



**TC05771**

**Appeal number: TC/2016/03890**

*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**

**DAVID DANIHEL**

**Appellant**

**- and -**

**HM REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE MICHAEL CONNELL  
MEMBER PETER SHEPPARD**

**Sitting in public at City Exchange, Albion Street, Leeds, on 22 February 2017**

**The Appellant in person**

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

1. This is an appeal by Mr David Danihel (“the Appellant”) against a decision by the Respondents (“HMRC”) notified on 10 March 2016, to issue Excise and Customs Civil Evasion Penalties in the total sum of £854 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 14 January 2015, the Appellant was stopped and questioned by a UK Border Force (UKBF) Officer, on entering the Green ‘nothing to declare’ channel at Manchester Airport arriving from Banjul Airport, The Gambia, on flight TCX2473.

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

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 by Officer Robert Templeton, a UKBF Officer.

5. Officer Templeton’s evidence is that the Appellant confirmed he had travelled from Banjul, The Gambia. 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”. He confirmed that he understood and that he was not carrying any such items. When asked if he understood his tobacco allowances he replied that he was aware and understood.

6. On conducting a search of the Appellant’s luggage, 4,000 Marlborough KDF cigarettes were found. In total, the overall quantity of goods seized was nineteen times over the Appellant’s personal allowance.

7. As the goods had not been declared and were over the allowances as set out in the Travellers’ Allowances Order 1994 (as amended), Officer Templeton seized the goods as liable to forfeiture under s 139 of the Customs and Excise Management Act 1979 (“CEMA”) and issued the Appellant with Public Notices 1 and 12A, being Seizure Information Notice C156 and Warning Letter BOR162, both of which the Appellant signed.

5 8. 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.

9. On 28 January 2016, HMRC's Officer Kelly Baker 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  
10 the imposition of a Civil Evasion Penalty, under s 25(1) of the Finance Act 2003 and under s 8(1) of the Finance Act 1994 for the evasion of Customs and Excise Duty was to be considered. The Appellant was invited to co-operate with the enquiry and advised of the action he could take to reduce any potential penalty. The letter enclosed  
15 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 the Appellant's response and co-operation with HMRC's enquires.

10. The letter, from Officer Baker, 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  
20 her letter:

- "A copy of this letter, signed and dated by you, as acknowledgement that you have read and understood Factsheet CC/FS9, Public Notice 160, and Public Notice 300. A copy is enclosed for this purpose.
  - Confirmation of who was involved in the smuggling or attempted smuggling, exactly what they did and why they did it.
  - A full explanation as to how the smuggling or attempted smuggling was carried out.
  - Confirmation of how many times, and when, alcohol or tobacco products were smuggled into the UK, or attempts made to  
25 smuggle them.
  - Confirmation of the quantities of goods involved on each occasion.
  - Details of all international travel during the period under enquiry, including the reasons for travel.
  - Any documentation you think will support the information you are providing.
  - Any other information or explanations you think may be of use to this enquiry."
- 35

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

"Disclosure

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

Co-operation

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

- attend all the interviews (where necessary);

- 5
- provide all information promptly;
  - answer all questions truthfully;
  - give the relevant information to establish your true liability;
  - co-operate until the end of the investigation.”
- 10 12. On 1 February 2016 the Appellant contacted HMRC, and spoke to Officer Mark Germani. Officer Germani explained the full situation to Mr Danihel and noted that the Appellant appeared co-operative and confirmed that he would respond to the additional questions asked on the initial letter
- 15 13. On 17 February 2016, in the absence of anything further from the Appellant, HMRC sent a reminder letter to the Appellant requesting a response by 29 February 2016.
- 20 14. On 24th February 2016, the Appellant wrote to HMRC, saying that the goods were seized on 14 January 2015 not 14 January 2016. Additionally he states that he said that he had never exceeded his personal allowances previously, all the goods were taken from him. He had learnt from his mistake and in future will always check personal allowances from any countries.
- 25 15. On 2 March 2016 HMRC wrote to the Appellant, acknowledging receipt of the Appellant's letter and advising him that they would be in contact within 30 days after they had considered the information
- 30 16. On 19 March 2016 Officer Baker issued a Civil Evasion Penalty - Notice of Assessment in the sum of £854.00 (£180 Customs civil evasion penalty and £674.00 Excise civil evasion penalty), which was calculated on the combined total of 4,000 cigarettes -(4,000 seized less personal allowance of 200). The Notice of Assessment explained how the penalty had been calculated and advised that a 25% reduction from the maximum penalty had been made, which included 5% for disclosure and 20% for co-operation) of the total evaded duty of £1,140, reflecting the degree of disclosure and co-operation given by the Appellant in the course of the enquiry.
- 35 17. On 7 April 2016 the Appellant wrote to HMRC asking them to reconsider the penalty. He said that he was still in the baggage collection area when the cigarettes were seized. He did not go through the Green Channel as having nothing to declare. The cigarettes were intended as gifts. He said that he had cooperated fully and provided full and frank information whenever required. On that basis he considered that the maximum reduction in the penalty should have been allowed.
- 40 18. Officer Hayley Beattie who had not previously been involved in the decision carried out a review of the penalty and on 12 May 2016 wrote to the Appellant notifying him that the penalty was to be upheld.

- 5 19. Officer Beattie replied that the Appellant was stopped by a Border Force Officer in the 'Green Channel', and a search of his bags revealed 4,000 cigarettes. The goods represented twenty times the allowance when travelling from a third country.
20. Although the Appellant said that he was in the baggage area when the goods were seized and was not given the opportunity to declare the cigarettes, it was clear from  
10 the Border Force Officer's Notebook entry detailing the seizure, that the Appellant was in the 'Green Channel' when stopped.
21. Further, although the goods were intended to be given as gifts and not sold commercially, the issue was not the intended use of the goods. The penalties had been issued as it is considered that the Appellant had dishonestly attempted to import an  
15 amount of excisable goods above the statutory allowance to evade paying the duties. Officer Beattie said that she did not find it credible that the Appellant would believe it would be within the law to import such a high quantity of tobacco product into the UK without having to pay the duties. The Green Channel should only be used when a person has no more than the statutory allowances.
- 20 22. Officer Beattie pointed out that there is considerable signage within airports which outline the restrictions and allowances on importing goods into the UK. If the Appellant was in any doubt as to his allowances and restrictions, he should have gone into the Red Channel. She said that she would have considered it reasonable for the Appellant to have acquainted himself with the permitted allowances when returning to  
25 the UK, especially upon noting the signs at both the baggage reclaim area and before entering the 'Green Channel'. In choosing to ignore the personal allowance restriction, and the signs located throughout the airport and entering the 'Green Channel', it is implicit that the Appellant acted dishonestly.
23. Officer Beattie explained that in her letter dated 24 February 2016, the Appellant  
30 had provided only a very brief disclosure in response to Officer Baker's letter dated 28 January. He was given a full explanation of the situation during his 'phone call dated 1 February 2016. Whilst he had responded to Officer Baker's enquiries, he had not fully responded to the line of questioning presented in the initial letter. He had simply confirmed that this was the only time he had been found with a quantity of  
35 goods over his personal allowances.
24. Officer Beattie concluded that the mitigation offered of 25% was within the range she would expect for the Appellant's level of disclosure and cooperation based on the information available, and upheld the reductions given by Officer Baker and penalty of £854.
- 40 25. By Notice of Appeal dated 18 July 2016, the Appellant appealed the penalty to the First-tier Tribunal.

### **Evidence**

26. The combined bundle of documents included the witness statement of Officer Robert Templeton, and a copy of his Notebook notes, and also the witness statement

5 of Officer Kelly Baker. Officer Templeton gave oral evidence under oath to the Tribunal. The Appellant also gave oral evidence to the Tribunal under oath. We were also provided with copy correspondence, copy relevant legislation and case law authority.

### **The Law**

10 27. 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 –

15 (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.

20 (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

25 (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. (...)

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

s25 Penalty for evasion.

(1) in any case where

30 (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. (...)

35 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

40 (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. (...)

5 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. (...)

10 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.

15 (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

20 (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

25 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—

30 (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;

35 (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

40 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.

45 (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.

5 (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:

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

#### Travellers' Allowances Order 1994

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

20 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—

25 (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;

30 (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

35 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.

#### 40 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:

- 45 • a person engages in any conduct for the purpose of evading any relevant tax or duty; and



- 5
- 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.
  - 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.
- 20

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.

## 25 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.

#### 2.3.1 Reductions under Civil Evasion Penalty Rules

35 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.
- 40

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.

## 45 **The Appellant's Case**

5 28. In the Appellant's Notice of Appeal he does not deny that the amount of tobacco imported was over the permissible limits. He appeals HMRC's decision to assess the penalty at £854.00 on the following grounds:

- He has been fully cooperative with the investigation.
- 10 • The 15-20 cartons of cigarettes were all intended as gifts for friends and family. They would not have been sold. This was explained to the officers at Manchester airport and he was informed that as it was the first time, there would probably only be a warning given.
- 15 • When asked to sign paperwork he did so quickly as had to get a train to York that night. He was told he would be unable to leave if he didn't sign the forms, but hadn't appreciated that the forms warned that penalties may be imposed.
- 20 • This incident occurred on 14 January 2015 and he was contacted in February 2016 (letter made reference to the wrong date of seizure, stating it as 14 January 2016).
- There were no boards at Banjul airport regarding allowances and he has problems with internet connection.

29. At the hearing, the Appellant repeated his earlier grounds of appeal and also challenged the discount he had been given of 25% on the basis that he had provided full disclosure and cooperation.

#### **HMRC's Case**

30. On 14 January 2015, by entering the Green 'nothing to declare' Channel at Manchester Airport, it was implicit that the Appellant was acting dishonestly and deliberately taking action to positively evade duty and tax given that:

- 30 a) The Appellant entered the Green Channel, indicating that he had nothing to declare despite significant signage present. A number of notices are visible to passengers entering the UK, both in the baggage reclaim area and at the entrance to Customs Channels. These explain which countries are inside and outside the European Union and the duty free allowances for excise goods.
- 35 b) The Appellant does not deny that the amount of cigarettes imported was over the permissible limits.
- c) The Appellant told the UKBF Officer that he was aware of the allowances relating to cigarettes and tobacco; the Appellant was carrying 4,000 cigarettes - nineteen times his personal allowance.
- 40 d) The Appellant would have known that The Gambia is outside the EU for excise duty purposes. The Appellant should have been fully aware that he was bringing more goods into the country than he was entitled to without declaring them.

- 5 e) The Appellant would have been aware that there were limits on the number of cigarettes he could import. Similar duty-free allowances apply worldwide, including in the Appellant's departure country. He could reasonably be expected to be aware of the regulations relating to duty-free allowances for goods imported into the UK.
- 10 f) Although he may not have been aware of the exact allowance he would have known that 4,000 cigarettes were too much. That knowledge should have prompted an honest traveller to check the allowances before entering the Green Channel.
- 15 g) Not doing so, in the belief that the amount was likely over the allowances, constitutes dishonest behaviour. A reasonable and honest person would check the allowances before importing a large amount of cigarettes. Failing to declare under those circumstances constitutes dishonest behaviour.

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

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

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

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

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

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

45 'In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether

5 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  
10 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.....’

15 36. ‘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*  
20 *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:

25 ‘...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.’

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

35 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.

40 40. The penalty is based on the amount of Customs Duties, Import VAT and assessed  
excise duty that was involved in the offence. In this case the penalty is £854, being  
75% of the culpable arrears.

45 41. The Appellant has submitted in correspondence and in his Notice of Appeal that  
he cannot afford to pay the penalty. The Finance Act 1994, s 8(5)(a) and Finance Act  
2003 s 29(2) and (3)(a) preclude the Commissioners or an appeal tribunal from taking

5 into account the insufficiency of the funds available to pay when considering reduction of the penalty.

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

### **Conclusion**

10 43. The Appellant imported the cigarettes from The Gambia. The Gambia is a non-  
EU country. There are strict limits on the number of cigarettes that can be brought  
into the UK from a non EU country. It is well known that tax and duty is payable on  
imported cigarettes. The airport has clear signage which describes the allowances.  
15 The signage is designed to inform travelers who are not aware of importation  
restrictions.

44. The Appellant would, on the balance of probabilities, have known of the  
allowances for importing tobacco and cigarettes. When questioned by the UK Border  
Force Officer, the Appellant confirmed that he was aware of his allowances. In any  
event, a reasonable person would check the allowances before importing such a large  
20 number of cigarettes.

45. The issue as to whether or not the 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  
25 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. That raises the question of whether the Appellant  
30 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.),  
35 [2009] 1WLR 398 at [25]).

47. It is inherently unlikely that the Appellant did not know or suspect that there were  
restrictions on cigarettes being brought to the UK in large quantities. A number of  
notices are visible to passengers entering the UK, both in the baggage reclaim area  
and at the entrance to Customs channels. These explain which countries are inside and  
40 outside the European Union and the duty free allowances for excise goods. The  
Appellant should have been fully aware that he was bringing more goods into the  
country than he was entitled to without declaring them. We have to conclude that the  
Appellant acted dishonestly and deliberately, taking action to positively evade duty  
and tax.

5 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.

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

15 50. HMRC can reduce a penalty on the basis of the customer's cooperation. There are two factors determining the level of any reduction. Firstly, there can be a reduction for an early and truthful explanation as to why the arrears arose. Secondly, there can be a reduction for fully embracing and meeting responsibilities under the enquiry procedure. Taking these factors into account, the fact that the Appellant did not provide the information Officer Kelly requested, the penalty has in our view been calculated correctly and reduced appropriately for disclosure and cooperation, resulting in a total reduction of 25%. We concur with Officer Kelly's assessment of the penalty.

20 51. The Appellant has not provided any grounds to show why the decision to issue the penalties should not be upheld. No challenge has been brought to the calculation of the duties and the Appellant has not in any event shown why the penalty has not been calculated correctly and to best judgment.

25 52. The appeal is accordingly dismissed and the penalties totalling £854 confirmed.

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

35

**MICHAEL CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 11 APRIL 2017**