



TC07994

CUSTOMS AND EXCISE DUTY PENALTIES – importation of 8kg hand rolling tobacco – penalties imposed for conduct involving dishonesty – Appellant stated unaware of legal limits and had been given incorrect information when purchasing overseas – held conduct dishonest and appropriate mitigation given for disclosure and cooperation – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/06218

BETWEEN

JATINDER KALAR

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE JEANETTE ZAMAN

The Tribunal determined the appeal on 11 January 2021 without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because of the Covid-19 pandemic. The documents to which I was referred are described in the decision.

DECISION

INTRODUCTION AND SUMMARY

1. HMRC issued a joint civil evasion penalty of £1,355 (the “Penalty”) to Mr Kalar on 27 June 2019 in respect of 8kg of hand rolling tobacco which was seized from him at Heathrow Airport on 21 May 2018. That Penalty comprised a customs evasion penalty of £471 and an excise evasion penalty of £884. Mr Kalar had requested a review of HMRC’s decision to issue the Penalty. The review conclusion letter dated 5 September 2019 upheld the decision to issue the Penalty. Mr Kalar appealed to the Tribunal on 22 September 2019.

2. For the reasons set out below, I have concluded that, even on the basis that Mr Kalar did ask a member of staff at Doha airport when he bought the tobacco about the legal limits for bringing tobacco into the UK, it was not reasonable to rely on any information given in that situation and the actions of Mr Kalar in bringing such a large amount of tobacco into the UK without declaring and paying the required duties were dishonest by the standards of ordinary and honest people. Having considered the level of disclosure and cooperation by Mr Kalar I have also concluded that the appropriate level of mitigation has been applied by HMRC to reduce the penalty (ie an aggregate of 50%). The appeal is dismissed.

BACKGROUND AND FINDINGS OF FACT

3. I had various papers in a hearing bundle of 356 pages, including Mr Kalar’s notice of appeal, correspondence between the parties including the review conclusion letter, HMRC’s statement of case dated 2 December 2019, extracts from the Border Force officer’s notebook (Officer Amarjit Panesar), together with a witness statement dated 5 March 2020 from Officer Panesar and a witness statement of Officer Martyn Davies of HMRC dated 28 February 2020. The hearing bundle also included relevant legislation, cases and HMRC notices.

4. In preparing for the appeal to be determined on the papers the Tribunal had asked the parties to provide an outline of the factual assertions made by the other party which they did not accept. Mr Kalar did not provide a response. HMRC stated that their factual assertions were set out in the Statement of Case and, based on Mr Kalar’s notice of appeal, HMRC could not identify any factual assertions that Mr Kalar disagreed with. HMRC thus also failed to answer the question. Whilst both parties failed to identify factual assertions made by the other with which they disagree, I considered that I was nevertheless able to make the relevant findings of fact without the benefit of this information.

5. These findings of fact are based on the evidence before me – I consider that they are largely common ground, albeit that the parties take issue as to whether they constitute dishonesty. Having reviewed the evidence, there are two matters of fact which may potentially be in issue between the parties – what Mr Kalar was told by the Border Force officer at the time of the seizure as to whether further action would be taken, and whether he asked at Doha airport about the legal limits for bringing tobacco into the UK. I address both of these matters in the Discussion.

6. On 21 May 2018 Jatinder Kalar and his travel companion were stopped by Officer Panesar of UK Border Force at London Heathrow Airport, returning back from Doha. Mr Kalar had entered the green channel indicating he had nothing to declare. Officer Panesar explained the duty free allowances from outside the EU and asked if they had anything to declare to customs, to which Mr Kalar responded “yes”. Officer Panesar then continued to ask if all the luggage and their contents were Mr Kalar’s and if it was packed by him. He responded “yes”.

7. Following a search of Mr Kalar’s bags, 8kg of Amber Leaf hand rolling tobacco was found and seized. The goods were seized as they were over the permitted personal allowance

of 250g of tobacco when travelling from a non-EU country. Officer Panesar issued Mr Kalar with forms BOR156 and BOR162, and Excise Notices 1 and 12A. Mr Kalar signed and dated the warning letter about seized goods.

8. Mr Kalar did not challenge the legality of the seizure.

9. On 20 May 2019, a post detection audit officer of HMRC wrote to Mr Kalar to inform him of HMRC's enquiry into the evasion of customs and excise duties and invited him to disclose any relevant information/documents. The letter explained that co-operation with the enquiry could reduce any penalties that may become due. Public Notices 300 and 160 and factsheet CC/FS9 were also issued to Mr Kalar at the same time.

10. On 24 May 2019, Mr Kalar telephoned HMRC and spoke to Officer Hirst. Mr Kalar stated that he received the letter from HMRC but was unsure what it was about. Mr Kalar confirmed that he had his goods seized approximately a year earlier. Officer Hirst explained to Mr Kalar that the letter was in relation to the seizure on 21 May 2018 and that there were questions within the letter to which he would need to reply in writing if he wanted to help with the enquiry. Nothing was received from Mr Kalar, and on 3 June 2019, Officer Hirst issued a reminder letter to him informing him that if he wished to co-operate with HMRC's enquiry he should provide a response by 19 June 2019.

11. On 13 June 2019 HMRC received a letter from Mr Kalar dated 5 June 2019. He had signed to say that he had read Public Notices 300 and 160 and Factsheet CC/FS9 and understood their contents and provided a written reply to each of the questions put by HMRC in the letter of 20 May 2019. Several of those answers were to state that "no one was involved" in the attempted smuggling, but his responses did include the following:

(1) he listed previous travel, two of which trips were prior to the seizure (trips to India in November 2017 and January 2018); and

(2) he said that on returning from India in May 2018 he purchased tobacco for personal use and at no point when he purchased the goods was he informed of his legal allowance. He was shocked when he was told (on being stopped and searched) that he had exceeded his legal allowance. He offered to pay the duty on the goods but was told this was not possible and the officer was confiscating the goods. At that point the officer advised him that as this was a first time offense, this would be dealt with by a warning, and he signed over the goods to the officer. He was concerned to be approached a year on, apologised for his naivety and has not attempted to bring any goods, other than his legal allowance.

12. On 27 June 2019 the Penalty was issued to Mr Kalar by Officer Hands. Officer Hands issued the Penalty on behalf of Officer Davies – it was Officer Davies who had considered the evidence to support the issue of a penalty and the appropriate level of mitigation. That penalty was for a total of £1,355. HMRC calculated that the total duty evaded was £2,711, and awarded a reduction of 50% (25% for disclosure and 25% co-operation), as Mr Kalar had provided information and assistance in relation to HMRC's enquiries. The Penalty comprised of a £471 customs evasion penalty and £884 excise evasion penalty. A duty schedule (which shows how the duties have been calculated) and form HMRC 1 (what you can do if you disagree) was also attached to that letter. The letter itself also outlined the options available to Mr Kalar if he disagreed and explained the process for requesting a review or appealing directly to the Tribunal.

13. On 24 July 2019 Mr Kalar telephoned HMRC and spoke to Officer Hall. Mr Kalar said he had received the penalty letter and wanted to request a review. He was told that the review request would need to be put in writing.

14. On 26 July 2019 HMRC received a letter dated 24 July 2019 from Mr Kalar requesting a review. In that letter he re-iterated that it was his first offence and that he had been fully compliant and honest when stopped at Heathrow and added that:

- (1) at Doha airport he spoke to staff asking about his legal allowance and was provided with false information; and
- (2) due to being in a foreign country he had no access to the internet to obtain this information.

15. On 5 September 2019 HMRC wrote to Mr Kalar upholding, on review, the decision to issue the Penalty and the amount, with the reviewing officer confirming that the reduction he had been given was “within a range” she would expect based on the information he had provided.

16. On the 22 September 2019 Mr Kalar appealed to the Tribunal.

RELEVANT LAW

17. In respect of penalties for unpaid excise duty, s8 Finance Act 1994 (“FA 1994”) provides, so far as relevant, as follows:

“8. Penalty for evasion of excise duty

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

- (a) any person engages in any conduct for the purpose of evading any duty of excise, and
- (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 or any part of the reduction made by the Commissioners.

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

- (a) the insufficiency of the funds available to any person for paying any duty of excise or for paying the amount of the penalty;
- (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of duty.”

18. Sections 12 and 13 FA 1994 provide, so far as relevant, as follows:

“12. Assessments to excise duty

(1) Subject to subsection (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

(b) that there has been a default falling within subsection (2) below,
the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.

...

(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say-

(a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

(5) Subsection (4) above shall have effect as if the reference in paragraph (a) to 4 years were a reference to twenty years in any case falling within subsection (5A)(a) or (b).

(5A) The cases are-

(a) a case involving a loss of duty of excise brought about deliberately by the person assessed (P) or by another person acting on P's behalf, and

(b) a case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of duty of excise.

13. Assessments to penalties

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

(2) An assessment under this section may be combined with an assessment under section 12 above, but any notification for the purposes of any such combined assessment shall separately identify any amount assessed by way of a penalty."

19. In respect of penalties for unpaid import VAT (a "relevant tax or duty" for these purposes), s25 to 32 Finance Act 2003 ("FA 2003") provide, so far as relevant, as follows:

"25. 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.
- (2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).
- (3) Those matters are-
 - (a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,
 - (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,
 - (c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

...

30. Demands for penalties

- (1) Where a person is liable to a penalty under this Part, the Commissioners may give to that person or his representative a notice in writing (a "demand notice") demanding payment of the amount due by way of penalty.
- (2) An amount demanded as due from a person or his representative in accordance with subsection (1) is recoverable as if it were an amount due from the person or, as the case may be, the representative as an amount of customs duty. This subsection is subject to-
 - (a) any appeal under section 33 (appeals to tribunal); and
 - (b) subsection (3).
- (3) An amount so demanded is not recoverable if or to the extent that-
 - (a) the demand has subsequently been withdrawn; or
 - (b) the amount has been reduced under section 29.

...

31. Time limits for demands for penalties

- (1) A demand notice may not be given-
 - (a) in the case of a penalty under section 25, more than 20 years after the conduct giving rise to the liability to the penalty ceased, or
 - (b) in the case of a penalty under section 26, more than 3 years after the conduct giving rise to the liability to the penalty ceased.
- (2) A demand notice may not be given more than 2 years after there has come to the knowledge of the Commissioners evidence of facts sufficient in the opinion of the Commissioners to justify the giving of the demand notice.

- (3) A demand notice-
 - (a) may be given in respect of a penalty to which a person was liable under section 25 or 26 immediately before his death, but
 - (b) in the case of a penalty to which the deceased was so liable under section 25, may not be given more than 3 years after his death.

...

33. Right to appeal against certain decisions

...

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

- (a) their decision that the person is liable to a penalty under section 25 or 26, or
- (b) their decision as to the amount of the liability.

...

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

- (a) power to quash or vary a decision; and
- (b) power to substitute the tribunal's own decision for any decision so quashed.

(7) On an appeal under this section-

- (a) the burden of proof as to the matters mentioned in section 25(1) or 26(1) lies on HMRC; but
- (b) it is otherwise for the appellant to show that the grounds on which any such appeal is brought have been established.”

20. Provisions relating to forfeiture are set out in the Customs and Excise Management Act 1979 (“CEMA 1979”) as follows:

“49. Forfeiture of goods improperly imported

- (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.

...

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

...

- (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.

...

139. 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 1998 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.

21. Paragraph 5 of Schedule 3 of CEMA 1979 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.”

22. The Travellers’ Allowances Order 1994 provides that persons travelling from a “third country”, ie non-EU countries, are relieved from payment of VAT and excise duty on a personal allowance of 250g of smoking tobacco.

GROUND OF APPEAL OF MR KALAR

23. Mr Kalar’s explanation is set out in his letters to HMRC (those dated 5 June 2019 and 24 July 2019) and his notice of appeal to the Tribunal (in both the sections related to hardship and the stated grounds of appeal). Based on that information, I consider that Mr Kalar’s grounds of appeal are:

- (1) the tobacco was for personal use;
- (2) this was his first offence and it was act of naivety;
- (3) he spoke to the staff at Doha airport and was provided false information regarding the legal allowance;
- (4) he had not been able to access the internet at Doha airport to check the information about legal limits;
- (5) at Heathrow airport he was fully compliant with the Customs Officer and offered to pay the duty at the time but the Customs Officer advised that as it was his first time the goods would be confiscated but no further action would be taken. He apologised for the mistake at the time; and
- (6) he is on a low income due to long-term health conditions, his family are financially dependant on his income and paying the penalty would cause financial problems for the family’s basic living needs.

SUBMISSIONS OF HMRC

24. HMRC submit that the test for dishonesty is set out in the decision of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords Club* [2017] UKSC 67. This makes it clear that it is first necessary to establish the actual state of the individual’s knowledge or belief as to the facts. 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 appellant must appreciate that what he has done is, by those standards, dishonest.

25. Mr Kalar was stopped in the green channel, thereby indicating that he had nothing to declare to Border Force. This proved to be a false indication, as he was found to be carrying 8kg of tobacco. According to the Travellers’ Allowance Order 1994, the maximum amount of tobacco permitted to be imported from a third country is 250g – he was thus carrying 32 times the legal limit. A reasonable and honest person would consider it dishonest to bring in 32 times the permitted allowance without declaring it.

26. It is the responsibility of a traveller to make themselves aware of the permitted allowances when bringing goods into the UK:

- (1) The rules and regulations on bringing and declaring goods are shown on the Gov.uk website.
- (2) There are signs at all UK airports which outline the restrictions and allowances on bringing goods into the UK. The signs are visual aids with pictures of dutiable goods,

including tobacco products. There are also clear signs showing the location of the green channel. HMRC submit that Mr Kalar chose to ignore these signs.

(3) It is not the responsibility of the airport staff overseas to advise travellers, many of whom are travelling to various countries around the world, as to what restrictions there are on importing tobacco products into their destination country. It is Mr Kalar's responsibility as a traveller to ensure that he does not exceed his dutiable allowance, and it would have been advisable to ask an appropriate Border Force official in the UK if he were in any doubt.

27. HMRC submit that ignorance of the many signs and the information available is indicative that Mr Kalar acted dishonestly by the standards of ordinary and honest people.

28. HMRC drew attention to the fact that 8kg of tobacco is a large amount and this is 32 times the personal allowance. The attraction of buying cheaper excisable goods abroad is well known. Even if you were not aware of your exact allowances, HMRC do not find it credible that Mr Kalar would believe the allowance would be as much as 8kg or that it would be within the law to import such a high quantity into the UK, without making a declaration.

29. HMRC contend that although Mr Kalar states that he was fully compliant with the Border Force Officer, he signed the BOR 156 and 162 and was issued the Notice 1 form when the seizure took place on 21 May 2018. Form BOR162 clearly states that HMRC may take action such as issuing an assessment for any evaded tax or duty and a wrongdoing penalty. HMRC are satisfied that Mr Kalar was made aware of any possible action that HMRC may take.

30. As Mr Kalar did not appeal the seizure of the goods, the goods have been condemned as forfeit. It is not open to the Tribunal to consider if the goods were imported for a commercial purpose; that is held as fact as the goods have been condemned (*HMRC v Jones* [2011] EWCA Civ 824).

31. HMRC and, on appeal, the Tribunal "may reduce any penalty to such amount (including nil) as they think proper". Public Notice 300 details a maximum of 40% reduction for disclosure and 40% for co-operation. The policy has no statutory force, and is therefore not binding on the Tribunal. However, HMRC contend that this policy provides for a consistent approach for the reduction of penalties and should normally be respected. In this case, HMRC have allowed a 25% reduction for disclosure and 25% for co-operation.

DISCUSSION

32. The issue in this appeal is whether or not the Penalty was properly imposed. The duty evaded was £2,711 and the penalties were imposed under s8 FA 1994 and s25 FA 2003, both of which can only apply where a person's conduct involves dishonesty.

33. The burden of proof to establish conduct involving dishonesty is on HMRC; once this has been met, the burden is on Mr Kalar to demonstrate that the grounds on which his appeal is brought have been established. The standard of proof is the balance of probabilities.

34. The test for dishonesty when issuing a civil evasion penalty is, as HMRC say, an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The test to be applied is as stated by the Supreme Court in *Ivey v Genting*:

"62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that

the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492; [2007] Bus LR 220; [2007] 1 Lloyd's Rep 115 and *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480, who had been a party also to *Twinsectra*: "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 state of the law and their Lordships agree."

63. Although the House of Lords and Privy Council were careful in these cases to confine their decisions to civil cases, there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution. Dishonesty is a simple, if occasionally imprecise, English word. It would be an affront to the law if its meaning differed according to the kind of proceedings in which it arose.

...

74. ...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*: see para 62 above. 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."

35. Mr Kalar's grounds make it clear (by describing this as an act of naivety, and saying that he had been given false information at Doha airport) that he is denying dishonesty. He is essentially arguing that he believed the duty free limits to be much higher than they actually were and, accordingly, he had not acted dishonestly in exceeding them.

36. HMRC submit that it is Mr Kalar's responsibility to make himself aware of the permitted allowances, and that it is not the responsibility of overseas airport staff to advise travellers who will be travelling to various countries around the world.

37. I must accept HMRC's submission that, as Mr Kalar did not appeal the seizure of the tobacco, the goods have been condemned as forfeit and it is not open for me to consider if the goods were imported for a commercial purpose; based on *Jones*, that is held as fact. However, that does not of itself answer the question as to whether Mr Kalar's conduct was dishonest.

38. It is well known that tax and duty is payable on imported tobacco products, and that the amount permitted varies according to whether they are being brought in from within or outside the EU. There are clear signs at Heathrow airport which describe the allowances, which are designed to inform travellers of the restrictions.

39. In his letter of 5 June 2019 Mr Kalar said that at no point when he purchased the goods was he informed of his legal allowance. That letter provided no further explanation of this point – eg, had he asked a direct question about the legal allowance for the UK (and if so, of whom) or was he saying that he had not asked and no-one had told him of their own volition. On 24 July 2019 he said that he had asked about the limits for importing tobacco when he bought it at Doha airport and was given what he described as false information.

40. HMRC have not challenged this statement made by Mr Kalar that he asked about the legal allowance at Doha airport. There was no witness statement filed by Mr Kalar for the purposes of the appeal. Such a witness statement would, if prepared with the assistance of a representative, be likely to have included a statement of truth, and even in the absence of that would have been signed by Mr Kalar. However, it has been clear to HMRC since receiving the letter dated 24 July 2019 that as part of his appeal Mr Kalar is maintaining that, as a matter of fact, he had asked about the limits for importing tobacco when he bought it. His earlier statement in this regard - on 5 June 2019 – was less specific, but again HMRC had not posed questions in relation to it (as to what facts he was alleging, rather than whether it was reasonable to rely on this). HMRC do not challenge this assertion in their statement of case (albeit that they do challenge Mr Kalar’s decision to rely on what he was told by airport staff (including stating that he should have been aware of the allowances and their existence, particularly given the quantity he was buying) and his subsequent actions in not checking with Border Force and using the green channel in the UK). Whilst HMRC clearly misunderstood what was asked of them by the Tribunal (see [4] above), they had prepared a statement of case setting out their version of events and the arguments they were relying upon, which showed that they had read and considered the specific arguments being made by Mr Kalar. HMRC had the opportunity to challenge what Mr Kalar had said about asking about the limits. Given that they have not done so, I find that Mr Kalar had asked a question about the legal limits for tobacco when buying it at Doha airport.

41. Mr Kalar was clearly aware that there were restrictions on bringing tobacco into the UK. I agree with HMRC that a reasonable person would check the allowances, particularly given the sheer quantity of the amount he was proposing to buy and bring into the UK. Whilst I have found that Mr Kalar did ask a question at Doha, I am not satisfied that it is realistic or reasonable to assume that those working in airports overseas would have an accurate knowledge of the restrictions applicable throughout the world. This is particularly the case where it is not clear that Mr Kalar was asking about limits, not as to how much he was allowed to buy at Doha, but how much he was allowed to bring into the UK without declaring it (rather than how much he was allowed to bring but would need to declare the goods and pay additional duty). In any event, knowing that there are limits it is not credible that a person could realistically believe that such a large quantity as 8kg of tobacco would be within those limits.

42. Mr Kalar has also said that he was not able to access the internet at Doha airport to check the limits. Given the widespread use of mobile data to access the internet overseas, albeit for short periods of time to avoid incurring excessive charges, I am not convinced that this was completely impossible. However, HMRC have not challenged this, and I do appreciate that poor reception or local restrictions may have made this difficult. Nevertheless, even accepting this statement by Mr Kalar, the fact that he was seeking to check the limits from overseas but was unable to do so should have reinforced the need to obtain information from Border Force in the UK, whether by paying close attention to the signs or by asking direct questions before choosing to enter the green channel.

43. In Mr Kalar’s letter to HMRC of 5 June 2019 he stated that when he was stopped by Border Force at Heathrow the officer advised him that, as this was a first time offence, this

would be dealt with by a warning, and he signed over the tobacco to the officer. He reiterated in his grounds of appeal that he had been told that no further action would be taken.

44. Officer Panesar's notebook, which is a manuscript, contemporaneous record of the seizure, describes that he intercepted a couple travelling together, the information he gave as to limits, finding 8kg on searching the bags, seizure of the tobacco and issuing the specified forms. There is no record in that notebook of any conversation about this being a first offence or any statement from Officer Panesar that this would be a "warning" only and no further action would be taken. I find as fact that the notebook is an accurate record of events and no such reassurance was given

45. In any event, Officer Panesar cannot give such a reassurance – and the forms which Mr Kalar was given make it clear that HMRC may take action such as issuing an assessment for any evaded tax or duty and a wrongdoing penalty. Furthermore, such an "after the event" discussion can have no bearing on whether or not Mr Kalar's conduct in seeking to bring this amount of tobacco into the UK without paying duty was dishonest.

46. Applying the test in *Ivey*, and by the standards of "ordinary decent people", I have concluded that Mr Kalar acted dishonestly in bringing 8kg of hand rolling tobacco into the UK and entering the green channel.

47. As Mr Kalar dishonestly attempted to evade customs and excise duties, a penalty is due under s8(1) FA 1994 and s 25(1) FA 2003. The Penalty was correctly calculated; Mr Kalar challenges the level of mitigation which has been applied by HMRC.

48. HMRC's policy on the reduction or mitigation of penalties (which is not legally binding) is set out as follows in 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.”

49. HMRC’s Notice 160 (compliance checks into indirect tax matters) sets out similar information:

“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.”

50. Officer Davies considered the evidence before him and applied a 25% reduction for disclosure and 25% for cooperation.

51. Considering the level of disclosure and cooperation, Mr Kalar entered the green channel but did then answer the Border Force officer’s questions. Upon receiving HMRC’s letter dated 20 May 2019 he acted very quickly to follow up on this, calling HMRC on 24 May 2019 to find out what it was about. Having been told that if he wanted to help with the enquiry he needed to reply in writing, he was then slow to act – HMRC sent a chasing letter on 3 June 2019, at which point he did then provide some information in a letter of 5 June 2019. The information provided in that letter was somewhat sparse – he did purport to go through all of HMRC’s questions (numbering them as they appeared on the letter, then putting an answer alongside those numbers) but in many instances that was confined to denying that anyone had been involved in smuggling. He provided more detail when he requested a review of HMRC’s decision in July 2019 – eg in relation to having purchased the tobacco at Doha, in the letter of 5 June 2019 he had said only that he had not been told that this was over the limit, whereas in his letter of July 2019 he added that he had asked about the legal limits and had been given what he described as false information.

52. Having considered the explanations provided by Mr Kalar in his correspondence with HMRC and the grounds of appeal, I have concluded that the 50% reduction for disclosure and co-operation is the appropriate level of reduction.

53. Mr Kalar has stated that he has a low income due to long-term health conditions and that paying the Penalty would cause financial difficulties for the family. No evidence has been provided in support of these assertions. In any event, hardship is not a valid ground of appeal or basis for reduction of the Penalty (s8(5)(a) FA 1994 and s 29(3)(a) FA 2003).

CONCLUSION

54. The appeal is accordingly dismissed and the Penalty of £1,355 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

RELEASE DATE: 14 JANUARY 2021