



TC06034

Appeal number: TC/2016/01330

Excise and Customs Duty – importation of tobacco products – appeal against an assessment for excise duty pursuant to s 12(1A) of Finance Act 1994 and Civil Evasion Penalties pursuant to s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 – whether dishonesty – yes – whether allowances given to reduce penalties correct – yes – whether financial hardship a reason for discharging assessment – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WALDEMAR KUBIAK

Appellant

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

**Sitting in public at The Tribunal Appeals Centre, Brooke Street, London on 5
June 2017**

The Appellant did not attend and was not represented

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

DECISION

1. This is an appeal by Mr Waldemar Kubiak (“the Appellant”) against a decision by the Respondents (“HMRC”) to raise an assessment for excise duty pursuant to s 12(1A) of the Finance Act 1994 (“the 1994 Act”) in the sum of £5,165.00 (“the Assessment”) and a wrongdoing penalty in the sum of £2,969.00 (“the Penalty”) issued pursuant to Schedule 41 of the Finance Act 2008 (“the 2008 Act”).

2. The Appellant did not attend the hearing. He had previously written to the Tribunal to say that he would not be attending. The Tribunal was therefore satisfied that he had been given notice of the time, date and venue of the appeal hearing and that it was in the interests of justice to proceed.

Background

3. On 18 November 2014, the Appellant was driving a lorry cabin and attached trailer and was stopped by Border Force Officers, English, White and Percival at Dover Eastern Docks, arriving from Calais. When he was initially questioned by an Officer, the Appellant stated that he was a haulier for Adi-Trans, that he had a bottle of whisky, one open carton of 180 cigarettes and he had no other cigarettes.

4. The Officers searched the vehicle cabin and found 4,000 Marlboro Gold cigarettes wrapped in black shrink wrap concealed within a locked side locker. A further search found an additional 16,000 Marlboro Gold cigarettes wrapped in black shrink wrap and covered in cardboard concealed within the trailer load. The 20,000 cigarettes were seized by the Officers as liable to forfeiture. The Appellant initially denied that they were his cigarettes, but later stated he had put them there with the intention of selling them in the UK. He signed the Officers’ notebooks. The vehicle was also seized. The Appellant was issued with a Seizure Information Notice, a warning letter, Notice 1 and Notice 12A.

5. The Appellant did not appeal against the seizure of the goods and they were therefore condemned as forfeit. The vehicle was offered to the Appellant’s employer, Adi-Trans, for a restoration fee.

6. On 16 October 2015, HMRC wrote to the Appellant informing him of their intention to issue an assessment for excise duty and a wrongdoing penalty. The letter gave him the opportunity to provide any relevant information by 15 November 2015. No response was received.

7. On 16 November 2015, HMRC issued the Assessment in the sum of £5,165.00 and the Penalty in the sum of £3,357.00.

8. In a letter dated 9 November 2015, the Appellant requested an exemption from paying the excise duty and penalty as he was experiencing financial difficulties. He stated that he had a family of seven and an incurably ill child. He enclosed un-translated medical documents.

9. On 27 November 2015, HMRC wrote to the Appellant informing him that having considered the information, the decision remained the same.

10. On 22 December 2015, the Appellant requested a review of the decision and requested information regarding the restoration fee paid.

11. On 18 January 2016, HMRC wrote to the Appellant stating that the restoration fee paid by Adi-Trans was a separate matter and would not be off-set against the Assessment and Penalty.

12. On 9 February 2016, HMRC informed the Appellant that the assessment was upheld on review and the penalty varied to £2,969.00

13. The Appellant submitted a notice of appeal to the Tribunal on 21 March 2016.

Evidence

14. The combined bundle of documents included of a copy of the notebook entries of Officers English, White and Percival and, and also the witness statement of Officer Talisha Marie Mills, the decision maker who issued the Assessment and Penalty. I was also provided with a copy of the Appellant's notice of appeal, copy correspondence, copy relevant legislation and case law authority.

The Law

15. The legislation relevant to this appeal is:

15 Section 2 Tobacco Products Duty Act 1979 ("TPD"), which imposes a duty of excise upon tobacco products.

"2 Charge and remission or repayment of tobacco products duty.

(1) There shall be charged on tobacco products imported into or manufactured in the United Kingdom a duty of excise at the rates shown in the Table in Schedule 1 to this Act."

"Tobacco products" are defined in section 1 TPD. The definition includes hand rolling tobacco.

"1 Tobacco products

(1) In this Act "tobacco products" means any of the following products, namely,-

(a) cigarettes;

(b) cigars;

(c) hand-rolling tobacco;

(d) other smoking tobacco; and

(e) chewing tobacco,

which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco, but does not include herbal smoking products."

16. The Commissioners have the power under s 1 Finance (No. 2) Act 1992 to make regulations that fix the time when the requirement to pay a duty owed will come into effect. The time at which a person becomes required to pay such a duty is known as an 'excise duty point'.

"1. - Powers to fix excise duty point.

(1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the

time when the requirement to pay any duty with which goods become chargeable is to take effect (“the excise duty point”).

5 (2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.

(3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say-

- 10 (a) the time when the goods become chargeable with the duty in question;
- (b) the time when there is a contravention of any prescribed requirements relating to any suspension arrangements applying to the goods;
- (c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;
- 15 (d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;
- (e) such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would otherwise be the excise duty point for those goods as may be prescribed;

20 and regulations made by virtue of any of paragraphs (b) to (e) above may define a time by reference to whether or not at that time the Commissioners have been satisfied as to any matter.

(4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision-

- 25 (a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed); and
- (b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several. (...)

30

17. The material regulations are the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (the “2010 Regulations”).

Regulation 13 of those Regulations states:

35 “Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the person-

- 40 (a) making the delivery of the goods;
- (b) holding the goods intended for delivery; or
- (c) to whom the goods are delivered.

(3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they are held-

- 45 (a) by a person other than a private individual; or
- (b) by a private individual (‘P’), except in a case where the excise goods are for P’s own use and were acquired in, and transported to the United Kingdom from, another Member State by P.

(4) For the purposes of determining whether excise goods referred to in the exception in paragraph (3)(b) are for P's own use regard must be taken of-

(a) P's reasons for having possession or control of those goods;

(b) whether or not P is a revenue trader;

5 (c) P's conduct, including P's intended use of those goods or any refusal to disclose the intended use of those goods;

(d) the location of those goods;

(e) the mode of transport used to convey those goods;

10 (f) any document or other information relating to those goods;

(g) the nature of those goods including the nature or condition of any package or container;

(h) the quantity of those goods and, in particular, whether the quantity exceeds any of the following quantities-

15 10 litres of spirits,

20 litres of intermediate products (as defined in article 17(1) of Council Directive 92/83/EEC),

90 litres of wine (including a maximum of 60 litres of sparkling wine),

110 litres of beer,

20 [800 cigarettes],

400 cigarillos (cigars weighing no more than 3 grammes each),

200 cigars,

[1 kilogramme] of any other tobacco products;

(i) whether P personally financed the purchase of those goods;

25 (j) any other circumstance that appears to be relevant.

(5) For the purposes of the exception in paragraph (3)(b)—

(a) "excise goods" does not include any goods chargeable with excise duty by virtue of any provision of the Hydrocarbon Oil Duties Act 1979 or of any order made under s 10 of the Finance Act 1993;

30 (b) "own use" includes use as a personal gift but does not include the transfer of the goods to another person for money or money's worth (including any reimbursement of expenses incurred in connection with obtaining them).

(6) Paragraphs (1) and (2) do not apply—

35 (a) where the excise duty point and the person liable to pay the duty are prescribed by the Excise Goods (Sales on Board Ships and Aircraft) Regulations 1999; or

(b) in the case of chewing tobacco."

Regulation 88 of the 2010 Regulations states:

"If in relation to any excise goods that are liable to duty that has not been paid there is

(a) a contravention of any provision of these Regulations, or

40 (b) a contravention of any condition or restriction imposed by or under these Regulations,

those goods shall be liable to forfeiture."

45

18. Article 7(2) of Directive 2008/118 states:

“For the purposes of this Directive, “release for consumption” shall mean any of the following;

5 (a) *the departure of excise goods, including irregular departure, from a duty suspension arrangement;*

 (b) *the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;*

10 (c) *the production of excise goods, including irregular production, outside a duty suspension arrangement;*

 (d) *the importation of excise goods, including irregular importation unless, the excise goods are placed, immediately upon importation, under a duty suspension arrangement.”*

15

19. Section 139 Customs and Excise Management Act 1979 states:

“(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.

20 (2) *Where any thing 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 subs (3) below, either—*

 (a) *deliver that thing to the nearest convenient office of Customs and Excise;*
or

25 (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.*

30 (3) *Where the person seizing or detaining any thing 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 subs (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.*

35 (4) *The following provisions apply in relation to things retained in the custody of the police by virtue of subs (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;*

40 (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 the Police (Property) Act 1897 Is 31 of the Police (Northern Ireland) Act 1998] shall apply in relation to that thing.*

5 (5) Subject to subsection (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 any thing as being forfeited, under the Customs and Excise Acts.

10 (7) If any person, not being an officer, by whom any thing 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].

15 (8) Subsection (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.”

Section 154 CEMA states in material part:

20 “(2) Where in any proceedings relating to Customs or Excise any question arises as to the place from which any goods have been brought or as to whether or not-

(a) any duty has been paid or secured in respect of any goods; or

25 then, where those proceedings are brought by or against the Commissioners, a law officer of the Crown or an officer, or against any other person in respect of anything purporting to have been done in pursuance of any power or duty conferred or imposed on him by or under the Customs and Excise Acts, the burden of proof shall lie upon the other party to the proceedings.”

Paragraph 5 Schedule 3 CEMA states as follows:

30 “If on the expiration of the relevant period under paragraph 3 above for the giving of notice of claim in respect of any thing 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 with, the thing in question shall be deemed to have been duly condemned as forfeited.”

35 20. The Commissioners’ power to assess the tax due from the Appellant is at s12(1A) of the 1994 Act:

“12.

[(1A) Subject to subs (4) below, where it appears to the Commissioners-

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

40 (b) that the amount due can be ascertained by the Commissioners,
the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.]”

21. Finance Act 2008 states at Schedule 41:

Paragraph 4:

“4(1) A penalty is payable by a person (P) where–

- 5 (i) *after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and*
 (ii) *at the time when P acquires possession of the goods or is so concerned, a payment of duty on the goods is outstanding and has not been deferred.*

10 (2) *In sub-paragraph (1)–*

“excise duty point” has the meaning given by section 1 of F(No.2)A 1992; and “goods” has the meaning given by section 1(1) of CEMA 1979.”

Paragraph 16(4) states insofar as relevant:

“(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with–

- 15 (i) *the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or”*

Paragraph 6(B) states:

“The penalty payable under any of paragraphs 2, 3(1) and 4 is –

- 20 • *for a deliberate and concealed act or failure, 100% of the potential lost revenue,*
for a deliberate but not concealed act or failure, 70% of the potential lost revenue,
and
 • *for any other case, 30% of the potential lost revenue.”*

Paragraph 10 states:

25 *“In the case of acquiring possession of, or being concerned in dealing with, goods the payment of duty in which is outstanding and has not been deferred, the potential lost revenue is an amount equal to the amount of duty due on the goods.”*

Paragraph 12 states:

30 *“(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure; (2) P discloses a relevant act or failure by–*

- (i) *telling HMRC about it,*
 (ii) *giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and*
 (iii) *allowing HMRC access to records for the purpose of checking how much tax is so unpaid.*
35 (3) *Disclosure of a relevant act or failure–*

(a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.”

5 Paragraph 13 states in so far as relevant (note that the Table only includes what is relevant and HMRC rely on prompted disclosure):

“(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a “standard percentage”) has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

10 (2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it-

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B-

15 (a) the case A minimum applies if-

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and otherwise, the case B minimum applies.

20

Standard %	Prompted Disclosure %	Unprompted Disclosure %
100	50	30

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% -

25 (a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or

(b) in any other case, to a percentage not below 20%, which reflects the quality of the disclosure.”

30 Paragraph 14 states:

“(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) “special circumstances” does not include-

35 (a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference To-

40 (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.”

The Appellant's Case

22. In the Appellant's Notice of Appeal he says:

5 “The inability to fulfil the obligation of paying the debt results from very difficult living conditions and financial situation which are of permanent character and in spite of my honest will, I am not able to improve these circumstances. Accordingly, I can only ask for one, and the only one, thing - for help in the most appropriate way, namely, the total debt cancellation (equalling £8,134) taking into account important living conditions of my family included and proved by documents in the letter dated 17 November (very low earnings, illness of my child, different financial obligations, collection of alimonies by a warrant of execution, debt in payments for a flat equalling 100 449.30 PLN, debts in banks equalling 54 147 PLN).

10 On account of my insolvency and non-performing loans any bank will not grant me another loan. Additionally, I even do not have the possibility to borrow more money from my relatives since I also have debts among my family.”

15 23. On 16 October 2016, Officers Mills wrote to the Appellant and gave him the opportunity to provide any further information that may have an impact in determining whether a penalty was due. He did his best to explain his situation and provide documentation.

20 24. He considers his lack of English language skills put him in a no-win situation. He cannot speak English and he did not understand what was said to him at the time of seizure. Therefore, it cannot be said that he did not co-operate or provide information as he did not have the opportunity to use a translator. He did not understand Notice 12A, BOR 162 or BOR 156.

25 25. He believes that his income and his family situation should have been taken into account and the penalty amount ought to be calculated based on income and living conditions in a given country. On his income the amount which he is liable for is absurd and extends beyond the severity limits which should be based on justice. It is life time debt which is unfair and unequal.

HMRC's Case

30 26. The Appellant's grounds for appeal predominately relate to the Penalty. He does not seek to offer any grounds for appeal in respect of the Assessment, apart from financial hardship. HMRC are entitled to raise the Assessment pursuant to 12(1A) of the Finance Act 1994 as a result of a duty point arising by virtue of Regulation 13(1) of the 2010 Regulations. The Assessment was correctly raised and calculated. The duty is legally due and financial hardship is not a sufficient ground to withdraw the assessment.

 27. The Penalty was calculated as a percentage of the Potential Lost Revenue which was £5,165.00. HMRC issued the Penalty based on the wrongdoing being deliberate, prompted and concealed behaviour.

40 28. The wrongdoing was deliberate. At the time of seizure the Appellant admitted purchasing the cigarettes in Poland with the intention of selling them in the UK. In a letter dated 9 November 2015 he admitted that his intention to sell the cigarettes was due to his urgent need for money.

29. The disclosure was prompted. The Appellant was stopped and gave a false disclosure when asked if he had cigarettes or tobacco.

30. The behaviour was concealed. The cigarettes were wrapped in black shrink wrap and 4,000 cigarettes were found in a locked side locker. A further 16,000 cigarettes were detected in the trailer and were made to look like any other pallet within the load.

31. A deliberate, prompted and concealed wrongdoing penalty attracts a penalty in the range of 50%-100% of the Potential Lost Revenue. Reduction on the penalty was given based on the Appellant's co-operation during the enquiry. The reduction is based on the factors of helping, giving and telling.

32. The Appellant was given the maximum reduction (40%) allowed for helping. The Appellant answered questions in full during interview.

33. The Appellant was given the maximum reduction (30%) for giving access. The Appellant was not required to assist with this element so therefore maximum reduction was given.

34. On review of the decision, the Appellant was given 15% reductions (out of a maximum of 30%) for telling. The Appellant when initially stopped by Officers and questioned stated that he was only carrying one bottle of whisky and one open carton of cigarettes. The Appellant only disclosed further information when questioned further by the Officers. As such full reduction has not been awarded. There is no indication from the Officers' notebooks that the Appellant had any difficulty in understanding the questions asked by Officers.

35. The Appellant's co-operation was taken into consideration when considering reduction and that the Penalty has been correctly calculated.

36. The Appellant in his grounds for appeal states that he is unable to pay due to financial hardship. HMRC have the discretion to reduce the penalty where there are special circumstances pursuant to paragraph 14(2), Schedule 41 FA 2008. Special circumstances are either uncommon or exceptional, or where the strict application of the penalty law produces a result that is contrary to the clear compliance and intention of the penalty law. Paragraph 14(2)(a) states that special circumstances does not include the ability to pay.

Onus and Burden of proof

37. By way of a letter dated 20 July 2016 the Tribunal requested that HMRC file and serve an Amended Statement of Case setting out the onus and explaining which party bears the burden in this appeal.

38. The standard of proof engaged in this appeal is the standard civil standard of proof (i.e. the balance of probabilities).

The Assessment

39. The Tribunal's statutory jurisdiction in respect of this appeal is pursuant to the provisions set out at section 13A to section 16 of FA 1994.

40. Section 16(6) of FA 1994 provides:

“(6) 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,

5 b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

10 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.”

The Penalty

41. In order to uphold HMRC’s decision to issue the Appellant with the Penalty HMRC must satisfy the Tribunal, pursuant to paragraph 4(1)(a) & (b) of Schedule 41 FA 2008, of the following:

- 15
- after the excise duty point for the goods which are chargeable with a duty of excise, the Appellant acquired possession of the goods or was concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
 - at the time when the Appellant acquired possession of the goods or was so concerned, a payment of duty on the goods was outstanding and has not been deferred.

20 42. In the event that the Appellant seeks to challenge the Penalty on the basis of reasonable or special circumstances, HMRC contend that it is incumbent on the Appellant to satisfy the Tribunal that either special circumstances or some reasonable excuse are in fact applicable.

25 43. The Appellant has submitted in correspondence and in his Notice of Appeal that he cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or on appeal the Tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

Conclusion

30 44. HMRC are entitled to make an assessment for unpaid duty under s 12 of the 1994 Act. The goods had been imported from the EU and were being held by the Appellant for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom. An excise duty point had therefore arisen. The amount of duty had therefore become due and that amount could be ascertained. The duty is legally due and financial hardship is not a sufficient ground for HMRC to withdraw the financial assessment.

35 45. HMRC were therefore entitled to raise an assessment for unpaid duty.

46. 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 an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary

and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

47. The penalty was issued on the following basis:

- 5 i. The penalty was calculated on the basis that it was deliberate, prompted and concealed. The behaviour was deliberate. The Appellant admitted to purchasing the cigarettes in Poland with the intention of selling them due to his urgent need for money.
- 10 ii. The disclosure was prompted. The Appellant initially lied about the quantity of cigarettes in his vehicle and trailer.
- iii. The behaviour was concealed. The cigarettes were wrapped in black shrink wrap and 4,000 cigarettes were found in a locked side locker. A further 16,000 cigarettes were detected in the trailer and were made to look like any other pallet within the load.

15 48. A deliberate, prompted and concealed wrongdoing penalty is in the range of 50%-100% of the potential lost revenue. A reduction of the penalty was given on the basis of the Appellant's co-operation during the enquiry, based on factors of helping, giving and telling. The Appellant was given the maximum reduction of 40% for helping by answering questions in interview. He was given the maximum reduction of 30% for giving access. He
20 was given a 15% reduction (out of a maximum of 30%) for telling. The Appellant did not tell the truth about the cigarettes he was carrying. The Officers' notebooks do not highlight any difficulties in understanding English.

49. Although HMRC have the discretion to reduce the penalty where there are special circumstances, special circumstances do not include the ability to pay.

25 50. The penalty imposed was proportionate for the following reasons:

- i. The potential loss to the revenue was significant.
- ii. The Appellant had deliberately concealed the goods. It is clear that the Appellant was attempting to avoid customs duty.
- iii. The Appellant intended to sell the goods for profit.

30 51. The Appellant has not offered any grounds on which he could successfully challenge the decision to issue the Penalty. Hardship is not a valid ground of appeal. FA 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.

35 52. The appeal is accordingly dismissed and the Assessment of £5,165 and Penalties of £2,969 are 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.

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**MICHAEL CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 31 JULY 2017

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