

10 40. Section 33(2) provides that a person may appeal to the Tribunal, following such a demand, against any decision that a person is liable to a penalty under s25, or against the decision as to the amount of that liability.

15 41. Section 33(6) of FA 2003 provides that, on appeal, the Tribunal has power to quash or vary a decision and to substitute its own decision for any decision so quashed.

42. Section 33(7) of FA 2003 provides that HMRC have the burden of proving the matters in s25(1) but that otherwise the appellant has the burden of proof.

Standard of proof

20 43. In *Han (trading as Murdishaw Supper Bar) v CCE* [2001] EWCA Civ 1048, the Court of Appeal held that civil penalties for the dishonest evasion of VAT 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. We have therefore concluded that the standard of proof applicable is the ordinary civil standard, namely
25 proof on a balance of probabilities.

Meaning of “dishonesty”

30 44. In *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2008), His Honour Judge Pelling QC (sitting as a judge of the High Court) considered the test of dishonesty in the context of a civil evasion penalty under s60 of the Value Added Tax Act 1994. He concluded:

35 In my view in the context of the civil penalty regime 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

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

² *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37

conduct. In essence the test is objective – it does not require the person alleged to be dishonest to have known what normally acceptable standards of honest conduct were.

45. Since s60 of the Value Added Tax Act 1994 was in terms almost identical to those of s8 FA 1994 and s25 FA 2003, we have adopted that as a binding statement of the test that we must apply.

46. It is clear, however, that the reference to the objective test in *Sahib Restaurant* was not intended to suggest that the question of “dishonesty” invites only an objective test. This is emphasised by *Twinssectra v Yardley and others* [2002] 2 AC 164. At [31], Lord Hutton considered the conclusion that Lord Nicholls had expressed in *Tan* at page 389 B to C to the effect that the test of dishonesty is an “objective standard” and said as follows:

“... I think that in referring to an objective standard Lord Nicholls was contrasting it with the purely subjective standard whereby a man sets his own standard of honesty and does not regard as dishonest what upright and responsible people would regard as dishonest. Thus after stating that dishonesty is assessed on an objective standard he continued, at p 389 C:

"At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. 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. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour."

47. We have therefore accepted Ms Choudhury’s submission that, in order to establish dishonesty, HMRC must show that, on a balance of probabilities, Mr Dyer’s (subjective) knowledge of the facts was such that his conduct was dishonest according to normally acceptable standards of honest conduct. However, HMRC do not have to show that Mr Dyer knew what those normally acceptable standards were.

Discussion

Whether the penalties are due

48. Excise duty, customs duty and import VAT are all payable on the import of cigarettes in excess of an individual’s personal allowance. The excise duty charge is

imposed by s2 of the Tobacco Products Duty Act 1979, the customs duty charge by the Community Customs Code and import VAT by s1 of the Value Added Tax Act 1994. Mr Dyer carried cigarettes in excess of his personal allowance into the green channel at Newcastle Airport in the hope that, by doing so, they could come into the UK without any of those taxes being paid. The purpose of that conduct was therefore to evade excise duty, customs duty and import VAT. The requirements of both s8(1)(a) of FA 1994 and s25(1)(a) of FA 2003 were thus satisfied.

49. The next question is whether the “conduct” referred to at [48] “involves dishonesty”. We have no doubt that it did. As we have found at [7] and [16] Mr Dyer knew that the cigarettes he was carrying were in excess of his personal allowance and that, as such, tax and duty were chargeable on them. He may not have known that the specific taxes were excise duty, customs duty and import VAT but he knew that tax and duty were payable on them. He also knew that by entering the green channel, he was making a statement to the effect that he had no goods that were subject to tax or duty. Therefore, by entering the green channel, which he did of his own free will, he was knowingly making a false statement for the purpose of evading excise duty. That behaviour is dishonest according to normal standards of honest behaviour.

50. We have considered carefully the import of Mr Dyer’s unchallenged evidence referred to at [12] that, from the moment he picked up his luggage from the carousel he “knew he was going to be stopped”. If on entering the green channel, Mr Dyer had declared the cigarettes immediately to the officers he saw waiting there, we might have accepted that he had abandoned his dishonest enterprise at the last minute and that the “physical declaration” he made by entering the green channel had immediately been reversed by an actual declaration that he was carrying the cigarettes. However, Mr Dyer did not do this. We were satisfied that he had no intention to do so and that rather he entered the green channel hoping that there was still a chance that he could bring the cigarettes into the UK without paying duty, even though he feared that he would be stopped. Had he genuinely wished to abandon the dishonest attempt to smuggle cigarettes into the UK, as an experienced traveller, he would have known that visiting the “red point” was the only reliable way of doing so. Moreover, as we have noted at [17], Mr Dyer did not volunteer the information that he was carrying a large quantity of cigarettes to Officer Howe. He only told her of the cigarettes after she stopped him and started asking questions.

51. We are reinforced in our conclusions as to Mr Dyer’s dishonesty by the fact that he understood that a bribe was being paid to Gambian security officials. Since we have not heard any evidence from Mr A, we have not found that Mr A actually paid a bribe. However, Mr Dyer certainly considered that he was participating in an arrangement that involved the payment of a bribe. He also knew, as noted at [8], that he was being asked to help out because Mr A’s other friend had previously been “caught”. He cannot fail to have appreciated that the enterprise as a whole was a dishonest one.

52. Mr Dyer submitted that he should not be subjected to the penalties firstly since the cigarettes in question belonged to Mr A rather than to him and secondly because Mr A, rather than Mr Dyer, was the instigator of the smuggling attempt. We have not

accepted that submission. Section 8 of FA 1994 and s25 of FA 2003 penalise a certain type of conduct; those sections do not provide that only the owner of the goods in question can be penalised. Since we have found that Mr Dyer's conduct was of a type that these sections penalise, Mr Dyer is properly subject to a penalty even if there are others who could also be deserving of a penalty.

53. The penalties, therefore, were validly charged under s8 of FA 1994 and s25 of FA 2003. Because of the provisions referred to at [34] and [42], Mr Dyer would have the burden of showing that the penalties were calculated incorrectly (by, for example, applying the wrong rates of duty). He made no such submission. We are satisfied that the penalties have been calculated correctly. Mr Dyer also made no submission to the effect that the penalties were issued out of time. We have ourselves considered this question and have concluded that the penalties were issued within the applicable time limits set out at [32] and [39] as they were issued earlier than two years after Mr Dyer was stopped in the green channel at Newcastle Airport. It follows that we consider that the penalties have been validly charged.

Whether the penalties should be mitigated

54. Mr Dyer argued that the penalties should be reduced because he could not afford to pay them. The Tribunal has a broad discretion to reduce the penalties. However, the effect of s8(5) of FA 1994 and s29(3) of FA 2003 is that Mr Dyer's insufficiency of funds cannot be a reason for us to reduce the penalties. We are therefore simply not permitted by law to accept Mr Dyer's submissions to this effect.

55. Beyond those referred to at [54], Mr Dyer did not make any detailed submissions as to why we should consider exercising our discretion to reduce the penalty. We have, however, considered whether we should exercise our discretion. HMRC have set out considerations that they will take into account in Public Notice 300 in deciding whether to reduce a penalty. We do not consider that the Tribunal needs itself to follow that approach, although it is relevant for the Tribunal to consider whether HMRC have followed their own stated policy since, if they have not, that might be relevant to the question of whether the Tribunal should exercise its own discretion.

56. HMRC's stated policy is to offer a reduction in the penalties of up to 40% for "disclosure". They amplify on this in Notice 300 as follows:

During the investigation, an early and truthful admission of the extent of the arrears and why they arose will attract a significant reduction (up to 40%). 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.

57. HMRC also state that they offer further reduction for "co-operation" stating:

- You will receive further mitigation (up to 40%) if you:
- Attend all 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

58. As to “disclosure”, Mr Dyer gave an early and truthful account of the duty on
5 the cigarettes seized on 27 November 2012, but has not answered HMRC’s requests
for information on whether he had been involved in other smuggling attempts. As to
“co-operation”, he has ultimately responded to some of HMRC’s questions. However,
he has not done so “promptly”. Nor has he answered all questions put to him
truthfully. In particular, we have concluded that his statement that he was “escorted”
10 into the green channel was untrue as was the assertion in his letter dated 10 February
2014 that the cigarettes seized were for his own personal use (when it was clear that
they were Mr A’s property). He has also allowed HMRC to believe that a letter he did
not even write was his response to questions that they were asking.

59. Therefore, we are satisfied that HMRC have properly applied their own policy
15 in offering Mr Dyer a discount to the penalties. We consider that to be a fair discount
and will not exercise our discretion to increase (or reduce) the discount that HMRC
have offered.

Conclusion

60. It follows from what we have said above that the appeal is dismissed.

20 61. 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
25 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

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JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 22 APRIL 2015