



**TC06060**

**Appeal number: TC/2016/05019**

*Excise Duty – penalties s 8 FA 1994 – one step test for dishonesty in N’Daye and Osman doubted*

**FIRST-TIER TRIBUNAL  
TAHAMIDI CHAMBER**

**ABDUL HAMIDI**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE CHARLES HELLIER  
                     JULIAN SIMS**

**Sitting in public at Southampton on 2 June 2017**

**The Appellant in person**

**Katherine Hardcastle for the Respondents**

## DECISION

5 1. Mr Hamidi appeals against penalties totalling £1,777 assessed by HMRC under section 8 Finance Act 1994 and section 25 Finance Act 2003 in relation to his import of 10,000 cigarettes on 2 May 2015.

10 2. On 2 May 2015 Mr Hamidi arrived at Heathrow airport having flown from Afghanistan via Istanbul. After retrieving his bags he went into the Green channel. There he was stopped by Mr Somogyi, one of the Border Force officers. Mr Somogyi inspected Mr Hamidi's baggage and found, and seized, 10,000 cigarettes.

3. On 24 June 2016, some 13 months after the seizure, and after having made some initial enquiries of Mr Hamidi, HMRC assessed the penalties against which the appeal is made.

15 4. Mr Hamidi's grounds of appeal and his oral submissions before us raised five issues:

(1) each penalty is assessable only if Mr Hamidi was evading duty or tax and his conduct involved dishonesty. Was that the case?

(2) each penalty is a percentage of the duty which should have been paid. Had HMRC correctly calculated the duty?

20 (3) Mr Hamidi says that he was told at the time of the seizure that no further action would be taken. Was that proved to be the case, and if so did it matter?

(4) HMRC had allowed a 60% rebate of the penalties for Mr Hamidi's cooperation and disclosure. Was that appropriate?

25 (5) Should the penalties be cancelled or reduced by reason of Mr Hamidi's financial circumstances or his intention not to repeat such an import.

5. The penalties were computed in the following manner: the amount of duty and VAT which HMRC considered payable on 9,800 cigarettes (being 10,000 less a tax-free allowance of 200) was calculated:

(1) £2,364 in excise duty,

30 (2) £70 in customs duty and

(3) £511 import VAT.

The total penalty was set at 40% of the total, being £1,177.

### **The relevant Legislation**

35 6. On the import of cigarettes into the UK from outside the EU excise duty, customs duty and VAT are payable; but by virtue of the Travellers' Allowances Order 1994 no such duty is payable on an import of 200 cigarettes.

7. Section 8 Finance Act 1994 provides:

(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

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(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—

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(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.

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(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;

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(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.

8. Section 24 and 25 Finance Act 2003 make equivalent provision in relation to customs duty and VAT (“relevant tax or duty”):

(1) In any case where—

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(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.;

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9. And section 29 makes equivalent provision to section 8(4) and (5) Finance Act 1994.

10. Section 60 of the VAT Act 1994 makes similar provisions in relation to the evasion of VAT.

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11. In the light of Mr Hamidi’s challenge to the computation of the duty we should also set out the statutory provisions which deal with the calculation of excise duty. Section 2 of the Tobacco Products Duty Act 1979 provides for a charge to excise duty on cigarettes. The duty has two components: one is a percentage of the retail

price of the cigarettes (the “ad valorem” part), and the other is computed by reference to the number of cigarettes. Section 5 provides

5. Retail price of cigarettes.

5 (1) For the purposes of the duty chargeable at any time under section 2 above in respect of cigarettes of any description, the retail price of the cigarettes shall be taken to be—

(a) the higher of—

(i) the recommended price for the sale by retail at that time in the United Kingdom of cigarettes of that description, and

10 (ii) any (or, if more than one, the highest) retail price shown at that time on the packaging of the cigarettes in question,

or

(b) if there is no such price recommended or shown, the highest price at which cigarettes of that description are normally sold by retail at that time in the United Kingdom.

15 (1A) In subsection (1) above ‘recommended price’—

(a) in relation to a case in which cigarettes of the applicable description are manufactured by a manufacturer in a member State, means any price recommended by that manufacturer; and

20 (b) in relation to a case which does not fall within paragraph (a) above, means any price recommended by an importer of cigarettes of the applicable description

(2) The duty in respect of any number of cigarettes shall be charged by reference to the price which, in accordance with subsection (1) above, is applicable to cigarettes sold in packets of 20 or of such other number as the Commissioners may determine in relation to cigarettes of the description in question; and the whole of the price of a packet shall be regarded as referable to the cigarettes it contains notwithstanding that it also contains a coupon, token, card or other additional item.

30 (3) In any case in which duty is chargeable in accordance with paragraph (b) of subsection (1) above—

(a) the question as to what price is applicable under that paragraph shall, subject to subsection (4) below, be determined by the Commissioners; and

35 (b) the Commissioners may require security (by deposit of money or otherwise to their satisfaction) for the payment of duty to be given pending their determination.

(4) Any person who has paid duty in accordance with a determination of the Commissioners under subsection (3)(a) above and is dissatisfied with their determination may require the question of what price was applicable under subsection (1)(b) above to be referred to the arbitration of a referee appointed in accordance with subsections (7) to (9) ...

## The Evidence

12. We heard oral evidence: from Mr Hamidi through an interpreter, from Miklos Somogyi, the HMRC official who stopped Mr Hamidi and seized the cigarettes and  
45 from Christine White, an officer of HMRC who gave evidence of the information sought and received by HMRC and the steps taken by one of her colleagues in relation to the assessment of the penalties.

## **General Findings of fact.**

13. At the baggage reclaim carousels at Terminal 2 at Heathrow (where Mr Hamidi landed) there are two electronic screens, one on each side of each carousel, each measuring about 6' by 4'. These screens display a loop of three information notices about the import of goods into the UK. One deals with the importation of cigarettes.

14. At the end of the baggage reclaim area are three exit channels. Each has a large coloured plastic sign over its entrance: one green, one red, and one blue. The green one is some 5' by 10' and has the words "Nothing to Declare" on it. The red sign says "Goods to Declare" and the blue sign bears an EU flag. After its entrance the Green channel joins the Blue channel to form a passageway some 30 feet wide; the red channel is somewhat smaller.

15. There are notices and pictures on the walls of the channels, whether these were inside the channels or on the wall outside the entrances to the channels was not clear, but, given our conclusion below, we do not believe that anything turns on the difference. These notices indicate the number of cigarettes which may be imported without payment of duty. Mr Somogyi could not tell us whether this was in words or numbers. The carousel screens also contain the same indications.

16. On occasion the entries to the three channels can become a fairly crowded.

17. Other airports and terminals have similar signage.

18. Mr Somogyi was on duty in the Green channel on 2 May 2015. He stopped Mr Hamidi as he walked through that channel. Mr Hamidi was carrying two pieces of luggage. One was a large nylon laundry bag.

19. Mr Somogyi asked Mr Hamidi number of questions about his luggage but concluded that Mr Hamidi did not speak (or understand) sufficient English to provide useful replies. Neither Mr Somogyi nor Mr Hamidi sought the services of an interpreter.

20. Mr Somogyi searched Mr Hamidi's luggage and found 10,000 cigarettes. The cigarettes were in both of Mr Hamidi's piece of pieces of luggage. Alongside the cigarettes were a few items of clothing. There was no suggestion that the cigarettes were in any way hidden.

21. Mr Hamidi's cigarettes occupied some 12 ft.<sup>3</sup> of space in his luggage. When removed and stacked they formed a rectangular block some 3' x 2' x 2'.

22. The cigarettes were 'L and M' brand. Such cigarettes are not generally available for retail purchase in the UK.

**1. Were the conditions for the assessment of the penalties met?**

23. Section 8 and section 25 imposed conditions for the liability to a penalty: the person must engage in conduct for the purpose of evading duty, and the conduct must involve dishonesty.

24. There is no doubt that duty and tax (together hereafter "duty") were due on the import of 10,000 cigarettes. By walking through the Green channel Mr Hamidi can fairly be described as evading (or attempting to evade) that duty. What is less clear is whether his conduct - walking through the Green channel - was for the "purpose" of evading duty. To our minds that person's conduct has such a purpose only if he knows that duty is payable and intends that his conduct will result in the duty not being paid.

25. The second requirement is that the conduct involves dishonesty. Recent decisions of this tribunal have adopted a different understanding of "dishonesty" from that applicable in the criminal law. The criteria necessary for the finding dishonesty in a criminal case were explained in *R v Ghosh* [1982] 1 QB 1053. There the Court of Appeal set out the test for dishonesty in the context of the use of that word in the Theft Act:

"Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word "dishonestly" in the Theft Act, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach. This is sufficiently established by the partial definition in section 2 of the Theft Act itself. All the matters covered by section 2(1) relate to the belief of the accused. Section 2(2) relates to his willingness to pay. A man's belief and his willingness to pay are things which can only be established subjectively. It is difficult to see how a partially subjective definition can be made to work in harness with the test which in all other respects is wholly objective.

If we are right that dishonestly is something in the mind of the accused (what Professor Glanville Williams calls "a special mental state"), then if the mind of the accused is honest, it cannot be deemed dishonest merely because members of the jury would have regarded it as dishonest to embark on that course of conduct.

So we would reject the simple uncomplicated approach that the test is purely objective, however attractive from the practical point of view that solution may be.

There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which "Robin Hood would be no robber". (See Green and Greenstein). This objection misunderstands the nature of the subjective test. It is no defence for a man to say "I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty". What he is however entitled to say is "I did not know that anybody would regard what I was doing as dishonest". He may not be believed; just as he may not be believed if he sets up "a claim of right" under section 2(1) of the Theft Act, or asserts that he believed in the truth of a misrepresentation under section 15 of the Theft Act. But if he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest.

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 not dishonest by those standards, that is the end of the matter and the prosecution fails.

5 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.

10 For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.”

15 26. As the tribunal in *N'Diaye v HMRC* [2015] UKFTT 380 (TC) said, this is a two step approach: the action must be dishonest according to the ordinary standards of reasonable and honest people, and if it is the defendant himself must have realised that what he was doing was by those standards dishonest.

20 27. That tribunal went on to consider the test for dishonestly in breach of trust cases. Drawing on the judgment of Arden LJ in *Abou-Ramah v Abacha* [2006] EWCA Civ 1492 it concluded that in such cases the second of the two steps in *Ghosh* did not apply. Arden LJ had described the test as applying “in the context of civil liability (as opposed to criminal responsibility)”, and the tribunal concluded that it should therefore apply that (reduced, one-step) test in the case of civil penalty liability under the Finance Acts (see [42-48] of the decision in that case).

25 28. *Sahib Restaurant Ltd v HMRC* (Case M7HAMIDI 090 unreported) concerned an appeal against a VAT tribunal decision in relation to VAT penalty under section 60 VATA. Judge Pelling QC sitting as a judge of the High Court considered the test for dishonesty in the context of that provision. Relying on the authorities in relation to trusts and trustees he considered that the relevant test was the civil rather than a version of the two step criminal test which the VAT tribunal had applied. This conclusion was not however necessary to his decision since HMRC were happy to proceed on the basis of the more stringent two step approach.

30 29. In *Zuned Osman v HMRC* [2016] UKFTT 524 (TC) the tribunal accepted that the authorities showed that the test for dishonesty in s 8 FA 1994 and s 25 FA 2003 was not the two step approach in *Ghosh* but that adopted in *N'Diaye*. That test required the determination of the person’s actual knowledge and the objective assessment of whether their actions and knowledge in the light of normally accepted standards of behaviour would be categorised as dishonest.

40 30. We doubt the conclusion that the two-step *Ghosh* test should not be applied for three reasons:

(1) The civil liability test was developed in the context of the adjudication entitlement to damages and the competing rights and liabilities of individuals. By contrast the penalty provisions, like those in the criminal law are between

the state and an individual and are concerned with penalising certain behaviour and encouraging compliance.

5 (2) *Abou-Ramah* was concerned with fiduciary liability in equity -with setting the level of unconscionability sufficient to give rise to liability, not with the interpretation of a statutory requirement in the context of proceedings which for Human Rights Act purposes are generally acknowledged to be criminal.

10 (3) It seems to us that unless the context otherwise requires a word used with one meaning in one Act should normally bear the same meaning in another Act. For the reasons in the following two paragraphs, the statutory context does not appear to require a different approach.

31. In *Ghosh* the Court of Appeal relied on the partial definition of “dishonesty” in section 2 of the Theft Act 1968:

15 (1)A person’s appropriation of property belonging to another is not to be regarded as dishonest—

(a)if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person; or

(b)if he appropriates the property in the belief that he would have the other’s consent if the other knew of the appropriation and the circumstances of it; or

20 (c)(except where the property came to him as trustee or personal representative) if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.

(2)A person’s appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.

25 32. Whilst there is no equivalent of section 2 Theft Act in the legislation with which we are concerned, it contains two conditions to be satisfied before liability can arise. The first is that there must be conduct for the purpose of evading duty, and the second that such conduct must involve dishonesty. If as we believe, the first of these conditions requires that the person penalised must have known that duty was payable  
30 and by his actions intended not to pay it, then the second condition – the requirement for dishonesty – is almost otiose if it requires only the fulfilment of the condition that the person’s actions were dishonest by ordinary standards, for in almost all situations honest and reasonable people would regard actions fulfilling the first condition to be dishonest, Thus the presence of the first condition indicates that something more is  
35 required by the second condition, in a manner parallel to that in which section 2 Theft Act indicated a two stage test in *Ghosh*.

33. Further the use of the term "penalty" as opposed for example to, say, "surcharge", suggests something to which moral obloquy would attach, and that, as in *Ghosh*, suggests that the statute has in mind a form of subjective dishonesty.



34. We are not bound by the judgment in *Sahib* as the judge's statements on this issue were not necessary for his conclusions. Nor is his reasoning set out in any detail. Thus we favour the *Ghosh* two-step test.

### **Further findings of fact**

5 (a) Mr Hamidi 's understanding of the three channels

35. Mr Hamidi had made four trips to and from Afghanistan prior to the trip which ended in his return to the UK on 2 May 2015. On one of the trips he took all six of his children. His children had been brought up and educated in the UK and spoke English well. They were successful. The two trips before the one in which he was stopped had  
10 been for an extended family visit and a wedding. On each trip he had flown back to Heathrow or Gatwick.

36. Mr Hamidi told us that his colour vision was normal and that on 2 May 2015 he had noticed the different channels and the large coloured signs above them. He said, however, that he had not known what the signage above the channels meant; he had  
15 been "confused" about what channel to choose; he did not have the knowledge to choose the correct one: he decided simply to follow the group of people - and that meant going through the Green channel.

37. In his witness statement to the tribunal Mr Hamidi put the position slightly differently:

20 "HM Revenue claims that I deliberately exited through the "nothing to declare gate". I did not notice any gates on the way to exit and surely, I don't understand it as I don't speak English."

38. We find it unlikely that on 2 May 2015 Mr Hamidi did not know the significance of the three channels. He told us that he understood that there were  
25 certain import restrictions. He had entered the UK on several occasions prior to 2 May 2015 and would have seen that there was a choice to be made. It is unlikely that on some of these occasions he was unable to, and did not, see them and obtain an understanding that entry into the Green Channel was a representation that the traveller was importing nothing on which duty was payable. In particular when he travelled  
30 with his children it is unlikely that they did not understand the significance of the three channels and that some of their understanding had not rubbed off on Mr Hamidi.

39. We conclude that Mr Hamidi did understand the effect of exiting through the Green Channel.

40. Did Mr Hamidi understand that duty was payable on the import of more than  
35 200 cigarettes from non-EU country?

41. Mr Hamidi's evidence displays a concentration on import for commercial purposes. In his first letter to HMRC, that of 10 June 2016, the year after the seizure, he said:

"On 2 May 2015 I had brought the few packets of cigarettes for my own personal use and for a couple of friends ...

"I have been ... given notice by the UK border not to bring more than I am allowed for personal use".

5 "I have never attempted to bring underpaid tobacco ... with me into the country for commercial purposes."

42. In his letter of 20 July 2016, seeking a review of HMRC's decision, he said:

"the goods were not intended to be brought into the country for any commercial purposes. It was purely for personal use ...",

10 and in his written evidence to us he said:

"I did not bring the Tobacco product for any commercial purposes".

43. When Mr Hamidi was asked by Mrs Hardcastle if he was aware of any restrictions on importing goods, he said that he understood the drugs were not allowed and that customs duties were "for commercial matters because you make a profit",  
15 and that he had known that for a long time.

44. We had described to us screens adjacent to the baggage carousel and at the entrances to the various channels. Mr Hamidi told us that he did not see the pictures of cigarettes on these lines: it was a long flight and he was tired.

45. The import of cigarettes from the EU is tariff free if the cigarettes are for personal use and not for commercial purposes. It seems to us likely that Mr Hamidi had heard of this restriction and had assumed that it also applied to goods imported from outside the EU: the emphasis in his letters was consistent with his evidence before us. It seems to us quite possible that armed with that understanding Mr Hamidi would not have paid full attention to the screens in the notices both on 2 May 2015  
20 and on previous trips.  
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46. Mrs Hardcastle urged us to doubt the credibility of Mr Hamidi 's evidence. She said that:

(i) Mr Hamidi's oral evidence (see below) that that he had been given an assurance that no further action would be taken by a female officer rather than  
30 by Mr Somogyi was a recent invention not mentioned in his previous correspondence, and that Mr Somogyi's evidence that he had not given an assurance had led to Mr Hamidi making up this invention in his oral evidence to us.

We were not convinced that this was a recent invention. The earlier  
35 correspondence had spoken of an assurance without mentioning by whom it had been given. Mr Hamidi's answer was consistent with his other evidence;

(ii) Mr Hamidi's indication that he was confused about which channel to use and had followed the crowd into the Green channel was also a recent invention. Until the hearing in his argument had been only that the import was not for commercial purposes.

5 We have found it likely that Mr Hamidi did know the significance of the different channels and consider that his suggestion that he was confused was gilding the lily. It casts some doubt on his veracity. But his use (or his translator's use) of 'confused' may well have reflected instead an imprecise understanding of the nature of the channels, a possibility not investigated before  
10 us.

47. We concluded that we should regard Mr Hamidi's evidence with some caution.

48. But were the cigarettes only for Mr Hamidi's own use - or for that of himself and a few friends?

49. We accept Mr Hamidi's evidence that he is a smoker and smokes heavily.

15 50. In his letter of 10 June 2016 Mr Hamidi says that on 2 May 2015 he brought back a "few" packets of cigarettes. In a note of a telephone call to HMRC made by Mr Hamidi's son on 29 June 2016, it is recorded that Mr Hamidi's son said that his father "only had 2-3 packets of cigarettes for him and 2-3 for his friends".

20 51. The reference to "few" packets in Mr Hamidi's letter of 10 June 2016, and to "2-3" packets in the telephone conversation, are in our view misleading. They attempt untruthfully to indicate that the imports were not for a commercial purpose. They cast doubt on Mr Hamidi's statement that the cigarettes were not for a commercial purpose.

25 52. Mr Hamidi had been to Afghanistan for three months in early 2014, for just over a month in the late summer of the same year and then went for a month before his return on 2 May 2015. He went again for a short family visit in December 2015. It seems to us to be likely that on his return to the UK in 2015 he would have anticipated a further visit within the year. Thus it would be unlikely that the cigarettes needed for his own use would be for more than six to eight months or so supply. If he smoked  
30 20- 30 a day that should be no more than some 4800 cigarettes. He brought in 10,000.

35 53. Mr Hamidi said, and we accept, that the L and M cigarettes were not available to retail customers in the UK. That suggests that it would have been less easy for Mr Hamidi to sell the cigarettes, but his indication that he bought cigarettes for a couple of friends suggest that there would have been a demand for them even if at a reduced price.

40 54. We find it unlikely that all the cigarettes were for Mr Hamidi's personal use and find it likely that he intended to pass some of them on to others for payment.. Mr Hamidi was at pains to tell us that he was not a rich man. It was unlikely therefore that he would not have sought some payment from those to whom he intended to pass cigarettes. We think it likely that he would at least have sought a commercial deal with a payment at least equal to his costs. We conclude that he would have known that the

cigarettes were not solely for his own use and knew that they were at least in part for a commercial purpose.

55. As a result we find:

5 (1) that Mr Hamidi believed that some duty was payable and intended, by passing through the Green channel, that that duty would not be paid. His conduct was therefore for the purpose of evading duty; and

10 (2) that Mr Hamidi entered the Green channel knowing that doing so was a representation that he had no duty to pay when on his understanding of the law he knew that at least some of the cigarettes would dutiable. That in our view was dishonest by the standards of ordinary reasonable honest people.

56. Thus on the one step test favoured by the tribunals in *Niaye* and *Osman* the test for the application of the penalty would be satisfied.

15 57. If we are right that the appropriate test for dishonesty is the two step test in Ghosh then we have to ask whether Mr Hamidi knew that it was dishonest according to those standards?

58. It seems to us that Mr Hamidi 's statement in his letter of 10 June that he bought only "few" cigarettes indicates that he realised that bringing in more without paying duty was wrong. That in turn suggests that he realised that ordinary people would have regarded his conduct as dishonest.

20 59. Therefore we find the test as we regard it as applying is satisfied.

*The conditions for the penalties Evasion and Dishonesty – conclusion*

60. We therefore conclude that the tests for the imposition of the penalties were satisfied.

**2. Were the tax and duty correctly calculated?**

25 61. HMRC calculated the duty and tax thus:

Excise Duty

(a) ad valorem 9,800 cigarettes at retail price of £6.28 per packet of 20; duty at 16.5%  
= £1,857.10

(b) duty by number of cigarettes: 9,800 at £189.49 per 1,000 = £ 507.74

30 **£2,364.74**

Customs duty

9,800 at £0.25 per 20. Duty at 57.6%= **£ 70.56**

VAT

20% x (£0.25 (value) + customs duty + excise duty) = **£ 511.30**

Total **£2,945.00**

62. Mr Hamidi questioned the element in this computation which related to the retail price of £6.28 per packet of 20. He said that there was no retail market for L and M cigarettes in the UK. The implication was that they would have a lower selling price than £6.28.

63. We have set out the relevant parts of the Tobacco Products Duty Act above. It provides that the ad valorem duty is to be assessed on the basis of the determination by HMRC of the normal selling price of cigarettes of this description but that once the duty has been paid the payer can challenge the determination before a referee. In the present case we understood that, the cigarettes having been seized, no duty was charged and none was paid. Thus there is no route under that Act to challenge the selling price determined by the commissioners.

64. In our opinion however the relevant Acts should not be understood construed so as to prevent such a challenge. Since a challenge cannot be brought under the Tobacco Products Duty Act, the jurisdiction of the tribunal on an appeal in relation to section 8 FA 1994 and section 29 FA 2003 must be construed as embracing a jurisdiction for the tribunal to determine the duty where it has not been previously judicially determined (and that may mean determined under the referee provisions and the Tobacco Duty Act).

65. Mrs White said, and we accept, that the figure of £6.28 was taken from tables computed by HMRC, and that where a brand of cigarettes would not ordinarily sold in the UK the lowest retail price of any brand sold in the UK was taken.

66. Apart from Mr Hamidi's evidence that this particular brand of cigarettes was not sold by retail in the UK we had no evidence of the price at which cigarettes of that description would normally be sold by retail in the UK. We do not believe that there would be no retail market for such cigarettes: if Mr Hamidi's friends smoked them then there would be people who would buy them. We conclude that there was no evidence to displace the figure of £6.28 and that we cannot adjust the computation.

30 The penalty.

67. We concluded that some of the cigarettes Mr Hamidi imported were imported for a commercial purpose. It was the importation of those cigarettes which was conduct for the "purpose" of evading duty (taking "purpose" in the relevant sections as being the subjective purpose of Mr Hamidi ). As a result it is only the duty on those cigarettes which was sought to be avoided. That means that the penalty under section 8 and section 25 is limited to the duty on those cigarettes rather than all the 9,800 cigarettes.

68. In our opinion half the cigarettes were for Mr Hamidi's personal use. As a result the maximum penalty is just over half (5,000/9,800)of the duties calculated above.

### **3. Was Mr Hamidi given any assurance that no further action would be taken?**

69. We make the following additional findings of fact

70. After his cigarettes were seized Mr Hamidi signed two forms. The first form was a seizure information notice specifying the goods which had been seized. The  
5 second was a warning letter about the seized goods. This stated that the seizure was "without prejudice to any further action that might be taken against [Mr Hamidi which might include the] sharing of information with HM Revenue & Customs who may take action ... such as issuing ... you with a wrongdoing penalty".

71. Mr Somogyi told us that he issued the two forms to Mr Hamidi. A box on the  
10 forms required an officer's signature or number. Each box had been completed with the same number and that was Mr Somogyi's staff number.

72. Mr Hamidi told us that a female officer brought the forms to him to sign after the cigarettes had been seized. He said that she told him that he could go and that no further action would be taken against him unless he did it again.

15 73. Mr Hamidi told us that he was asked to sign the forms and he signed them although he did not understand what he was signing. However he said that he did understand that he had been told that unless he did it again no further action would be taken.

74. Mr Somogyi told us, and we accept, that he himself gave no assurance to Mr  
20 Hamidi that no further action would be taken. Although Mr Hamidi's account of the action of the female officer was not mentioned in the short letters Mr Hamidi wrote the HMRC or in his statement of case, we found his evidence that he had been given the forms to sign by a female officer believable and that it was likely that since Mr Somogyi had been seizing officer he would have put his number on the form. It  
25 seemed quite possible that while Mr Somogyi had been dealing with the cigarettes another officer had given Mr Hamidi the forms. We also find it likely that Mr Hamidi was told that he could go by that officer.

75. However, we find it unlikely that that officer gave him an assurance that no  
30 further action would be taken. An officer delivering a one-page form, the majority of whose text concerned the possibility of further actions, would in our judgement be very unlikely to give any assurance that no further action would be taken.

76. Whilst we accept Mr Hamidi may have obtained the impression that no further  
35 action would be taken it seems to us that, given his limited understanding of English, it is likely that he mistook being told that he was free to go for an assurance that nothing else would ensue.

77. We conclude that no assurance was given. We do not therefore need to determine what the position would have been if it had. No reduction or cancellation of the penalties is therefore due by reason of this argument.

### **4. Was the 60% mitigation applied by HMRC appropriate?**

78. On 17 May 2016 HMRC wrote to Mr Hamidi indicating that they were enquiring into his import duty affairs and considering imposing a dishonest conduct penalty in relation to import duties. The letter sought a variety of information. It made no reference to the events of 2 May 2005. The information sought was generally phrased in terms of Mr Hamidi's involvement in "smuggling", although there were also more neutrally phrased questions about his international travel. The letter offered a reduction in penalties for cooperation.

79. In a further letter of 1 June 2016 HMRC renewed their request, referring this time to the events of 2 May 2015.

80. Mr Hamidi responded on 10 June 2016 (within the time requested in the first letter from HMRC) giving details of his travel in the period March 2014 to December 2015, and saying in relation to the events of 2 May 2015 that he had bought a "few" packets of cigarettes for himself and his friends.

81. In the notification of the assessment of the penalties to Mr Hamidi HMRC say that they have decided to allow a reduction of 60% of the penalty to reflect Mr Hamidi's disclosure and cooperation. Mrs White told is that she concluded that Mr Hamidi had not answered all the questions in a letter of 17 May 2016 - in particular he had referred to a few packets rather than 500 packets of cigarettes, and had made no disclosure of the amounts imported on other visits. As a result the mitigation was limited to 60%.

82.

It is clear that the first omission amounted to Mr Hamidi not telling HMRC what they already knew. It seems reasonable to us for HMRC expect to be told this, and for the taxpayer to provide it, as it allows them to assess the likely truth of the rest of the response from a taxpayer. The second potential omission was that no disclosure was made in relation to whether or not any goods were 'smuggled' on previous occasions. We consider it likely that, given Mr Hamidi's finances and smoking habit, he brought back cigarettes on previous occasions. If these cigarettes had been for his own use he would not have regarded them as being "smuggled"; but an open, honest and helpful response would have been to explain what he had imported if anything on those occasions.

83. Overall, we recognise that Mr Hamidi's reply was both incomplete and, in its reference to a "few" packets, misleading. On that ground it seems to us that the reduction should be limited to that set by HMRC.

#### 5 Other Matters.

84. Mr Hamidi asked us to take into consideration the fact of his limited resources and that the action will not be repeated.

85. As regards the first of these the relevant provisions expressly forbid taking a person's resources into account. As regards the second the penalty is in relation to previous behaviour. Future behaviour is rewarded by not suffering a penalty again. We decline to reduce the penalty on either of these grounds.

## **Conclusion**

86. We find that penalties are due but must be reduced to a total of

$$40\% \times 5000/9800 \times (£2945) = £601.$$

## **Rights of Appeal**

5 87. 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  
10 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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**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 10 AUGUST 2017**