



TC05980

Appeal number: TC/2016/02004

EXCISE DUTY, CUSTOMS DUTY & IMPORT VAT -- whether appellant dishonestly evaded duties and taxes when bringing 10,600 cigarettes through green channel on arrival from Pakistan: held yes – whether penalty reduction appropriate: held no, reduction increased from 40% to 80%.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SYED NAQVI

Appellant

- and -

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

**TRIBUNAL: JUDGE RICHARD THOMAS
 ANN CHRISTIAN**

**Sitting in public at Alexandra House, 14-22 Parsonage, Manchester on 23 May
2017**

The Appellant in person

**Heather Aspinall, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The date and location of this hearing show that it was held on the morning after the suicide bombing at the Manchester Arena in a building which was in the block
5 immediately to the south of the police cordon around the Arena and Victoria Station. Despite this, at 10 am everyone involved in the hearing was present and ready to proceed: the appellant, counsel for HMRC, a solicitor and two witnesses, the clerk and the Tribunal panel, most or all of whom had had disrupted travel arrangements. We are grateful to everyone, including other Tribunal and security staff in Alexandra
10 House, for ensuring the hearing could go ahead despite the tragic circumstances.

2. The hearing was of the appeal by Mr Syed Naqvi (“the appellant”) against a penalty charged under s 8 Finance Act (“FA”) 1994 and s 25 FA 2003 by the Respondents (“HMRC”). These penalties are known as civil evasion penalties (“civil” because there are also criminal evasion offences in nearby sections of both
15 Acts). The FA 1994 penalty was imposed for the attempted evasion of an excise duty, tobacco products duty, and the FA 2003 one for the attempted evasion of customs duty and import Value Added Tax (“VAT”).

3. Both penalties related to the same event, the appellant’s bringing in to the UK 10,600 cigarettes on which duty and tax had not been paid at the time the appellant
20 was stopped by UK Border Force in the green channel at Terminal 1 at Manchester Airport.

4. The issue for us was whether the appellant by his actions dishonestly attempted to evade the duties. We have held that he did, but we have reduced the penalty by a larger amount than HMRC eventually did.

25 **Evidence**

5. We had a bundle of papers prepared by HMRC which included the correspondence between HMRC and the appellant.

6. We had a witness statement and oral evidence from Officer Mike Jarrett of UK Border Force who was the officer who intercepted the appellant and seized his
30 cigarettes. Officer Jarrett exhibited a copy of his notebook entry for the interception, and copies of documents signed by the appellant and others which he gave to the appellant.

7. We have no hesitation in accepting Officer Jarrett’s evidence of his encounter with the appellant as honest and credible.

35 8. We also had a witness statement and oral evidence from Ms Samantha Easton, an officer of HMRC who conducted the compliance check into the appellant’s affairs relating to the seizure. She exhibited the correspondence in the bundle. We accept her evidence as truthful. We asked Ms Easton a number of questions about the content of her letters and documents attached to them which Ms Easton was no longer

familiar with. These did not go to the truth of what she had said in the correspondence.

9. The appellant gave evidence by reading to us the questions posed to him by HMRC in their compliance check and his answers. He was cross-examined by Ms
5 Aspinall. Where his evidence of the interception events differs from that of Officer Jarrett we prefer the officer's account, although we suspect that in some respects there may have been genuine misunderstandings by the appellant of what Officer Jarrett told him.

10. We consider later other evidence of the appellant.

10 **Facts**

Basic facts

11. From the evidence in the bundle and the oral evidence of the witnesses we find the following undisputed facts.

12. On 20 September 2014 the appellant arrived at Manchester Airport on flight
15 EK019 from Dubai. His journey had originated at Islamabad in Pakistan.

13. The appellant entered the green channel in Terminal 1 and was stopped by Officer Jarrett.

14. The appellant confirmed to Officer Jarrett that the luggage he had was his and that he had been visiting his wife and daughters in Pakistan. He visited them three
20 times a year.

15. The appellant stated to Officer Jarrett that he did not know his allowances for tobacco and alcohol, and had no prohibited items.

16. On examination of the appellant's luggage Officer Jarrett found 10,600 (53 sleeves of 200) Gold Leaf cigarettes.

25 17. Officer Jarrett issued Forms BOR 162 and BOR 156 both of which the appellant signed, and also issued Notices 1 and 12A. The cigarettes were seized.

18. The appellant did not start condemnation proceedings within the 30 day limit or at all.

30 19. On 21 September 2015 Ms Easton, writing as a Post Detection Audit Officer, wrote to the appellant to inform him that she was enquiring into his customs duty ("CD"), Import VAT and excise duty ("ED") affairs and that she had reason to believe that "conduct relating to dishonesty may have occurred in relation to your EU/UK Customs obligations." She enclosed Notices 160 and 300 for information.

20. The letter explained that no decision about penalties had been taken and told the appellant how a reduction in the penalties that might become due could be achieved and asked the appellant to produce:
- 5 (1) a signed copy of the letter to acknowledge that he had read and understood certain notices issued by HMRC
 - (2) answers to seven questions about his involvement in smuggling alcohol or tobacco between 20 September 2013 and 21 September 2015
 - (3) any further documentation, information or explanations he wished to give in support of his answers or which may be of use in the enquiry.
- 10 21. On 6 October 2015 Ms Easton sent a reminder letter to the appellant.
22. On 12 October 2015 the appellant's father telephoned Ms Easton to inform her that the appellant was visiting his wife and family in Pakistan and would be away for a few months. Ms Easton told him that the enquiry could not be put on hold and that he should contact her by email. She also for asked for corroborating evidence that he was in Pakistan.
- 15 23. On 16 October 2015 such evidence was provided.
24. On 22 October 2015 Ms Easton wrote to the appellant's father repeating that the enquiry could not be put on hold and that his son should contact her by email.
25. On 24 October 2015 Ms Easton considered the evidence available. She concluded that the appellant had dishonestly attempted to evade duties.
- 20 26. On 26 November after her findings were supported by her superior officers who authorised penalty assessments, she issued a civil evasion penalty in a single notice charging £2,995, of which £2,347 was ED and £648 CD and VAT. The amounts represented a 5% reduction from the maximum penalty of 100% of the duty.
- 25 27. On 4 February 2016 the appellant responded to say that he disagreed with the penalty and that the reason he had not replied was because he had been in Pakistan.
28. On 16 February 2016 Ms Easton wrote to the appellant giving him a further opportunity to respond to the request for information and answers.
29. On 2 March 2016 the appellant sent his response.
- 30 30. On 22 March 2016 Ms Easton issued a revised penalty showing a 20% reduction from the total duty for "disclosure" and 20% for "cooperation". She enclosed a duty schedule and Form HMRC 1 that showed what to do if the recipient of the penalty assessment disagreed.
31. On 6 April 2016 the appellant appealed to the Tribunal.

Further findings of fact

32. When giving his evidence Officer Jarrett was asked by the Tribunal about the signage at Terminal 1 at Manchester Airport. He said that there were notices informing passengers about their allowances at each baggage carousel and there was a large sign, bigger than a house door, at the entrance to the customs channels (there were blue and green at this Terminal, plus a phone for declaring goods in place of a red channel).

33. We find as fact that this was the signage at the Terminal.

34. In his evidence in his response letter of 2 March 2016 and in cross-examination, the appellant said as follows.

35. In response to Ms Easton's first request in her letter of 21 September 2016, asking for "confirmation of who was involved in the smuggling (attempt)" he protested that he was not a smuggler (as he had mentioned earlier) – it was just him.

36. To the second request to state for each person involved exactly what they did, he said: "It was just myself. I brought 40 boxes from Pakistan. I had some money left at Pakistan Airport [later confirmed to be Islamabad]. I am a smoker so I thought I would bring cigarettes for myself".

37. In cross-examination the appellant said he intended some of the cigarettes as presents for his brothers in the UK. When asked why his story was now different, he denied that it was. He had not told his brother of the gifts and his answer was intended to imply only that the cigarettes were for the personal use of his family and he did not intend to sell them. We accept his evidence on this matter.

38. To the third request to state for each person involved why they did it, he said: "it was me and the officer on duty. He seized my stuff and gave me a warning not to bring cigarettes next time".

39. On being recalled to the witness stand, Officer Jarrett denied that he let the appellant off with a warning. He said his invariable practice was to tell people whose goods were seized that Border Force would not take further action beyond seizure but he warned such people that it was open to HMRC to take such action as they wished.

40. On this issue we accept Officer Jarrett's evidence and think that the appellant either misunderstood what he was told or has convinced himself that he had been let off all consequences beyond seizure.

41. To the fourth request for a full explanation of how the smuggling attempt was carried out, he replied that he was "not a smuggler, it was a mistake and it just happened once".

42. To the fifth request, for confirmation of the number of times alcohol and tobacco products were smuggled into the UK, he replied that he just bought tobacco, not alcohol, it was the first and last time he brought cigarettes, and since then he had

been to Pakistan twice and had brought nothing in because of what Officer Jarrett had told him about the illegality of his conduct. We accept his evidence on this matter.

43. To the sixth request, for each occasion how much was brought in, he said it was only once and it was 40 boxes. We have found from Officer Jarrett's evidence that it was 53 boxes: we do not accept the appellant's evidence that it was only 40.

44. As to his international travel and the reasons for it in the two year period, he said he has been to Pakistan two times and he has friends and family there, including his wife and two daughters. He has been to Latvia twice for holiday and brought nothing from there.

45. He was also asked for documentation in support of his replies, and he gave copies of his passport showing his trips to Pakistan.

46. In his final answer he explained that he was not a smuggler. He said "I commit a crime without knowing it so accept my apology once again. It will not happen again".

47. When asked how much he smoked he said in 2014 it was more than 20 a day. He volunteered the information that at the time of the seizure "he was on drugs" so he smoked more than he does now. We assume he meant cannabis and that he smoked reefers, though we take judicial notice that reefers are usually prepared with hand rolling tobacco, not cigarettes. We accept his evidence on this matter.

48. He denied he had seen any signage. He said that after a 30 hour journey from a village in Pakistan without food he was not in a fit state to notice anything. He denied knowing what his allowances were. He agreed he had not sought to ask anyone at the airport or made any enquiries. We set out our views on the appellant's evidence here in the discussion section.

25 **Law**

49. For excise duty penalties the relevant section in Part 1 FA 1994 is:

"8 Penalty for evasion of excise duty

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

30 (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),

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

50. Other relevant parts of Part 1 FA 1994 are in the Appendix to this decision.

51. For customs duty and import VAT the relevant provision is:

“25 Penalty for evasion

(1) In any case where—

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(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),

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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.

(2) Subsection (1) is subject to the following provisions of this Part.

52. Other relevant parts of Part 3 FA 2003 are in the Appendix to this decision.

53. The allowances in force for cigarettes brought into the UK from a non-EEA country are in the Traveller’s Allowances Order 1994 (SI 1994/955)¹ the relevant parts of which are:

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“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 . . . contained in his personal luggage.

...

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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.

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That condition is complied with, for example, where an occasional importation consists exclusively of goods intended as presents, or of goods for the personal or family use of the person in question.

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(See Article 6 of Council Directive 2007/74/EC (non-commercial imports).)

¹ Not for the first time in our experience, the authorities bundle did not contain the 1994 Order, only a later amending Order which did not include article 2.

Schedule

...	...
Tobacco products	200 cigarettes, ...

“

54. We had number of extracts of cases cited to us on the meaning of dishonesty in a civil context. For these purposes we are content to rely on *N’Diaye v HMRC* [2015] UKFTT 380 (TC) where Judge Redston said:

5 “47. However, the subjective is not entirely banished. In *Abou-Ramah* at [66], Arden J first summarises *Barlow Clowes* and then says:

10 ‘On the basis of this interpretation, the test of dishonesty is predominantly objective: did the conduct of the defendant fall below the normally acceptable standard? But there are also subjective aspects of dishonesty. As Lord Nicholls said in the *Royal Brunei* case, honesty has ‘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.’

15 48. At [68(iv)] Arden LJ said that the test as formulated in *Abou-Ramah* applied ‘in the context of civil liability (as opposed to criminal responsibility).’ We have therefore adopted the *Barlow Clowes* test for dishonesty rather than the two-step approach provided for in *Ghosh*.

20 49. The test we apply to Ms Krubally N’Diaye’s case is therefore primarily objective: was her behaviour dishonest according to normally accepted standards of behaviour? We also need to consider what she actually knew at the time, not what a reasonable person in her position would have known or appreciated.

25 50. Ms Choudhury [for HMRC] did not disagree with this analysis, although she submitted that ‘it was important not to overstate the subjective element.’”

30 55. The last sentence of [49] is amplified in *Rasull v HMRC* [2015] UKFTT 193 (TC) where Judge Jonathan Richards says:

35 “45. Ms Choudhury submitted that this test was ‘purely objective’. We did not accept that aspect of her submissions. We agreed that that the ‘normally accepted standards of honest conduct’ must be determined by reference to an objective standard. We also agree that a taxpayer’s subjective knowledge, or otherwise, of those ‘normally accepted standards’ is not

relevant. That is made clear in *Barlow Clowes*. However, we still consider that it is necessary to examine the subjective state of a person's mind in order to determine whether he or she has, in fact, been dishonest according to normally acceptable standards of honest conduct.

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46. We derive support from that conclusion from Lord Hutton's speech in *Twinsectra v Yardley and others* [2002] 2 AC 164. At [31], Lord Hutton considered the conclusion that Lord Nicholls had expressed in *Tan* at pages 389 B to C to the effect that the test of dishonesty is an 'objective standard' and said as follows:

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'... 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:

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"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."

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47. That view of the law was not doubted in *Barlow Clowes*. We have therefore concluded that the subjective state of the appellant's mind is relevant for the purposes of assessing the type of conduct in which he has actually been involved. Having assessed the type of conduct in which he has been involved, we have compared that with the objective benchmark of 'normally acceptable standards of honest conduct'. Following *Barlow Clowes*, we have concluded that it is not relevant to consider

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whether the appellant is aware of what normal standards of honest conduct are, or whether he has a personal moral code that differs from normal standards of honest conduct.”

56. It is by reference to these cases and the statements in them that we judge the appellant’s conduct.

Submissions

57. HMRC, who have the burden of proof as to dishonesty, argued that the appellant’s dishonesty is shown by the fact that:

- 10 (1) as a frequent traveller it is inconceivable that he was not aware of the duty free allowances.
- (2) if not aware of the precise allowances, he ought to have been aware that 10,600 cigarettes is far above any allowance.
- (3) if he had doubts it would have been honest and prudent to have enquired and to have gone to the “red channel” phone point
- 15 (4) ignorance of the allowances is not a defence
- (5) he went through the green channel despite his lack of knowledge of the allowances.
- (6) an honest person would have declared the cigarettes if in doubt
- (7) when questioned by Officer Jarrett he denied any possession of dutiable goods
- 20 (8) there are a number of notices around Manchester Airport informing a traveller of the duty free allowances when coming from outside the EU.

58. Ms Aspinall made supplementary submissions in writing after the hearing. These were prompted by the Tribunal’s querying HMRC’s contention that Article 6 of the European Convention on Human Rights had no application to this case. In those submissions Ms Aspinall agreed that Article 6 was engaged, but she argued that there was no breach of the appellant’s rights. We agree and take this matter no further.

59. The appellant argued that:

- (1) he was not aware of the allowances
- 30 (2) the goods were for personal use
- (3) it was his first offence and he should have received a warning (and did receive what he thought was one)

Discussion

Liability to the penalties

35 60. We consider that the appellant’s conduct in entering the green channel carrying 10,600 cigarettes was conduct which was done only for the purposes of attempting to

evade duty and tax. We say this because it is inconceivable to us that the appellant could honestly have thought that his allowance was over 10,000 cigarettes.

61. Such conduct is in our view conduct which in the eyes of the ordinary person is dishonest. While such a person might balk at describing an attempt to bring in 300
5 cigarettes as dishonest, the same cannot be said of an attempt to bring in 53 times the limit.

62. We do not consider there is anything in the particular circumstances of the appellant that would compel us to find differently. He did not suggest this was the first time he had flown into the UK from outside the EU and he did not strike us as
10 unintelligent or very naïve or unable to read English or understand internationally recognised symbols.

63. In particular we do not accept that the appellant's tiredness and hunger could have led him to be unaware of the signs at the airport. If he had any doubts about the position he had a number of options which he chose not to exercise, in our view
15 deliberately.

64. We therefore find that it is more likely than not that he dishonestly attempted to evade excise duty, customs duty and VAT.

The level of penalties

65. The original assessment on the appellant gave a 5% reduction. This was
20 assessed at a time when the appellant had not answered Ms Easton's enquiries. After he had done so she reduced the penalty by 40%, 20% each for disclosure and co-operation.

66. By virtue of s 16(5) FA 1994 and s 29 FA 2003 the Tribunal may make its own determination of any reduction to be made. It is not bound by HMRC's policy
25 approach, but we start with that and consider first of all whether what Ms Easton did conformed with that approach.

67. In her opening letter Ms Easton pointed the appellant to the two Notices 300 and 160 as giving information about reductions in penalties.

68. Notice 160 at paragraph 2.3.1 gives details of the reductions that may be made
30 to civil evasion penalties. The notice however says at 2.2 that this only applies where the civil evasion penalties are imposed for conduct that relates to "returns or documents due to be sent to us before 1 April 2010". Ms Easton could not explain why the Notice says this, but we are satisfied that the policy of HMRC towards civil evasion penalties for all conduct, whether involving returns or documents and whether
35 it occurred is still the same and that it was that policy which Ms Easton was seeking to follow.

69. Section 2.3.1 says that a reduction under this policy of up to 40% is due for:

“an early and truthful explanation as to why the arrears arose and the true extent of them.”

70. Another 40% may be given for:

5 “fully embracing and meeting responsibilities under this procedure by, for example, supplying information promptly, quantification of irregularities, attending meetings and answering questions.”

71. Notice 300 is specifically aimed at “customs” civil investigation of suspected evasion. “Customs” here excludes excise duties (2.3), so we assume that the division is that this notice applies to CD and Import VAT and that Notice 160 was intended to cover ED civil evasion penalties despite what it says. Ms Easton was unaware of any other notice relating to ED civil evasion penalties.

72. Notice 300 says more about reductions than Notice 160. At 3.2 it gives the same text as 2.3.1 of Notice 160, but at 3.1.1 and 3.1.2 it gives much more detail of the policy.

73. At 3.1.1 under the heading “disclosure” it says:

“3.1.1 Disclosure

20 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%). 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. Disclosure forms the first part of the available reduction of any penalty as described in Section 3.2.”

25 74. And at 3.1.2 under the heading “co-operation”:

“You will receive further mitigation (up to 40%) if you:

- attend all the interviews (where necessary)
- provide all information promptly
- answer all questions truthfully
- 30 • give the relevant information to establish your true liability
- co-operate until the end of the investigation

We will consider the extent to which your co-operation when applying a penalty.

35 You may receive no penalty reduction at all if you:

- delay supplying information, or refuse to provide it

- avoid attending interviews (where necessary)
- give untrue answers to questions
- obstruct the course of the investigation

5 Our officer has to decide how much information you gave, how soon you gave it and how it contributed towards settling the investigation when considering the reduction of any penalty.”

75. We assume that this applies to ED penalties as well, but we cannot be sure.

76. Neither Ms Easton’s letter of 26 November 2015 giving a 0% and 5% reduction nor her letter of 22 March 2016 giving 20% and 20% give any hint of her thinking about the level. Nor did her witness statement, except where she said of the appellant that:

15 “he did not confirm the date the seizure happened, exactly what he did, or provide an explanation as to how the smuggling was carried out. Although Mr Sayed (*sic*) responded, the relevant information was not disclosed promptly and he did not admit to smuggling”

77. Although this was said in the context of her explanation of why she thought the appellant was dishonestly evading, it is clear to us that these are matters which she took into account in arriving at the reduction.

20 78. We asked Ms Easton why she needed to know from the appellant that which she clearly already knew from the Border Force report. Her response was that he was asked about any smuggling attempts in a two year period and had been asked to give details of everything that might have been done in that period.

25 79. If the Notices are read literally then if a truthful explanation is not given early, no reduction is due at all. Similarly a delay in supplying information can lead to no reduction being given. But this is clearly not how Ms Easton understood the policy as she complains of relevant information not being disclosed promptly but still gives a 20% reduction.

30 80. We prefer to read what is said in the notices in the way Ms Easton had applied the Notices in practice, that is by regarding 0% to 40% as a continuum with the descriptions of conduct in 3.1.1 and 3.1.2 being the polar ends of that continuum.

35 81. We therefore consider how the appellant met the requirements as to disclosure. Looking at 3.1.1 it seems to us that it is not aimed at and is not suitable at all for a traveller who has had goods seized. Border Force made a precise quantitation of the value of the cigarettes for duty calculation purposes at the time of seizure. The appellant has said that this was the only time he attempted to bring in dutiable goods through the green channel and HMRC does not offer any evidence or even a hint that it was not the only time in the whole of the period of enquiry that there had been any attempt to smuggle. He had explained “what had happened and over what period of

time” in his letter of 2 March 2016. He also wrote an undated letter which from the file appears to have been in response to the assessment of 26 November 2015 which also informs HMRC that the seizure was the first time and last time he had tried to bring in too many cigarettes.

5 82. He has then made an admission of the extent of the “arrears” if what is meant by that is the value of the goods. There are of course no arrears in the normal sense of the word in this case, as no duty was charged².

83. There is nothing to show that his explanation of the “arrears” is not truthful. Ms Easton relied it seems on it not being early. She complained that the appellant did not
10 answer her questions within the 30 days set for a response. The appellant said through his father that he was in Pakistan and unable to reply and he produced corroborating evidence of this. He did reply after the penalty assessment and in evidence explained that the village where his family is is remote and does not have internet access. In our view the quantification of the arrears was firstly not necessary
15 in this case and the admission of the extent of the arrears was as early as could reasonably be expected. We give a 40% reduction for disclosure.

84. As to co-operation HMRC do not complain of an insufficiency of information or of any untruthfulness in the answers or any obstruction. The complaint relates to the replies to the questions Ms Easton asked and in particular that he did not confirm
20 the date the seizure happened, exactly what he did, or provide an explanation as to how the smuggling was carried out. As to the date the seizure happened she did not ask him this. As to the other matters, he did tell her as can be seen from the letter of 2 March.

85. We are simply unable to understand why Ms Easton said what she did in her
25 witness statement. The only issue here that might prevent us giving a 40% reduction, applying the HMRC policy, is the question of promptness. Promptness is contrasted with delay in supplying the information. We do not accept that in the circumstances there was delay. We therefore give a 40% reduction, making the total reduction 80%.

86. HMRC’s policy allows them to give a further 20% in exceptional
30 circumstances, which they say as an example is where “you have made a complete and unprompted voluntary disclosure”. We have difficulty in seeing how a traveller with 10,600 cigarettes could make a complete and unprompted disclosure and still be liable for a penalty before reduction. If such a traveller makes an admission on the “red channel” phone then we assume no penalty would be charged, only duty.
35 Perhaps the case is one were a traveller sees the officer in the green channel and goes up to them and says “I have 10,600 cigarettes here in my luggage”. But that is certainly not how HMRC apply paragraph 4 Schedule 41 FA 2008.

² Neither Ms Easton nor Ms Aspinall was able to give any explanation of why duty was not charged. The answer we assume is a decision of the European Court of Justice, Case C-230/08 *Dansk Transport og Logistik v Skatteministeriet* ECR 2010 I-03799.

87. Looking at the case overall while we think the appellant fully disclosed and co-operated with HMRC, we cannot say that an attempt to bring in 10,600 cigarettes when the allowance is 200 is not a culpable act. We therefore maintain the reduction at 80%, which means that the total penalty is £630.80.

5 88. 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
10 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.

15 **RICHARD THOMAS**
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2017

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APPENDIX

Finance Act 1994

13 Assessments to penalties

5 (1) Where any person is liable to a penalty under this Chapter, the Commissioners may assess the amount due by way of penalty and notify that person, or his representative, accordingly.

...

10 (5) If an amount has been assessed as due from any person and notified in accordance with this section, then unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced, that amount shall, subject to any appeal under section 16 below, be recoverable as if it were an amount due from that person as an amount of the appropriate duty.

15 (6) In subsection (5) above “the appropriate duty” means—

(a) the relevant duty (if any) by reference to an amount of which the penalty in question is calculated; or

20 (b) where there is no such duty, the relevant duty the provisions relating to which are contravened by the conduct giving rise to the penalty or, if those provisions relate to more than one duty, such of the duties as appear to the Commissioners and are certified by them to be relevant in the case in question.

16 Appeals to a tribunal

...

25 (1B) ... an appeal against a relevant decision ... may be made to an appeal tribunal within the period of 30 days beginning with--

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

...

30 (5) ... the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to--

35 (a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,

...

40 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.

(7) An appeal tribunal shall not, by virtue of anything contained in this section, have any power, apart from their power in pursuance of section 8(4) above, to mitigate the amount of any penalty imposed under this Chapter.

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Finance Act 2003

29 Reduction of penalty under section 25 ...

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

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(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.

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(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—

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(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,

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

30 Demands for penalties

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(1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person ... a notice in writing (a “demand notice”) demanding payment of the amount due by way of penalty.

(2) An amount demanded as due from a person ... in accordance with subsection (1) is recoverable as if it were an amount due from the person ... as an amount of customs duty.

This subsection is subject to—

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(a) any appeal under section 33 (appeals to tribunal); and

(b) subsection (3).

(3) An amount so demanded is not recoverable if or to the extent that—

(a) the demand has subsequently been withdrawn; or

(b) the amount has been reduced under section 29.

31 Time limits for demands for penalties

(1) A demand notice may not be given—

5 (a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or

...

10 (2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

...

33 Right to appeal against certain decisions

...

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

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

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

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

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

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

(7) On an appeal under this section—

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

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