



[2019] UKFTT 563 (TC)

TC07357

EXCISE DUTY AND CUSTOMS DUTY – civil evasion penalties – section 8 Finance Act 1994 and section 25 Finance Act 2003 – whether conduct involved dishonesty – quantification of penalty – mitigation allowed – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/06712

BETWEEN

NADIA MOUSTAPHA

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
JULIAN STAFFORD**

Sitting in public at Centre City Tower, 5 Hill Street Birmingham on 16 August 2019

Ms Nadia Moustapha, in person.

Ms Giselle McGowan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns civil evasion penalties issued to Nadia Moustapha (“**the Appellant**”) in relation to the alleged dishonest evasion of customs and excise duties in connection with the importation of cigarettes and water pipe smoking tobacco issued by Her Majesty’s Revenue and Customs (“**HMRC**”) in the total (reduced) sum of £2,722 by notice dated 13 August 2018.

2. There are three issues for determination by the Tribunal:

(1) Whether the penalties have been correctly imposed for the dishonest evasion of:

(a) Excise duty under s8 Finance Act 1994 (“**FA 94**”); and

(b) Customs duty under s25 Finance Act 2003 (“**FA 03**”)

The burden on proof lies on HMRC to show on the balance of probabilities that the conduct of the Appellant involved dishonesty.

(2) Whether the goods seized from the Appellant by Border Force on 30 May 2014 at London Heathrow Airport were as described by HMRC and in particular whether the quantities seized were as stated on the seizure form BOR1056.

The burden of proof lies with the Appellant to show on the balance of probabilities that the quantities were not as contended for by HMRC.

(3) What level of penalty should properly be imposed? HMRC have allowed the Appellant 60% mitigation by reference to their policy for mitigation in respect of disclosure and co-operation.

The Tribunal are not bound by HMRC’s policy and pursuant to s8(4) FA 94 as regards the excise penalty and s29 FA 03 as regards the customs penalty, may reduce the penalty to such sum as they consider proper.

PROCEDURAL CHRONOLOGY

3. As set out in more detail below on 30 May 2014 the Appellant travelled from Egypt to London Heathrow with her mother. Her flight landed at approximately 9pm. She was returning from one week in Sharm el Sheikh (where her then husband worked) having transited through Cairo.

4. Having entered the green channel the Appellant’s luggage was searched and certain excise goods were seized.

5. On 6 May 2015 HMRC wrote to the Appellant stating that they were enquiring into the Appellant’s Customs Duty, Import VAT and Excise Duty affairs and had reason to believe that conduct involving dishonesty may have occurred. The letter advised that the enquiry would be conducted with a view to the recovery, where appropriate, of any duty or tax arrears and interest and, if there was sufficient evidence of dishonest conduct, consideration would be given to imposing a Civil Evasion Penalty under section 25(1) FA 2003 for the evasion of Customs Duty and Import VAT and under section 8(1) FA 1994 for the evasion of Excise Duty. The letter explained that the Appellant did not have to cooperate with the enquiry but that, if she chose to do so, she would have the opportunity to significantly reduce any penalties that may become due by making a full and prompt disclosure, providing details of her involvement in the smuggling or attempted smuggling and by cooperating throughout the investigation.

6. No response was received from the Appellant. A chasing letter was sent on 20 May 2015. On 11 June 2015 HMRC issued the Appellant with a Civil Evasion Penalty under s.25 FA 2003 for the evasion/attempted evasion of Customs Duty and Import VAT and under s.8 of FA 1994

for the evasion/attempted evasion of excise duties. The total penalty raised was £6,919 (consisting of a £1,668 customs penalty and a £5,251 excise penalty). The penalty was calculated on the basis of a sum equal to the duty evaded or the amount of duty sought to be evaded by the Appellant.

7. No payment was made against the penalty assessments and debt management action was commenced. As a consequence of such action it was identified that the Appellant was not resident at the address to which all previous paperwork had been sent.

8. On 7 June 2018 all letters were reissued to the Appellant at her correct address.

9. On 18 June 2018 the Appellant wrote to HMRC.

10. On 13 August 2018 HMRC issued the Appellant with revised civil evasion penalties under s.25 FA 2003 for the evasion/attempted evasion of Customs Duty and Import VAT and under s.8 of FA 1994 for the evasion/attempted evasion of excise duties. The total penalty raised was £2,767. The penalty was calculated on the basis of a sum equal to the duty evaded or the amount of duty sought to be evaded by the Appellant with a 60 percent reduction for disclosure (30 percent) and co-operation (30 percent).

11. On 18 August 2018 the Appellant requested a review of the original decision.

12. By letter of 10 October 2018 Officer Baxter concluded the review, varying the original decision on the basis that the incorrect price per kilogram for the water pipe tobacco had been used. The penalty was recalculated as £2,722 (consisting of a £622 customs penalty and a £2,100 excise penalty). The reason for the amendment was that the value used for the price per kilogram of water pipe tobacco (£11.00) when calculating the customs duty due was not the correct price for the date of the seizure and should have been £9.13.

13. The Appellant appealed on 27 October 2018.

FINDINGS OF FACT

14. The Tribunal were provided with a bundle of documents and took sworn testimony from the Appellant. Somewhat surprisingly given the substance of the Appellant's appeal HMRC did not tender Mr Evans, the Border Force Officer responsible for seizure, to give evidence and no witness statement was prepared or served by him.

15. The Tribunal found the Appellant to be a straightforward witness who gave a clear account of events. The Tribunal accepts her evidence. In addition to the evidence set out below the Appellant also gave more detailed evidence supporting the documents she had produced regarding her treatment by her husband and the issues leading to their divorce. It is not considered necessary to set out that evidence. Suffice it to say that the Tribunal accepts that the Appellant was married to a controlling man and achieving a divorce from him required the intervention of the British Consulate in Egypt.

16. From the evidence the Tribunal finds the facts as set out in paragraphs 17 to 56 below.

17. The Appellant explained that the trip to see her then husband had been a difficult one. Her ex-husband is an Egyptian national. She had married him believing him to be a loving husband but shortly after what she described as a "religious" marriage he pushed for a legal marriage with the aim of obtaining a UK spousal visa which he anticipated she would pay for. The relationship quickly became very strained. Her trip to see him had been cancelled once but under some pressure/duress she rebooked and travelled out for one week returning on 30 May 2014.

18. On the day she was due to depart Sharm el Sheikh her husband demanded that she give him £160 to purchase what he told her was non-tobacco Al Fakher water pipe molasses which he wanted her to carry back to the UK and take to a friend of his who worked at the Hilton

Hotel on Edgware Road. This friend, she was told, would sell the molasses and the money would be used to assist with obtaining a UK entry visa. The Appellant gave her husband £160 sterling cash.

19. The Appellant's then husband returned with a number of boxes of what she believed to be non-tobacco water pipe molasses. He removed the clear plastic pouches from their boxes, folded the boxes flat and put the pouches in what the Appellant thought was about 5 carrier bags. The carrier bags and the folded boxes were packed by her ex-husband into her suitcase/carry-on luggage.

20. The Appellant explained that she had some serious misgivings about carrying the molasses back to the UK; she stated that she genuinely understood that the molasses was non-tobacco. Her then husband told her that if she loved him she would carry the molasses for him as this would help him get a visa to the UK. By this time she was aware of her then husband's father's connections with the Muslim Brotherhood as her husband said he was using those connections to monitor her movements and associations with, particularly male, friends when she was in the UK. The Appellant said that she felt that she had no choice but to bring the molasses back to the UK.

21. The Appellant described her suitcase as a standard medium sized case with 4 wheels which was brown; she also had a cabin bag of regulation size as hand baggage. HMRC did not cross-examine the Appellant as to the description of her luggage and the Tribunal finds as a fact that the Appellant's luggage was as described by her.

22. The Tribunal was told that the Appellant does not pack particularly lightly and had taken more clothing as this was not just a beach holiday as it was also time with her then husband. She said that the case was reasonably full when she travelled out. The bags of molasses were packed in and around her clothing, toiletries, shoes etc. that she had taken away with her. Again HMRC did not cross-examine the Appellant as to the volume of clothing/shoes etc. said to have been in the luggage and the Tribunal accepts the Appellant's evidence in this regard.

23. The Appellant's evidence was that she did not pay any excess baggage fee for overweight luggage at check in. Before the Tribunal, for the first time, she stated that she in fact weighed her luggage before leaving the hotel with small scales she carries with her for that purpose. In previous correspondence the Appellant had consistently stated that her luggage was within her luggage allowance of 23kg. In oral evidence she explained that she had tried but been unable to obtain confirmation of the weight of her luggage from the airline because it was just under 4 years between the flight and first contact from HMRC.

24. The Tribunal accepts the Appellant's evidence that she was not required to pay any excess luggage charge and that it is therefore likely that her luggage was not significantly over the 23kg which is the standard luggage allowance for economy scheduled flights.

25. At Cairo it was explained that the Appellant and her mother both purchased cigarettes as presents for the Appellant's father (and her mother's ex-husband). The Appellant said they spent approximately £20 each. The Appellant has reasonably consistently described what was purchased as two cartons of cigarettes each. The Appellant told the Tribunal that she did not smoke and was unclear as to how many cigarettes were in the carton. She said that what she purchased was two cartons bound together by a ribbon. The Tribunal asked her to describe the carton purchased in terms of dimensions.

26. On the basis of the evidence given by the Appellant the Tribunal finds that each of the Appellant and her mother purchased 400 cigarettes i.e. two 200 cigarette boxes bound together. The Tribunal were told and accept that the Appellant put hers into her hand luggage and that her mother carried hers in a clear duty-free bag and therefore not within her luggage.

27. Upon landing, disembarking and clearing passport control the Appellant and her mother arrived in baggage reclaim. The Appellant cannot remember exactly whether she removed her suitcase from the carousel or whether it had already been removed. However, her evidence, accepted by the Tribunal, is that also present at the carousel were four Border Force officers.

28. Upon seeing them the Appellant stated that she “knew they were for her”. The Appellant described that in the UK when checking in for a flight the assistant always asks whether she has packed her luggage herself and whether she is carrying anything for anyone else. Her evidence is that those questions are not/were not asked in Sharma el Sheikh but she felt uncomfortable because she knew she was carrying goods on behalf of her then husband.

29. The Appellant also explained that some years previously she had imported, by post, 5 identical CDs from the US. When these arrived she was contacted and required to pay import duties on them because she was told that 5 CDs could not be for personal use as they were all the same.

30. Conscious of that prior experience the Appellant explained that she was uncomfortable that she was carrying the molasses which she knew was not for herself and would be delivered to her then husband’s friend at the Hilton. The Appellant was adamant that she did not know that the molasses contained tobacco nor that excise and customs duties were, in any event, payable on non-tobacco molasses.

31. Despite her discomfort the Appellant proceeded through the green channel. She explained that she knew that she would be stopped because the officers were following her. She also said that she knew that the molasses would be taken from her. However, her decision to proceed through the green channel was because she feared the consequences of voluntarily surrendering the molasses by going through the red channel.

32. In evidence the Appellant was completely clear that the fear of her husband and the consequences that would follow were what caused her to go through the green rather than the red channel. It was put to the Appellant in cross-examination that she could have gone to the red channel, surrendered to goods and lied to her husband. This was flatly denied by the Appellant who explained firstly that she would never have lied in that way and that, in any event, the status of her ex-husband and his father meant that she was confident that such a lie would have been found out and that would have made things even worse.

33. Once she had entered the green channel the Appellant was stopped by the officers. She was asked for her passport which was taken from her and although her recollection was not entirely clear she believes that the details of it were taken down and entered into a computer. Both she and her mother were cautioned following which the Appellant unlocked her suitcase and it was searched.

34. The molasses was removed from her suitcase and hand baggage and the cigarettes were taken from both the Appellant and her mother. The Appellant’s evidence is that they were put into clear plastic bags by the officers. She did not see the bags weighed and was confident that they were not weighed before she left the green channel.

35. The Appellant confirmed that she was asked to sign a document prior to departure from the airport. The Appellant has, with complete consistency both in correspondence and in testimony, stated that she was asked to sign a form to confirm that the goods had been seized and that she understood why. She has been equally consistent that when she signed it the form did not include the details of the goods seized and that she was not provided with any paperwork informing her of her rights to challenge seizure.

36. When cross-examined as to why she would sign a form that did not contain the details of the goods seized the Appellant answered that she would have no reason to believe that when later completed it would not be accurate.

37. As indicated in paragraph 14 above Mr Evans the seizing officer did not provide a witness statement and was not present at the tribunal hearing. Within the bundle was a copy of pages 42 - 45 of a notebook said to be Mr Evans'.

38. The Tribunal had some significant concerns about the notebook provided. Whilst no handwriting experts the Tribunal was concerned that the notebook appeared to have been written up by two different people. However, it and the BOR156 is the only evidence the Tribunal has from HMRC.

39. Consistent with the Appellant's evidence the Notebook records that the Appellant's suitcase was a brown Conwood bag. The Notebook suggests that having been identified the bag was "left with another officer" and officer Evans then went into the luggage hall (at 21:38). It is then noted that at 21:40 "I observed a female IC6 PAX pick up the bag from Belt 5 and proceed to the Green channel". There is an apparent inconsistency as it is unclear to the Tribunal how the bag can both have been left with another officer and remained on the belt. However, the Notebook would appear to indicate that it was the Appellant who lifted the case from the luggage conveyor belt though as indicated in paragraph 27 above the Appellant could not confirm that position with certainty.

40. The Notebook indicates that 4 trolley bags were searched, by reference to the Appellant's evidence, those bags were one suitcase and one hand baggage sized case each for the Appellant and her mother. The Notebook records that 50kg of Al Fakher water pipe tobacco and 1,000 king size filter-tipped cigarettes were seized at 21:55. The Notebook does not say in which bags the various items were found.

41. It is recorded that BOR156, 152, Notice 1 and 12a were issued to the Appellant who left at 22:05.

42. The BOR 0156 as it appears within the bundle of documents records that it was issued to both the Appellant and "Gillian May Nadia Moustapha" and the address shown is that of the Appellant at the time of the seizure. It shows that 50kg Al Fakher and 1,000 KSF cigarettes were seized. It is noted by the Tribunal that whilst HMRC accept that Al Fakher produce both tobacco and non-tobacco water pipe molasses the BOR156 does not identify which type of molasses was seized.

43. The Appellant has consistently through correspondence denied that she had 50kg of molasses but has accepted in correspondence carrying "approximately" 20kg but also repeatedly stated that she did not exceed her baggage allowance.

44. There is a clear conflict between the Notebook/BOR156 and the Appellant's evidence in 5 material regards:

- (1) The quantity of Al Fakher seized
- (2) Whether the Al Fakher was tobacco or non-tobacco
- (3) The quantity of cigarettes seized
- (4) From whom those cigarettes were seized
- (5) Whether the necessary paperwork was completed and given to the Appellant

45. Dealing with each of these matters in turn.

Al Fakher

46. HMRC contentions are principally based on Mr Evans' notebook and the Appellant's signature of the BOR156 to support their allegation that 50kg of water pipe tobacco was imported.

47. They contend that the Appellant has produced no independent evidence that she was within her baggage allowance.

48. The Tribunal accepts that the Appellant believed that the molasses she was asked to carry was non-tobacco. The evidence on the BOR156 does not indicate whether it was tobacco or non-tobacco. The Notebook indicates that it was tobacco molasses.

49. On the basis that the Appellant did not confirm that she personally checked the packaging the Tribunal are prepared to accept, on the balance of probabilities, the HMRC evidence that the product concerned was a tobacco product.

50. However, the Tribunal cannot accept that the quantity imported was 50kg. As set out above the Appellant's evidence was that she was not over her luggage allowance and that her case also had clothes, shoes etc. in it. The Appellant accepts that she was carrying "more like" 20kg of molasses. HMRC's own evidence appears to be that the Appellant herself lifted the luggage off the conveyor. Further, the Appellant, albeit for the first time at the hearing, stated that she had given £160 to her ex-husband to purchase the molasses.

51. On the basis of the evidence taken as a whole the Tribunal considers that, on the balance of probabilities, the amount carried was 15kg. The basis of this conclusion is:

- (1) It is almost inconceivable that the Appellant could have been able to lift a suitcase containing up to 50kg
- (2) HMRC's evidence indicates that the Appellant did lift the suitcase
- (3) At 50kg plus clothing etc. the Appellant would have been twice her baggage allowance
- (4) The Tribunal has accepted the Appellant's evidence that she did not pay any excess luggage charge
- (5) 15kg would seem a reasonable weight on top of existing luggage
- (6) The cash used was £160 which, using HMRC's value for molasses indicates that of the order of £15kg could have been purchased
- (7) 15kg is not inconsistent with the Appellant's own admission as to volume carried

Cigarettes

52. The Appellant accepts that she was carrying 400 cigarettes and states that her mother was carrying a similar amount with both carrying them as presents for the Appellant's father. HMRC did not put it to the Appellant that her mother was carrying the cigarettes on behalf of the Appellant; it was merely asserted that the penalties had been raised on the basis that she was.

53. On the basis of the evidence available the Tribunal has concluded that the Appellant's mother was not carrying cigarettes on behalf of the Appellant and that on the balance of probabilities the Appellant was carrying 400 cigarettes.

54. The Tribunal determines that the Appellant did not import those carried by her mother as the Appellant was not responsible for them.

Documentation

55. HMRC chose not to tender any evidence from the seizing officer. The Appellant's account of signing the BOR156 has been uniformly consistent. Her actions upon receipt of the penalty assessment sent on 7 June 2018 are consistent with her acting and responding to the receipt of official paperwork promptly. Absent evidence that was open to cross-examination on the balance of probabilities the Tribunal accepts that the Appellant did not acknowledge seizure of 50kgs of Al Fakher or 1,000 cigarettes.

56. It is not necessary for the Tribunal to determine whether the figures were completed after the Appellant left and on that basis the Tribunal makes no finding as to the proper or improper completion of the BOR156 but simply finds that the document cannot, without Mr Evans, be used by HMRC as evidence of the volumes of seizure.

RELEVANT LEGISLATION

57. Pursuant to s.78 of Customs and Excise Management Act 1979 any person entering the UK shall, at such place and in such manner as HMRC may direct, declare anything contained in his/her baggage or carried with him/her which he has obtained outside the United Kingdom and in respect of which he/she is not entitled to exemption from duty and tax by virtue of any order under section 13 of the Customs and Excise Duties (General Reliefs) Act 1979 (personal reliefs).

Excise Duty

58. Pursuant to s.2 of the Tobacco Products Duty Act 1979 ('TPDA 1979') excise duty is payable on tobacco products imported into the UK. The excise duty payable at the relevant time was 16.5 percent of the lowest recommended retail price of the cigarettes plus £184.10 per thousand cigarettes and £100.96 per kilogram of tobacco in accordance with schedule 1, TPDA 1979.

59. Pursuant to Articles 2 and 3 and schedule 1 of the Travellers' Allowances Order 1994 (and Article 3(1) of Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries) an individual is exempted from excise duty and VAT on 200 cigarettes and 250g of smoking tobacco imported in his personal luggage for non-commercial purposes from a non-EU Member State country.

60. Pursuant to s.8(1) FA 1994 any person who engages in any conduct involving dishonesty for the purpose of evading any excise duty shall be liable to a penalty of an amount equal to the amount of duty evaded or sought to be evaded.

61. Section 8(4) FA 1994 provides that where a person is liable to a penalty HMRC or, on appeal, the FTT, may reduce such a penalty to such amount (including nil) as they think proper. However in exercising this power neither HMRC nor the FTT can take into account the insufficiency of funds available to any person for paying any duty of excise or the penalty or the fact that there has been no or no significant loss of duty.

62. Pursuant to s.14 FA 1994 any person liable to pay any such penalty may require HMRC to review the decision to impose the penalty and pursuant to s.16 FA 1994 any person may appeal against a decision on review to the FTT.

Customs duty

63. Customs duty is payable on cigarettes imported in EU Member States from outside of the EU (Article 4 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff ('the Combined Nomenclature')). At the date the Cigarettes and water pipe tobacco were brought into the UK by the Appellant the rate of customs duty payable on cigarettes was 57.6 percent of their value and the rate of customs duty payable on water-pipe tobacco was 74.9 percent (Articles 1 and 2 of and Annex I (2402 20 90 and 2403 1100) to the Commission Implementing Regulation (EU) No 927/2012 of 9 October 2012 amending Annex I to the Combined Nomenclature).

64. Pursuant to sections 1 and 16 of the Value Added Tax Act 1994 ('VATA 1994') provisions in relation to duties of customs and excise charged on the importation of goods entering the EU apply in relation to any VAT chargeable on the importation of goods as they apply in relation to customs and excise duty and such VAT is to be charged and payable as if it were a customs duty. At the date the Cigarettes and water pipe tobacco were brought into the

UK by the Appellant VAT was charged at 20 percent of the value of the goods (valued in accordance with s.21 VATA 1994) (s.1(1)(c) VATA 1994).

65. Pursuant to ss 24 and 25 FA 2003, any person who engages in any conduct involving dishonesty for the purpose of evading customs duty and/or import VAT is liable for a penalty of an amount equal to the amount of the tax or duty evaded or sought to be evaded.

66. Pursuant to s.29 FA 2003 HMRC or, on appeal, the FTT, may reduce such a penalty to such amount (including nil) as they think proper. However in exercising this power neither HMRC nor the FTT can take into account the insufficiency of funds available to any person for paying any duty of excise or the penalty or the fact that there has been no or no significant loss of duty.

67. Pursuant to s.33 FA 2003 any person liable to pay any such penalty may appeal against this decision to the FTT.

DISHONEST CONDUCT

68. As set out in HMRC's submissions the test for dishonesty is the test in *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [10] as approved by the *Supreme Court in Ivey v Genting Casinos Ltd* [2018] AC 391 at [74]). First the FTT must ascertain (subjectively) the actual state of the Appellant's knowledge or belief as to the facts. Once the FTT has ascertained the Appellant's actual state of mind as to knowledge or belief, the FTT must determine whether her conduct was honest or dishonest applying the (objective) standards of ordinary decent people.

HMRC's submission

69. HMRC contend that on the Appellant's own case as set out in her Notice of Appeal:

- (1) She had 400 cigarettes (which was double the duty free allowance).
- (2) She was under the impression that the water pipe tobacco was "menthol shisha molasses that did not contain any tobacco";
- (3) On entering the UK 4 customs officers followed her. Although she saw the officers, she walked through the nothing to declare exit; and
- (4) She felt panicked by this as it was intimidating to have the officers wait behind her as she collected her bags and then follow her. At this time, she did not believe that she had anything to declare but when seeing the officers follow her "wandered (sic) if [she] was allowed to bring molasses into the country".

70. HMRC also point to the information contained in the Appellant's letter of 18 June 2018, in which she accepted that:

- (1) She "did not understand that water pipe tobacco was classed as a tobacco product but [she] felt uncomfortable that [she] was bringing 20kg of anything back to the UK"; and
- (2) "[A]gainst [her] better judgements (sic), [she] entered the UK with the Shisha and even after being met and followed by 4 custom officers [she] panicked and walked through the nothing to declare channel".

71. Accordingly, it is contended, even on the Appellant's version of events, applying the test for dishonesty in *Barlow Clowes*, the Appellant's behaviour was dishonest.

72. As regards the Appellant's knowledge or belief as to the facts, HMRC contend that on the Appellant's version of events, at the time she entered the green channel, she was not sure whether she was allowed to bring the water pipe tobacco that she was transporting into the UK without paying duty and yet, against her better judgment, she entered the green channel.

Despite the Appellant not being sure whether she was entitled to enter the green channel with the water pipe tobacco and despite there being customs officers within her vicinity whom she could have asked, she chose not to clarify whether she was entitled to bring the water pipe tobacco into the UK but chose to simply enter the green channel.

73. HMRC submit that choosing to enter the green channel, against her better judgment, when she was unsure if she was entitled to do so and without taking steps to clarify whether she was so entitled, was dishonest according to the standards of ordinary decent people. An ordinary decent person would have clarified whether they were entitled to enter the green channel prior to doing so; most obviously with the four customs officers said to be in their vicinity.

74. Further, HMRC contend that the Appellant must have been aware that there were restrictions on the number of cigarettes which could be imported to the UK. On the Appellant's own account, she questioned her ex-husband about whether the water pipe tobacco contained tobacco which demonstrates that she knew that there were restrictions on importation of tobacco-based products. Secondly it is inconceivable that the Appellant did not see signage at Heathrow explaining restrictions on importation of dutiable goods including cigarettes as described in Officer Baxter's review conclusion letter. Accordingly the Appellant must have known that she was only entitled to import 200 cigarettes duty free.

75. By entering the green channel with goods which she was unsure if she was allowed and/or which she was aware that she was not allowed to bring into the country without paying tax and duty, the Appellant engaged in conduct involving dishonesty for the purpose of evading tax and duty. Consequently the Appellant was liable for penalties equal to the tax and duty evaded or sought to be evaded pursuant to ss24 and 25 FA 2003 and s.8(1) FA 1994.

Decision on dishonesty

76. The Appellant accepts that the cigarettes imported were over the permitted allowance. Whilst she contends that she did not, at the time, appreciate she was over the allowance she was aware that there was an allowance and that it was easily discernible from the signage in the airport terminal.

77. As regards the molasses the Appellant has maintained that she believed that she was carrying non-tobacco water pipe molasses and that she did not know that such molasses was even subject to excise duty. The Tribunal accepts her evidence that she did not know that the molasses contained tobacco.

78. However, she has freely admitted that she was uncomfortable carrying the molasses on behalf of her husband and that she was aware that it was not for personal use and would be sold by her husband's friend. She was aware that it was possible she was breaking the law and, therefore, her admission is, de facto, of dishonesty by reference to the applicable test in the sense that it is evidence that she subjectively knew what she was doing was wrong or that it was likely to be viewed by ordinary people as wrong despite the fact that she felt she had no real choice other than to act as she did.

79. The fear she had of her husband and her rationale for choosing the green channel do not go to the question of dishonesty but rather to the mitigation which should be applied to the penalties.

80. The Tribunal therefore finds that the case for dishonesty has been made out by HMRC.

Amount of penalty

81. As set out above the Tribunal has concluded, on the balance of probabilities that the Appellant imported: (1) 15kg of water pipe tobacco molasses and (2) 400 cigarettes.

82. HMRC, by their penalty assessments have permitted the Appellant to use her tobacco allowance against 200 of the cigarettes imported. The Tribunal agrees that this approach is appropriate.

83. HMRC did not permit the Appellant any personal allowance in respect of the water pipe tobacco. The Tribunal agrees with this approach. The water pipe tobacco was imported for commercial purposes by the Appellant's own admission and the provisions of the Travel Allowance Order do not therefore apply.

84. The Tribunal has undertaken the following recalculation of the penalty assessment position based on the conclusions as to quantities imported:

Excuse Duty

Cigarettes

Calculation based on percentage of RRP

Malborough Red	200 x RRP £8.50 x Duty Rate 16.50%	£14.03
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Calculation based on rate per 1000

Malborough Red	0.2 x specific duty rate £184.10	<u>£26.82</u>
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Total excise duty		£40.85
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Other tobacco products

Al Fakher	15kg x rate per kg £100.96	£1,514.40
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<u>Total excise duty</u>		<u>£1,555.25</u>
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Customs duty

Cigarettes

Malborough Red	200 x price per 20 £0.41 x duty rate 57.8%	£2.36
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Other tobacco products

Al Fakher	15kg x price per kg £9.13 x duty rate 74.9%	£102.58
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<u>Total customs duty rounded down to the nearest £</u>		<u>£104.00</u>
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Import VAT

Value of cigarettes	£	4.10
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Value of other tobacco	£	139.95
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Customs Duty	£	104.00
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Excise Duty		<u>£1,555.25*</u>
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		£1,803.00
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VAT @ 20%

£360.60

Total duty calculation

£2,163.60

Mitigation of the penalty

HMRC's submission

85. HMRC accept that there is no statutory guidance on what principles should be applied in determining any reduction. However, HMRC's policy on mitigation is set out in HMRC Notices 160 and 300 which provide that HMRC will reduce such penalties by up to 80 percent as follows:

(1) Up to 40 percent for disclosure - an early and truthful explanation as to why the arrears of tax arose and the true extent of them including what has happened and over what period of time along with any information about the value involved rather than the precise quantification.

(2) Up to 40 percent for cooperation - fully embracing and meeting responsibilities under the penalty procedure by, for example, supplying information promptly, answering all questions truthfully, giving the relevant information to establish the true liability and cooperating to the end of the investigation.

86. In the present case HMRC awarded the Appellant a 30 percent reduction for disclosure and a 30 percent reduction for cooperation.

87. The basis for reduction applied is stated to be:

(1) HMRC's policy of a maximum reduction of 80 percent and therefore a minimum penalty of 20 percent) is not appropriate where the Appellant was, by her own admission, unsure whether she was entitled to enter the green channel with the goods in her luggage and yet, despite there being customs officers in her vicinity with whom she could have clarified this, chose not to do so and simply enter the green channel. Whilst the Appellant's marital circumstances were unfortunate, the Appellant, upon her own admission, made a choice to enter the green channel in circumstances where she was not sure whether she was entitled to do so and was, in fact, not so entitled.

(2) Despite the seizure and the Appellant having signed the Form BOR156 to confirm this, the Appellant continued to maintain that only 400 cigarettes and circa 20kg of shisha were seized and refuses to accept that it was tobacco which was seized. Further the Appellant has failed to provide any documentary evidence to support such assertions or her assertion that the Form BOR156 which she signed (and which she was given a copy of) did not include quantities. The Appellant has therefore not fully disclosed the extent of the attempted evasion or fully cooperated with HMRC's investigation.

(3) The Appellant declined to remain for interview when initially intercepted by Officer Evans, the earliest point at which she could have disclosed the full extent of and reasons for her wrongdoing.

(4) Despite having paid for the molasses and cigarettes the Appellant has failed to provide information about their cost which could be used by HMRC to calculate the customs duty based on actual rather than estimated value.

88. HMRC consider that a reduction of 60 out of a maximum of 80 percent therefore properly reflects the quality of the Appellant's disclosure and cooperation.

Proper level of penalty

89. The Tribunal is required to determine the penalty in the amount they think proper. The Tribunal is not bound by HMRC's policy on mitigation but the Tribunal does consider that where dishonesty has been established it is inappropriate to reduce the penalty to nil.

90. In determining the proper penalty which should be imposed the Tribunal takes account of all the factors considered by HMRC to be relevant justifying their mitigation percentage of 60%.

91. However, the Tribunal considers there are factors in addition to those considered by HMRC to justify a reduction. These factors are:

(1) The Appellant's fear of her then husband and his family was the principal cause of her entering the green channel irrespective of the presence of the Border Force Officers

(2) The volumes imported reflected the evidence of the Appellant and hence rebutted HMRC's assertion that her protests as to quantity imported should limit the mitigation allowed.

92. In addition, the Tribunal cannot see that the Appellant could have done much more by way of co-operation once she was aware of the allegation particularly given the passage of time after the seizure. The only additional information provided by the Appellant since her explanation given in correspondence was the sum of money handed to her husband to purchase the molasses and this would have assisted HMRC. The Tribunal does not consider that significant enough to limit the allowable mitigation.

93. Overall the Tribunal concludes that the proper level of penalty in the present case is 20% of the tax and duty dishonestly evaded giving a total penalty due of £432.72.

DECISION

94. For the reasons given above the Tribunal allows the appeal in part.

95. The Penalty is upheld in the sum of **£432.72**.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

96. 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.

**AMANDA BROWN
TRIBUNAL JUDGE**

RELEASE DATE: 04 SEPTEMBER 2019