



TC05410

Appeal number: TC/2015/03781

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**

URFAN IQBAL

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER: MOHAMMED FAROOQ**

**Sitting in public at Manchester ET, Alexandra House, 14-22 The Parsonage,
Manchester on 2 June 2016**

The Appellant in person and his brother Shezad Iqbal

**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 Urfan Iqbal (“the Appellant”) against a decision by the Respondents (“HMRC”) on 1 April 2015, to issue Excise and Customs Civil Evasion Penalties in the total sum of £478, 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.

Background

2. On 06 April 2014, the Appellant arrived at Manchester Airport from Islamabad, Pakistan on flight PK701.

3. From disembarkation to clearing Customs there were 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. Pakistan is not in the EU and therefore, returning travellers, for the purposes of the Travellers Allowance Order 1994, have a personal allowance of 200 cigarettes.

4. 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 and questioned by Officer Adrian Ford, a UKBF Officer.

5. The Appellant confirmed he had travelled from Pakistan and that he was travelling alone. He was asked if he understood his allowances and replied “Yes”. He was then asked if he had anything in excess of his allowances to which he stated “No”. 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.

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

7. On conducting a search of the Appellant’s luggage, 500 grammes of molasses tobacco and 5,400 king size filter cigarettes were found.

8. 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 BOR156 and Warning Letter BOR162, both of which the Appellant signed.

9. 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.

5 10. On 24 February 2015, HMRC's Officer Claire Taggart 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
10 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 Notice 160 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
15 the Appellant's response and co-operation with HMRC's enquires.

11. In her letter, Officer Taggart 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:

- 20 • "A copy of this letter, signed and dated by (the Appellant) as acknowledgement that he had read and understood Factsheet CC/FS9, Public Notice 160, and Public. Notice 300. A copy was enclosed for this purpose.
- Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
- 25 • 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.
- 30 • Details of his travel and how the purchase of goods were financed on each occasion.
- 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,
35 including the reasons for travel.
- An explanation of what he did with, or intended to do with, the smuggled goods.
- Any documentation he thought would support the information he was providing.
- Any other information or explanations he thought may be of use to the enquiry."

40 12. Officer Taggart 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
5 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;
- 10 • answer all questions truthfully;
- give the relevant information to establish your true liability;
- co-operate until the end of the investigation.”

13. On 10 March in the absence of a reply to her earlier letter, Officer Taggart
15 issued a reminder and requested a reply by 27 March 2015.

14. On 14 March 2015 Officer Taggart received a letter from the Appellant. He
stated that the cigarettes were for his own personal use and for friends. He said that he
was not aware that he was not allowed to bring them into the UK because at the
airport in Pakistan he paid ‘tax’ on the tobacco and did not know he would have to
20 pay it again.

15. Attached to the letter was a copy of Officer Taggart’s letter of 24 February
2015, which had been signed by the Appellant and dated 14 March 2015. The signed
copy indicated that the Appellant had read and understood the enclosures Public
Notices 160 and 300 and the Factsheet CC/FS9 which were enclosed with Officer
25 Taggart’s letter of 24 February 2015.

16. On 1 April 2015, Officer Taggart issued to the Appellant, a ‘civil penalty -
notice of assessment’ in the sum of £478.00 (£89.00 custom civil evasion penalty and
£389.00 excise civil evasion penalty). The Officer further explained that s 29 of the
Finance Act 2003 and s 8(4) of the Finance Act 1994 allowed HMRC to reduce a
30 penalty as they think proper. There are two factors, disclosure and co-operation,
which determine the level of any reduction. Firstly, there can be a reduction of up to
40% for an early and truthful explanation as to why the arrears arose. Secondly, there
can be a reduction of up to 40% for fully embracing and meeting responsibilities
under the enquiry procedure.

35 17. In considering whether to apply a reduction, Officer Taggart took into account
her view that it was not credible for the Appellant to suggest that he was unaware of
his personal allowances, given the extensive signage at the airport. It was also
difficult to accept that the Appellant would assume that because he paid tax in
Pakistan that he would not have any duty to pay in the UK. In particular because of

the substantial number of cigarettes brought into the UK by the Appellant, it was not reasonable for him not to make further checks with the UK authorities.

18. The penalties represented 30% of the attempted evaded duty of £1,595. Officer Taggart had allowed a 35% reduction for disclosure and 35% reduction for co-operation, a reduction in total of 70%. The maximum reduction that could be given is 80%.

19. In a letter dated 15 April 2015, the Appellant wrote to Officer Taggart, stating that he wished for the penalty to be reviewed. He said that this was his first offence and reiterated the points made in his earlier letter of 14 March 2015. He also said that he was unemployed and was unable to pay the penalties.

20. On 28 April 2015 Officer Taggart replied to the Appellant saying that based on the information provided, there was no reason why she should change her decision. She advised that he had signed the paperwork given to him at the time of seizure, which confirms that HMRC may take action against him, including issuing an assessment (warning letter BOR162) and that the penalty cannot be removed for reasons of a first offence or inability to pay. She was unable to consider any hardship implications when making her decision as it is specifically stated in legislation that the ability to pay a civil penalty cannot be considered in determining the liability to such penalties. The Appellant's financial position could not therefore be considered. [Finance Act 1994, Chapter 9, Section 8 (5).] She advised the Appellant that a 70% reduction had been given and also pointed out the Appeals and Review procedure, advising that if he did not agree with the decision, he could appeal to an independent tribunal within 30 days.

21. By notice of appeal dated 1 June 2015, received by the Tribunal Service on 11 June 2015, the Appellant appealed the decision to the First-tier Tribunal. The Appellant explained that his appeal was late because he had "sent the papers to the wrong department. They were sent back to me with more forms to fill out."

22. Following the Appellant's appeal to the Tribunal, an error was identified in the Duty category allocated to the Molasses by Officer Taggart. This was corrected on 26 November 2015, when a revised penalty of £463 was issued comprising a £86 Customs evasion penalty and a £377 Excise evasion penalty. A 70% discount was again applied.

Evidence

23. The combined bundle of documents included the witness statement of Officer Ford, which included a copy of his note book notes and the witness statement of Officer Claire Taggart. Both gave oral evidence to the Tribunal. The Appellant also gave oral evidence to the Tribunal under oath. We were provided with copy correspondence, copy relevant legislation and case law authority.

The Law

24. 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 –

- 5 (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.

10 (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
15 reduction made by the Commissioners. (...)

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

s 25 Penalty for evasion.

(1) in any case where

- 20 (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. (...)

25 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
30 (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-

- 35 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.

40 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. (...)

5 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.

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

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

15 (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 any thing as liable to forfeiture under the Customs and Excise Acts is a constable and that thing is or may be required for use in connection with any proceedings to be brought otherwise than under those Acts it may, subject to subsection (4) below, be retained in the custody of the police until either those

20 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—

25 (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;

30 (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

35 direct.

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

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

45 (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 any thing no such notice has been given to the Commissioners, or if, in the case of any such notice given, any requirement of paragraph 4 above is not complied.

The Tobacco Products Duty Act 1979, s.1 provides:

(1) In this Act “tobacco products”, namely -

- (a) cigarettes;
- (b) cigars;
- (c) hand-rolling tobacco;
- (d) other smoking tobacco; and
- (e) chewing tobacco,

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

Travellers’ Allowance 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:

- 5 • 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.

10 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.

15 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.
- 20 • 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.

30 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.

35 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
- 40 • 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.

5 **The Appellant's Case**

25. In the Notice of Appeal, the Appellant's stated grounds of appeal can be summarised as follows:

- It is not denied that the amount of tobacco imported was over the permissible limits.
- 10 • He had made a genuine mistake and should not have listened to other people (at Islamabad airport, where he was told that if he paid 'tax' in Pakistan there would be no duty payable in the UK).
- He is unemployed and HMRC have not considered the hardship he will suffer, should he have to pay the penalties.
- 15 • It is his first offence and it will not happen again.

26. At the hearing the Appellant was represented by his brother Shezad Iqbal. He said that his brother, the Appellant, was a relatively naive man and had been taken advantage of at Islamabad airport. As a child he had been diagnosed as having special needs. He had never been in trouble before.

20 27. The Appellant said that he had travelled to Pakistan to visit his family. He had been three times before.

25 28. He had purchased 5,400 cigarettes for himself and his brother, as each of them smoke between 20 and 40 cigarettes a day. The molasses were for a friend. The cigarettes were a lot cheaper in Pakistan than the UK. He did not have a receipt to show the price he had paid for the cigarettes or whether tax had been paid in Pakistan.

29. He had travelled out with an empty bag which he intended to fill with cigarettes. He had never previously brought cigarettes or tobacco into the UK.

30. He hadn't taken any notice of the signage at the airport which explained the allowances of persons travelling into the UK from non-EU countries.

30 31. During the hearing, Mr Davies for HMRC put it to the Appellant that his conduct involved dishonesty. In reply the Appellant denied this, saying that he had simply made a mistake.

HMRC's Case

35 32. On 6 April 2014 the Appellant was stopped on entering the Green 'nothing to declare' Channel at Manchester Airport. It is implicit that the Appellant acted

dishonestly and deliberately took the action to positively to evade duty and tax given that:

- a) it is well known that duty is payable on excise goods upon entering the UK and also that Pakistan is outside the EU for excise purposes.
- 5 b) the Appellant entered the Green Channel, indicating that he had nothing to declare, despite carrying 29 times his personal allowance.
- c) The Appellant does not deny that the amount of tobacco and cigarettes imported was over the permissible limits. He says that they were mainly for his own personal use. However that is not relevant.
- 10 d) The airport has signage which describes the allowances. The signage is designed to inform travellers who are not aware of importation restrictions. The Appellant chose to ignore the signage.
- e) The Appellant confirmed in answer to Officer Ford's questions, that he was aware of his allowances. In any event such a large quantity of
15 cigarettes would have prompted a reasonable and honest person to make enquiries rather than assuming there was no tax to pay.

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

20 "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
25 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."

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

35 "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.....”

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35. ‘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* 120051 UKPC 37. 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:

15 “...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.”

20 36. The Appellant’s actions as set out in paragraphs 4-7 and 32 above demonstrate that he acted dishonestly and deliberately took action to positively evade duty and tax. His attempt to clear Customs without paying any duties by entering the Green Channel “nothing to declare” demonstrates his intent to positively evade duty and tax.

25 37. The act undertaken (entering the Green Channel with an amount of cigarettes and tobacco above the allowance) was objectively dishonest by the standards of an ordinary, reasonable person and the Appellant realised that what he was doing was, by those standards, dishonest.

30 38. 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.

39. 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.

35 40. The penalty is based on the amount of evaded or attempted evaded Customs Duties and Import VAT and Excise duty. In this case the penalty is £463, being 30% of the culpable arrears.

41. HMRC exercised its discretion as to the amount of discount to be allowed. A 35% deduction was allowed for early disclosure and a further 35% for co-operation (both out of a maximum of 40%), a total of 70%.

40 **Conclusion**

42. The Appellant imported tobacco and cigarettes from Pakistan, substantially in excess of his allowance. The Appellant accepted in evidence to the Tribunal that he was aware of the personal allowances/limits.

43. There are strict limits on the number of cigarettes and tobacco products that can be brought into the UK. It is well known that tax and duty is payable on imported cigarettes. The airport has clear signage which describes the allowances.

44. Pakistan 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. The Appellant knew the allowances for importing tobacco and cigarettes. In any event, a reasonable person would check the allowances before importing such a substantial amount of tobacco products and cigarettes, whether or not he had paid ‘tax’ on the tobacco in Pakistan.

45. The issue as to whether or not the tobacco product and cigarettes were for personal use does in any event 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.

46. The issue in this appeal is therefore whether or not the penalties which have been imposed were properly imposed and for the correct amount. That raises the question of whether the Appellant has been dishonest. The test for dishonesty when issuing a civil evasion penalty is an objective one and involves assessing whether the actions of the taxpayer were dishonest by the standards of ordinary and honest people. The burden of proof for dishonesty in a civil evasion penalty case is the civil standard and assessed on the balance of probabilities (*Tahir Iqbal Khawaja v HMRC* [2008] EWHC 1687 (Ch.), [2009] 1WLR 398 at [25]). We are also required to determine whether the Appellant himself considered his actions to be dishonest.

47. We have to conclude for the reasons argued by HMRC (paragraph 32 above) that the Appellant acted dishonestly and deliberately in taking action to positively evade duty and tax and therefore a penalty is due under s 8(1) Finance Act 1994 and s 25(1) Finance Act 2003

48. 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.

49. 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. The Appellant has been given a reduction of 70%.

50. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld nor shown why the penalty may not have been calculated correctly and made to best judgment.

51. The appeal is accordingly dismissed and the penalties totalling £463 confirmed.

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

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MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 12 OCTOBER 2016

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