[2017] UKFTT 796 (TC)

TC06202

Appeal number: TC/2016/04995

Excise and Customs Duty - importation of tobacco products - appeal against Civil Evasion Penalties - s 25(1) of Finance Act 2003 and s 8(1) of Finance Act 1994 - whether dishonesty - yes - whether allowances given to reduce penalties correct - yes - appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

SHANE MADDISON **Appellant**

- and -

HM REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LESLIE BROWN

Sitting in public at Hull Magistrates Court, The Law Courts, Market Place, Hull on 2 August 2017

The Appellant did not attend and was not represented

Mr Rupert Davies, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr Shane Maddison ("the Appellant") against a decision by the Respondents ("HMRC") notified on 25 July 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £624 under s 25(1) of Finance Act 2003 for the evasion and/or attempted evasion of Customs Duty, and under s 8(1) of Finance Act 1994 for the evasion and/or attempted evasion of Excise Duty, in that he failed to declare cigarettes and tobacco which he was importing into the United Kingdom above the personal allowance of 200 cigarettes or 250g of tobacco.

2. The Appellant did not attend the hearing. He had been given notice of the time, date and venue of the appeal hearing and had agreed by letter that he was content for the appeal to be heard in his absence.

Background

3. On 17 June 2015, the Appellant was stopped and questioned by a UK Border Force Officer, on entering the Green 'nothing to declare' channel at Manchester Airport arriving from South Africa, via Dubai on flight EK017.

4. From disembarkation to clearing Customs, there are displayed a number of notices advising which countries fall inside/outside the European Union ("EU") and also the duty free allowances for excise dutiable products acquired outside the EU. South Africa is not in the EU and therefore, returning travellers, for the purposes of the Travellers' Allowances Order 1994, have a personal allowance of 200 cigarettes.

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

6. Officer Ford's evidence is that the Appellant confirmed he had travelled from South Africa via Dubai. He was then asked if he understood that there are certain goods travellers are not allowed to bring into the United Kingdom such as drugs, offensive weapons or indecent/obscene material. The Appellant confirmed that he understood and that he was not carrying any such items. He was asked if he understood the alcohol and tobacco allowances and replied that he did.

7. The Appellant confirmed when asked that the bags he had with him were his and also confirmed that he had packed them himself. He was asked whether he was aware of the contents of his luggage and he stated "Yes".

8. On conducting a search of the Appellant's luggage, 5,400 King size filter cigarettes were found. In total, the overall quantity of goods seized was twenty-seven times over the Appellant's personal allowance.

9. As the goods had not been declared and were over the allowances as set out in the Travellers' Allowances Order 1994 (as amended), Officer Ford seized the goods as

liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 ("CEMA") and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice C156 and Warning Letter BOR162, both of which the Appellant signed.

10. The legality of seizure was not challenged in the Magistrates' court and the seizure was therefore deemed to be legal pursuant to paragraph 5 schedule 3 CEMA.

11. On 28 June 2016, HMRC's Officer Easton of HMRC's International Trade and Compliance Unit, wrote to the Appellant at the address he had provided, informing him that HMRC would be conducting an enquiry into the matter and that the imposition of a Civil Evasion Penalty, under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed Public Notice 300 in respect of Customs Duty and Import VAT and Public Notice160 in respect of Excise Duty and invited any disclosure by the Appellant. The letter made it clear that any reduction in the penalty was contingent on the Appellant's response and co-operation with HMRC's enquires.

12. The letter from Officer Easton explained that if the Appellant was willing to co-operate with the enquiry he should provide the following within 30 days of the date of her letter:

- "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- A full explanation as to how the smuggling or attempted smuggling was carried out.
- Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to smuggle them.
- Confirmation of the quantities of goods involved on each occasion.
- Evidence of the cost of the goods, such as receipts, invoices, or bank statements.
- Details of all international travel during the period under enquiry, including the reasons for travel.
- An explanation of what you did with, or intended to do with, the smuggled goods.
- Any documentation you think will support the information you are providing.
- Any other information or explanations you think may be of use to this enquiry."

13. Officer Easton referred the Appellant to Public Notice 300, s 3 where it states that a reduction in penalty may be given as follows:

"Disclosure

During the investigation an early and truthful admission of the extent of the arrears and why they arose will attract a considerable reduction (up to 40 per cent). By the extent of the arrears we mean what has happened and over what period of time, along with any information about the value involved, rather than the precise quantification.

Co-operation

You will receive further mitigation (up to 40 per cent) if you:

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

14. On 4 July 2016 the Appellant called HMRC seeking an explanation for the letter, stating that he had been told that there would be no further action. Officer Harwood had taken over responsibility for the case. It was agreed that correspondence could continue via email.

15. On 6 July 2016. Officer Harwood confirmed to the Appellant that the next step if he wished to comply with the investigation was to send his submissions in reference to the details requested in the letter dated 28 June 2016 by 29 July 2016.

16. On 6 July the Appellant responded by email to Officer Harwood confirming no other parties were involved and stating this was the first time he had brought cigarettes into the United Kingdom. The Appellant stated that he no longer had the paperwork involved and that he was travelling back from Dubai on business. He stated that his line of work requires him to fly in and out of the country about four times a year.

17. The Appellant said that he was stopped in the Green 'Nothing to Declare' channel, on "the wrong side of declaration". He states he entered the Green 'Nothing to Declare' channel because his attention was distracted whilst on the telephone to his father.

18. The Appellant referred to the telephone conversation on 4 July 2016 with Officer Harwood, in reference to the documentation signed at the airport at the time of the seizure, and conceded that he had not given his full attention to those documents.

19. On 25 July Officer Harwood issued a Civil Evasion Penalty - Notice of Assessment in the sum of £624, being £123 Customs Civil Evasion penalty and £501 Excise Civil Evasion penalty which was calculated on the total of 5,400 cigarettes - (5,200 seized less personal allowance of 200). The Notice of Assessment explained how the penalty had been calculated and advised that a reduction from the maximum penalty had been made which included a 60% discount (30% for disclosure and 30% for co-operation) of the total evaded duty of £1,562, reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry.

20. On 26 July 2016 the Appellant by email responded to Officer Harwood and confirmed receipt of the Notice of Assessment. He stated that he disagreed with the decision of Officer Harwood and raised the following points:

- The Appellant believed he should have been given the maximum 80% discount, instead of 60%, as he had answered all the questions in Officer Easton's letter dated 28 June 2016 in an honest and timely manner.

- He had made a mistake in entering the Green 'Nothing to Declare' channel, reiterating his earlier contentions that he did not give this his full attention due to being on the telephone to his father. He also said that to seize the goods was punishment enough.

- He refers to his belief that to be charged a penalty was unfair, considering the goods were seized.

- He also states that he would have paid the duty at the airport, but this opportunity was lost on entering the Green 'Nothing to Declare' channel. He states that he would have explored other options had he known a penalty would have been issued.

21. On 29 July 2016 Officer Harwood replied to the points raised by the Appellant and confirmed that having looked at all the evidence the level of reduction awarded was fair and reasonable. He explained why the Appellant had received a 60% reduction. This included the fact that the Appellant had not fully provided answers to the questions raised by HMRC in their letter dated 28 June 2016 and that, as a regular traveller, he would have been aware that there are restrictions and allowances relating to bringing goods into the United Kingdom.

22. On 29 July 2016 the Appellant replied to Officer Harwood and asked for an independent review.

23. On 1 September 2016 HMRC wrote to the Appellant to confirm a full review had been carried out by an Officer not previously involved in the original decision and that it had been carried out independently. The Appellant was informed that the decision should be upheld

24. By notice of appeal dated 19 September 2016 the Appellant appealed the decision of HMRC to the First-tier Tribunal.

Evidence

25. The combined bundle of documents included the witness statement of Officer Ford, and also the witness statement of Officer Harwood. Both gave oral evidence under oath to the Tribunal. We were also provided with copy correspondence, copy relevant legislation and case law authority.

The Law

26. The legislation relevant to this appeal is:

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

Penalty for evasion of excise duty.

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

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

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

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

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

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

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

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

s25 Penalty for evasion.

(1) in any case where

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

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

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

29 Reduction of penalty under section 25 or 26.

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

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

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

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

49(1) Where -

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

(i) unshipped in any port,

those goods shall ...be liable to forfeiture.

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

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

S139 Provisions as to detention, seizure and condemnation of goods

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

(2) Where anything is seized or detained as liable to forfeiture under the Customs and Excise Acts by a person other than an officer, that person shall, subject to subsection (3) below, either -

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

(b) if such delivery is not practicable, give to the Commissioners at the nearest convenient office of Customs and Excise notice in writing of the seizure or detention with full particulars of the thing seized or detained.

(3) Where the person seizing or detaining anything as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those proceedings are completed or it is decided that no such proceedings shall be brought.

(4) The following provisions apply in relation to things retained in the custody of the police by virtue of subsection (3) above, that is to say -

(a) notice in writing of the seizure or detention and of the intention to retain the thing in question in the custody of the police, together with full particulars as to that thing, shall be given to the Commissioners at the nearest convenient office of Customs and Excise;

(b) any officer shall be permitted to examine that thing and take account thereof at any time while it remains in the custody of the police;

(c) nothing in [section 31 of the Police (Northern Ireland) Act 19987 shall apply in relation to that thing.

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

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

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

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

Paragraph 5 Schedule 3 CEMA states:

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

Travellers' Allowances Order 1994

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

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

(2) For the purposes of this article -

(a) goods shall be treated as contained in a person's personal luggage where they are carried with or accompanied by the person or, if intended to accompany him, were at the time of his departure for the United Kingdom consigned by him as personal luggage to the transport operator with whom he travelled;

(b) a person shall not be treated as having travelled from a third country by reason only of his having arrived from its territorial waters or air space;

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

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

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

HMRC Public Notices

HMRC Notice 300 Customs civil investigation of suspected evasion

2.4 Penalty for evasion of the relevant tax or duty

A penalty may be imposed in any case where:

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

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

3.2 By how much can the penalty be reduced?

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

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

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

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

HMRC Notice 160 Compliance checks into indirect tax matters

2.3 How can penalties be reduced?

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

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

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

2.3.1 Reductions under Civil Evasion Penalty Rules

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

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

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

The Appellant's Case

27. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £624 on the following grounds:

- His mother had recently passed away and he had been out of the country for several months at sea with no access to any form of communication. He was preoccupied talking to his father whilst travelling through Customs, which was the reason he mistakenly walked through the Green lane and not the Red.
- Not being a smoker himself (the tobacco was a gift for his father) he was under the impression that he could bring as much into the UK as he wished, providing it was for personal use or a gift. After researching import laws, he is now fully aware that these rules refer to Europe only which he considers was an easy mistake to make, especially as this was confirmed when asking duty free staff upon purchasing.
- At the actual seizure of the goods the officer in charge informed him that as this was his first offence, seizure of the goods would be the end of the matter and that no further action would be taken. He trusted the officers and apologised for the whole misunderstanding. He handed over the goods without incident. He would have sought legal advice and looked at all alternative options available to him had he known that penalties may also be imposed.
- He had complied at every single stage, communicating quickly, efficiently and disclosed all information requested. The officer investigating his case stated on 15th September 2016 that "my case is unique in comparison to the usual ones he deals with as I have communicated/responded thoroughly and in a timely manner unlike the usual people in my position that ignore all correspondence etc".
- Seizure of the goods is punishment enough. To impose penalties in addition is unfair and excessive.

HMRC's Case

28. On 17 June 2015, by entering the Green 'nothing to declare' channel at Manchester Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

a) The Appellant entered the Green channel, indicating that he had nothing to declare despite significant signage present.

b) The Appellant does not deny that the amount of cigarettes imported was over the permissible limits.

c) The Appellant told the UKBF Officer that he was aware of the allowances relating to cigarettes and tobacco.

d) The Appellant was carrying 5,400 cigarettes – twenty-seven times his personal allowance.

e) A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. These explain which countries are inside and outside the EU and the duty free allowances for excise goods.

f) It is well known that South Africa is outside the EU for excise purposes. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them.

29. HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty because he acted dishonestly and deliberately took action to positively evade duty and tax.

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

31. The appropriate standard of proof is the balance of probabilities: Re *B (Children)* [2008] UKHL 35.

32. The Tribunal in *Ghandi Tandoori Restaurant* (1989) VATTR 39 considered the meaning of the word 'dishonesty'.

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

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

> 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. . . If it was dishonest by those standards

> then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did…..'

34. 'Dishonest' should be given its ordinary English meaning, namely 'not honest, trustworthy, or sincere'. The correct test for establishing dishonesty as stated in the High Court case of *Sahib Restaurant v HM Revenue & Customs* (February 2008 - unreported) is found in the case of *Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others* [2005] UKPC. In this case it was held that the test laid down in *Royal Brunei Airlines Sdn Bhd v Tan* 9951 2 AC 378 was the correct test and was summarised as follows:

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

35. The Appellant's actions as set out above demonstrate that he acted dishonestly and deliberately took action to positively evade duty and tax. His attempt to clear import controls without paying any duties by walking through the Green channel 'nothing to declare' with the concealed cigarettes demonstrates his intent to positively evade duty and tax.

36. Because the Appellant acted dishonestly and deliberately took the action to positively evade duty and tax, HMRC are entitled under s 8(1) of the Finance Act 1994 and s 25(1) of the Finance Act 2003 to issue the Appellant with a penalty.

37. The legislation at s 8(1) of the Finance Act 1994 and s 29(1)(a) of the Finance Act 2003 provide that the Commissioners, or on appeal an appeal Tribunal, may reduce the penalty up to nil.

38. The penalty is based on the amount of Customs Duties, Import VAT and assessed Excise Duty that was involved in the offence. In this case the penalty is £624, being 60% of the potential lost revenue because HMRC exercised its discretion and allowed a 30% deduction for early disclosure and a further 30% for co-operation (both out of a maximum of 40%) which in the circumstances was considered reasonable. Officer Harwood who undertook the review said that he had not been able to give the full 40% allowance for either disclosure or co-operation because the Appellant had failed to provide the information requested. He believed it was inherently improbable that the Appellant, having previously travelled to the UK from a non-EU country, and being a frequent flier, believed he was entitled to import 5,400 cigarettes, without

checking his allowance. Such a large quantity of cigarettes would have prompted a reasonable and honest person to make enquiries rather than assuming there was no tax to pay.

39. The Appellant submitted in correspondence 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 an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

40. The Appellant says he was told that there would be no further action. That potentially goes to legitimate expectation and is a matter for judicial review. The Tribunal lacks the jurisdiction to consider it - see *HMRC v Hok* [2012] UK UT363 (TCC) as referred to by Judge Chapman when considering the strike out application in the matter of *Winifred Garland* TC/2016/00015.

41. The Appellant has not shown grounds to successfully appeal the decision to issue the penalty.

Conclusion

42. The Appellant imported the cigarettes from South Africa, travelling via Dubai. There are strict limits on the number of cigarettes that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. Manchester airport has clear signage which describes the allowances. The airport signage is designed to inform travellers who are not aware of importation restrictions. South Africa is a non-EU country and so there could be no confusion with the 'unlimited for own use' provisions which are applicable when importing from EU countries.

43. The Appellant says he is a frequent flier, and had previously travelled to the UK from a non-EU country. It is therefore more likely than not that he would have been aware of the allowances. In any event, a reasonable and prudent person exercising appropriate caution would check the allowances before importing such a large number of cigarettes.

44. The issue as to whether or not the cigarettes were for personal use does not arise. The facts of the matter are not in dispute and the Appellant did not challenge the legality of seizure of the goods within the statutory time limit. Where there is no timely challenge, the law provides that the goods are deemed to be condemned as forfeited and what that means in practice, is that, in law, the Appellant is deemed to have imported the goods for commercial use. That is a final decision and the Tribunal has no jurisdiction to consider that issue any further.

45. The issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the ordinary standards of reasonable and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed

on the balance of probabilities *(Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]).

46. The Appellant says that at the airport he was talking to his father and that his mother had recently passed away. He says that he was distracted.

47. However it is inherently unlikely that the Appellant did not know or suspect that there were restrictions on cigarettes being brought to the UK in large quantities. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs channels. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them. We have to conclude that the Appellant acted dishonestly and deliberately, taking action to positively evade duty and tax. We concur with HMRC's assertion as stated at paragraph 35 above, that the Appellant's actions demonstrated his intention to clear import controls without paying any duties. He must have realised that his actions amounted to dishonesty.

48. In the recent case of *Ivey v Genting Casinos (UK) Ltd t/a Crockfords*, released on 25 October 2017, the Supreme Court said [at paragraph 74 of the judgment]:

> 'These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.'

49. The Appellant would have been fully aware that there are restrictions on the importation of cigarettes and that she was bringing more cigarettes into the country than she was entitled to without declaring them. Applying the objective standards of ordinary honest people, we have to conclude that the Appellant acted deliberately and dishonestly, taking action to positively evade duty and tax.

50. 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. Finance Act 1994, s 8(5)(a) and Finance Act 2003, s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from taking into account the insufficiency of the funds available to pay when considering reduction of the penalty.

51. As the Appellant dishonestly attempted to evade import VAT, Excise and Customs duties, a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003.

52. HMRC can reduce a penalty on the basis of the customer's co-operation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and co-operation resulting in a total reduction of 60%.

53. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld and no valid argument as to why the 60% reduction should not be confirmed.

54. The appeal is accordingly dismissed and the penalties totalling £624 confirmed.

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

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 06 NOVEMBER 2017