[2016] UKFTT 0196 (TC)

TC04984

Appeal number: TC/2015/02137

Civil Evasion Penalty – Customs Duties – failure to declare six imports of mackerel from non-EU vessels – whether penalty or further mitigation appropriate – 20% penalty confirmed - Finance Act 2003, Sections 25 and 29 – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRESH CATCH LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MEMBER: JAMES ROBERTSON, CA

Sitting in public at George House, 126 George Street, Edinburgh on 17 November 2015 and 7 January 2016

Appellant:- Miss Charlotte Brown, of Counsel, Quorum Tax Chambers

Respondents:- J Komorowski Esq, Advocate

DECISION

Preliminary

1. This appeal is against the imposition of a Civil Evasion Penalty ("CEP") for £59,862 on the appellant company in respect of six imports of mackerel between September and December 2013 on which a liability to Customs Duties of £299,314.49 had arisen. The penalty represents 20% of the relevant amount of duty after 40% mitigation for an early and truthful explanation, and a further 40% for full cooperation and disclosure. It is accepted that no import declarations had been made in respect of the landings of fish. The appellant company had applied for Inward Processing Relief ("IPR") which, it believed, would be granted. If so, liability to Customs Duties on the landings would not arise.

2. An initial issue arose when the respondents, HMRC, sought to lodge extra productions, viz a High Court Indictment against the appellant and a Confiscation Order. These related to matters within the knowledge of the appellant and its officers, and its advisers had been forewarned of the application. Miss Brown opposed this, having regard to the observations of Lewison J in *HMRC v Brayfal* [2011] STC 1482 concerning our discretion. In the event we decided that these documents should be allowed to be produced late, but under reservation of all questions as to competency and relevancy. Ultimately, having regard to their limited relevance, we did not consider that the appellant company was prejudiced as a result.

The Law

3. Section 25 Finance Act 2003 provides:-

"(1) In any case where—

(a) a person engages in any conduct for the purpose of evading any relevant tax or duty, and

(b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),

that person is liable to a penalty of an amount equal to the amount of the tax or duty evaded or, as the case may be, sought to be evaded.

(2) …

(3) …

(4) Any reference in this section to a person's "evading" any relevant tax or duty includes a reference to his obtaining or securing, without his being entitled to it, —

(a) …

(b) …

(c) any deferral or other postponement of his liability to pay any relevant tax or duty or of the discharge by payment of any such liability …".

Parties provided a Joint List of Authorities which is incorporated herein as an Appendix.

The Evidence

4. It was agreed that the respondents, HMRC, should lead. They accepted that as the question of dishonesty arose, the burden of proof rested on them. Mr Komorowski called one witness, **George Leith Laing,** a higher compliance officer of the respondents since 2000. He read and adopted the terms of his Witness Statement (Bundle p115-125). He is specially trained in Customs Civil Evasion procedure and relative investigations.

5. Mr Laing explained that he had reviewed a colleague's audit of the appellant company's imports and exports. The report found that on six occasions between September and December 2013 the appellant had failed to present or declare to HMRC imports of Norwegian mackerel, on which duty of £299,314.49 was found to be due. The appellant had advised HMRC's Approvals Team on 25 September 2015 that it had made a retrospective application for Inward Processing Relief and that it had received landings of "third country" fish. The appellant had been advised in September and October 2013 to make import declarations and that duty had to be paid on imports. That could be reclaimed later if IPR were granted. Part of the requirements for IPR was satisfying an economic test, to be determined by DEFRA. Pending a decision on IPR the appellant had been advised of two options. Fish could be landed, paying duty on entry, or it could be sent to a Customs Warehouse. Duty could be reclaimed retrospectively. The application for IPR was in fact refused early in 2014.

6. HMRC's Approval Team held documentation in respect of six landings by Norwegian vessels at Peterhead between September and December 2013 for a total value of about £1.5M. Mr Laing had examined the appellant's import declarations (which confirmed its awareness of its legal obligations) but it had failed to declare the Norwegian mackerel. (There was an incorrect declaration of these goods to Simplified Inward Processing.) In the previous Year's audit the appellant had failed to enter "a third country" fish, resulting in Customs debts. Civil penalties were raised and agreed remedial steps suggested. Mr Laing noted also a letter dated 31 October 2012 from HMRC reminding the appellant of the need to abide by import procedures.

7. On 10 March 2014 the appellant's application for IPR was refused. Mr Laing was satisfied that the appellant was fully aware of its legal obligations, and that its failure to declare the six landings of imported fish resulted in avoidance of £299,313.49 in Customs duties. This contravened advice given to the appellant.

Mr Laing thought it appropriate that the appellant's directors be interviewed in terms of Customs Public Notice 300 as potentially civil penalties arose. A meeting to this end was held on 3 April 2014 at the appellant's offices. Christopher Anderson, the appellant's managing director, its solicitor, and its accountant were present. Mr Laing advised that penalty levels could be mitigated by cooperation. He indicated that HMRC had information suggesting that there had not been full declaration of duty by the appellant attributable to dishonesty, although he stressed that there could be an innocent explanation. He advised that he was seeking to establish whether the suspected under-declarations were attributable to dishonesty.

8. Mr Anderson replied that he had believed IPR would be granted. He advised that the six landings made would have been documented in ongoing correspondence with HMRC. He was surprised when IPR was refused. Mr Laing responded that the issue was the failure by the appellant to declare for Customs Duties purposes the six landings of fish from Norwegian vessels on 21 and 26 September, 9 October, 27 November (two landings) and on 3 December 2013. Mr Laing referred to assurances given to Ms Delea, a Civil Penalties Officer, on 18 September 2013 and email correspondence between the company and HMRC's supervising office on 27 September 2013, advising that any duty paid could be reclaimed if IPR were granted retrospectively. Mr Laing reminded Mr Anderson that Customs duties of £299,314.49 had arisen. Mr Anderson stated that no Custom import entry had been made as the company understood that the IPR would be granted. Mr Laing stressed that there were regimes available which could suspend duties but these all required that a declaration and import entry be made. In short, Mr Laing wished to know why a decision had been made not to make the import entry and whose decision that was.

9. The appellant company's solicitor requested an adjournment. Thereafter, the company's Customs record keeper (Ms King) explained that she had been taught how to prepare inward processing spreadsheets and that landings from "third country" vessels required a Customs declaration. Mr Anderson then acknowledged that the decision not to make the relevant entries was an error of judgement made on the basis that IPR was pending and that the declaration could be made when that was approved. He acknowledged that decision as his. Thereupon Mr Laing indicated that if such conduct were continuing, then it must cease. He indicated that statements found to be false after the enquiry had been concluded, could result in a criminal investigation and prosecution. Also, false statements would affect any mitigation of the maximum penalty.

10. Mr Laing considered that the appellant company was aware of the requirement to declare imported goods, having been so advised. It appeared that a deliberate decision had been made not to do so on the six imports made between September and December 2013. There had been deliberate intent as the trader was fully aware that Customs duties would be incurred. The trader was fully aware that a nil rate was not applicable and that duty suspension was not available. Mr Laing considered that the appellant had made this decision in full knowledge that Customs duties would have been payable. A Customs evasion penalty would amount to 100% of the assessed duties, but Mr Laing had recommended that this be mitigated by 80%, 40% in respect of an early and truthful explanation and a further 40% for full cooperation and

disclosure at the meeting on 3 April 2014. Mr Laing had recommended a net penalty of 20% of the assessed duties, being £59,862. A formal penalty notice was issued on 21 October 2014.

11. In cross-examination by Miss Brown, Mr Laing confirmed that the decision about imposition of a penalty was his. This penalty arose in his view from a deliberate decision resulting in financial gain to the appellant. The purpose had been to avoid duty. He was then referred to various items of documentation. The thrust of this was that there had in fact been full disclosure by the appellant company and no attempt to conceal the landings of fish. The context was that IPR was likely to be granted and a guarantee was also being negotiated. Mr Laing was reluctant to accept that all this was inconsistent with an attempt to avoid duty. He explained that the grant of IPR depended on *inter alia* satisfying an economic test, which was determined by DEFRA. While certain documents had been provided by the appellant, these did not contain evidence of Customs entries.

12. It was then put to Mr Laing that HMRC had received the International Maritime Organisation Declarations ("IMO") i.e. a declaration of fish being imported in respect of each of the landings. These documents, Mr Laing explained, were provided by the ship's master shortly in advance of the landings. While the appellant may have relayed these to HMRC, it did so as agent of the ship's master. Critically, in Mr Laing's view, the IMO's did not represent Customs declarations. The failure to make formal Customs declarations had not been explained away satisfactorily in his view.

13. Mr Laing agreed that *dishonesty* was required for a penalty to be imposed under Section 25. Evasion and dishonesty were of the essence, he agreed. Miss Brown suggested that HMRC was in fact fully aware of the landings. However, Mr Laing explained that, notwithstanding, a Customs declaration was required as it was more detailed, and this further information was necessary for the calculation of duty. An IMO was insufficient for that purpose.

14. While there had been previous contraventions by the appellant, these were dealt with under Section 26 and had not been regarded as *evasion*, Mr Laing explained. Advice had then been given to the appellant company on proper procedures.

15. In re-examination Mr Laing was asked how actual landings might compare with intended landings. It was suggested to him that they could be more or less. Mr Laing then explained the different codes for different types of fish. He was uncertain of the exact circumstances in which an IMO was required, but it was a document to be completed by the ship's master.

16. We were then referred to the Witness Statement of **Celine Delea** (doc C3), a Higher Officer of HMRC with experience of Customs Civil Penalties. It had been agreed by Parties that she would not be cross-examined on behalf of the appellant and she did not attend the hearing. Her WS narrates that in her capacity as Customs Civil Penalty Officer for Scotland, Wales and Northern Ireland, she received a referral from Lorna Souden, a colleague in Aberdeen. An examination of the appellant's

international trading records identified 117 contraventions of Customs Law. Landings had not been processed timeously. Importations had not been declared. IPR conditions had not been observed. On 17 September 2013 she phoned the appellant company and spoke to Messrs Anderson, Ritchie, and Bruce and Ms Vanj King, its shipping administrator and book-keeper.

17. Ms Delea explained the nature of the financial penalty system and asked to interview the representatives of the appellant company about the circumstances in which the contraventions arose, whether there was a reasonable excuse or other mitigating factors, and, also, whether any remedial action had been taken to prevent future contraventions. In due course the appellant's representatives explained the remedial systems to support future compliance. Miss Delea discussed the detail of this with them and provided further education and advice, stressing the importance of having a clear audit trail of all imports and landings of fish and all movements and disposals of fish. She explained the legal obligations on the appellant in relation to International Trade activities. For every landing of fish, there should be a corresponding Import Declaration. For every movement and disposal of fish, there should be a corresponding transfer and export declaration. The appropriate Excel Spreadsheets and IPR Returns should be submitted timeously to show landings and imports, and transfers and disposals. The appellant's representatives indicated that the new systems supported compliance. In the event of any further queries or questions about the use of IPR approval, they were advised to contact the International Trade Assurance Officers in Aberdeen or their Customs consultant. Finally Ms Delea advised the appellant company of the monetary penalties intended and the basis for mitigation. She sent copy notes of the interview for the company's representatives to consider (ex 1). Thereafter penalty notices were issued on 26 September 2013 (exs 3, 4 and 5). Ms Delea was satisfied that the appellant's company's representatives understood clearly their legal obligations for future compliance with International Trade Regulations.

18. Mr Komorowski stressed his reliance on the phone call of 17 September 2013 and the record of advice given to the appellant company.

19. Miss Brown then led her evidence on behalf of the appellant company. She called one witness, its managing director, **Chris Anderson.** He read and adopted his Witness Statement (p156-159), correcting "2014" to "2013" throughout para 9 and in the first sentence of para 12. Mr Anderson has worked in seafood processing for 44 years. Initially he had sea-going experience but by age 17 he had established a fish processing business, which by 1987 had become the biggest white fish business in the EU. He established the appellant company in 1989 as a family business. It became a large pelagic fishing company and it continued to trade until 2014. Its key market was SE Asia where North Atlantic fish products are valued highly. Latterly the appellant company had problems with HMRC relating to customs duties and the operation of IPR.

20. In particular Mr Anderson referred to an email from HMRC dated 27 September 2013 (Ex 1), which stated – "Assuming the outcome of the economic test is satisfactory the company will be approved from 25 September 2013 …". The

appellant landed six imports of fish purchased from Norwegian vessels between 22 September and 3 December 2013. Its general manager, Jackie Bruce, did not make any relative import declarations, believing that the IPR application would be accepted shortly. On 19 December 2013, the appellant's solicitors asked for its IPR to be back-dated and explained that the IPR was required urgently. HMRC enquired whether import entries had been made in respect of landings of fish. Mr Bruce had explained that entries would be made once an IPR number was available. The appellant did not conceal the landings made between September and December 2013, Mr Anderson maintained. Mr Anderson stated that he and Jackie Bruce had sought to progress the company's IPR application with HMRC from July 2013. By September the company was calling HMRC daily. It was told at one stage that IPR would be restricted to one month, then it was refused entirely. On 13 January 2014 the appellant company was advised by HMRC that customs duties of £299,314.49 would be levied for undeclared imports. The company's management was surprised about the refusal of IPR: they had expected it to be approved. The six landings were not declared as the company understood that the IPR application would be accepted. Mr Anderson acknowledged that this was an error of judgement, which he had accepted when he met HMRC in April 2014. Additionally, a personal guarantee for £420,000 had been granted in favour of HMRC. This was secured over Mr Anderson's personal property. This, he suggested, confirmed the absence of any intention to evade duties.

21. A CEP was served on the appellant on 21 October 2014. The company's management was surprised as they had tried to co-operate with HMRC and sought to meet them to resolve the dispute. Mr Anderson stressed that all relevant landings had been reported to Scottish Fisheries and HMRC. There had been no attempt to evade duty or mislead the authorities, he insisted. While the company accepts that import declarations should have been made in respect of the six landings in issue, that failure was an error of judgement and not an act of dishonesty, he claimed.

22. In response to cross-examination by Mr Komorowski Mr Anderson explained that he was 51% shareholder and managing director of the appellant company. Its business was fish-processing. The imported fish had been processed and then re-exported. Mr Bruce was the general manager of the company and the main contact with HMRC. Mr Anderson confirmed that the company had pled guilty to the criminal charges before the High Court. There had been full cooperation with the authorities then. He accepted that the company had over-fished its quota. There was a teare on the company's scales which facilitated downwards variations. The company's employees could do this.

23. Mr Anderson acknowledged that a Customs Declaration should have been made. He accepted that while the IPR application was pending, duty should have been paid. He claimed that he had no recollection of the terms of certain emails, although he did accept that he had weekly meetings with Messrs Bruce and Ritchie and Ms King about the company's operations. He insisted that his recollection of events was reliable notwithstanding. All relevant information had been passed to the company's solicitors. Mr Anderson agreed that he had attended the interview with HMRC. He accepted that by end October 2013 he was aware that Customs Declarations were required even while the application for IPR was pending. He

accepted that no declaration or presentation of the six landings had been made to HMRC.

24. Mr Anderson was then asked about IMO declarations. It was put to him that these did not relate to Customs and Excise matters, and that they had been completed as agent for the ships' masters. Mr Anderson indicated that he was uncertain. Further, it was put to him by Mr Komorowski that there had been a deliberate failure and dishonesty on the company's part. Mr Anderson disagreed. Finally, in respect of the accuracy of the notes of HMRC's meeting with the company's management, he claimed not to have a sufficient recollection.

25. Mr Anderson was not re-examined.

Submissions

26. Counsel had helpfully submitted their skeleton arguments at the outset. At the continued hearing they both elaborated on these and the evidence led.

27. We were addressed firstly by Mr Komorowski on behalf of HMRC. He moved us to refuse the appeal and to uphold the evasion penalty at the rate imposed of 20%. He accepted that the *onus* of proof was on HMRC to establish liability to the penalty. Once established, the *onus* then transferred to the appellant to show that the level of penalty was excessive.

28. So far as the witness evidence was concerned, Mr Komorowski urged us to accept Mr Laing's evidence as credible and reliable. His evidence had not been challenged in cross-examination. On the other hand he suggested that Mr Anderson's evidence should be viewed as neither credible nor reliable. Mr Anderson had been defensive and had tended to excuse or minimise irregularities and failures by the appellant company. This was exemplified by his comments on its High Court conviction. In particular para 18 of his Witness Statement was irreconcilable with the two emails of 27 September 2013 (tab 11) and 16 October 2013 (tab 14) in which HMRC had set out recommended procedures for landings of fish and the grant of IPR. By contrast Mr Anderson did recollect in his evidence HMRC's letter of 14 October 2013 to Mr Jackie Bruce (tab 13). Given that Mr Anderson as one of a team of four managing the business, involved in daily conversations, it was implausible for him to suggest that he was not aware of the implications of the emails. Further, in the notes of interview (tab 34, p284) revised on behalf of the appellant company there is reference to both emails. The inference from all of this, Mr Komorowski suggested, was that the appellant company's officers, including Mr Anderson, knew that they had to declare and pay duty on the landings of fish.

29. Mr Komorowski then turned to his Skeleton Argument. He noted the terms of Section 25 FA 2003 which refer to *dishonesty* for the purposes of *evading* duty. Evasion of duty, he submitted, included "temporary avoidance". In support he relied on an unreported decision, *Fairclough*, approved in *Dealy* (Authorities 12) and in particular p665D-F thereof. This confirmed that a cash-flow advantage secured by delaying payment of tax due amounted to evasion, he argued.

30. Mr Komorowski then considered the sense of *dishonesty*. He noted the observations of Pelling J in *Sahib Restaurant Limited* (tab 22), paras 39-40, where the objective nature of the test is emphasised. In the present case, Mr Komorowski continued, there had been a deliberate delay to make a declaration of duty. That, he said, was dishonest and obviously dishonest. Mr Komorowski noted observations made in *Walker & Walker* (tab 23) at paras 116/117. The actings of the appellant company's officers in the present case should have been open and transparent. They were not.

31. Mr Komorowski reminded us of the terms of the previous conviction relating to the appellant company (tab 38-39). He noted also that the company had a previous conviction for failure to present (CD3, p109/110) pre-dating the six landings with which this appeal is concerned. "Presentation" is the submission of a special form, "C1600", which gives HMRC details of the landing of fish. He emphasised as critical to HMRC's argument the implications of the exchange of emails produced (tabs 20-27).

32. Mr Komorowski then turned to the significance of the guarantee as amounting to goodwill on the appellant company's part. He rejected this. Irrespective of any guarantee HMRC had to be made aware of the landings of fish. Also, the security was a pre-requisite of IPR. Further, the amount of the security sought bore no relation to the value of the mackerel landed.

33. He then considered the implications of the IMO declarations. These indicate the amount of fish on the ship, not what is landed. The IMO serves a different purpose from that of a presentation or customs declaration.

34. Mr Komorowski noted the email (tab 14) in which the "commercial" choices available to the appellant company were set out pending the grant of IPR.

35. Finally, he submitted that all of these circumstances indicated an intent on the part of the appellant company to evade duty completely.

36. At the outset of her reply Miss Brown accepted that the appellant company had not declared the landings of fish or made the appropriate presentations. She emphasised that the issue in the appeal was whether a Civil Evasion Penalty was correct and justified. There was a discretion in terms of Sections 24-26 FA 2003. To satisfy Section 25 two criteria, dishonesty and evasion, had both to be satisfied. By contrast Section 26 imposed a (relatively) nominal penalty of £1,000 for contravention of a rule. Miss Brown suggested that the imposition of a CEP under Section 25 was the exceptional procedure, with its special criteria.

37. The appellant company accepted its failure to "declare" or "present" but that, Miss Brown continued, was irrelevant in relation to the imposition of a CEP. For that there had to be an intention to evade and, also, dishonesty. She adopted the sense of "dishonesty" in *Ghandi Tandoori Restaurant* noted in para 10 of her Skeleton Argument as denoting an additional element to evasion, of which a reasonable and honest person would disapprove. While Miss Brown's primary stance was that

Section 25 was not satisfied, as an alternative she suggested that further mitigation of the penalty from the present 20% to nil should be considered.

38. Cogent evidence was required to establish dishonesty. Miss Brown referred to para 17 of her Skeleton and a reference to *Mohammed Siddiq Khan*. The more serious the allegation of dishonesty, as in the present case, the stronger the supporting evidence had to be, she submitted. Here an innocent explanation was the most likely. Failure to declare in itself did not allow an inference of dishonesty. The appellant company's officers believed that no tax was due. IPR, they understood, was to be granted. (See para 26 of the Skeleton). There was no evidence of any unwillingness to pay. As a substantial guarantee had been negotiated successfully, it was reasonable to assume that the IPR was being processed favourably.

39. Miss Brown then referred to the terms of the emails. She accepted that the term "commercial decision" (in tab 14) was curious. However, HMRC were aware of the landings, although no duty had been declared. The IPR application had seemed to be progressing satisfactorily in which case no duty would be payable. Failure to declare landings had to be contrasted with *concealment* of landings, which would amount to evasion for Section 25 purposes. It was the appellant company which had transmitted the IMO's, and the terms of HMRC's letter (tab 13) which proceeded on information from the appellant, contained relevant information of landings. All this was inconsistent with evasion, Miss Brown submitted. The flaw in HMRC's argument was that there was insufficient evidence to support both criteria required for Section 25 viz an intention to evade together with dishonesty.

40. In determining *dishonesty* Miss Brown suggested that there was an important subjective element in the test. She referred us to *Ghosh*, which relates to the Theft Act 1968. There the Court of Appeal suggested that to establish guilt the court had to be satisfied that, in addition to particular conduct being wrong by objective standards, the defendant should have realised personally that his conduct was dishonest by these standards (see [1982] QB p1054, 1062 and 1064). As a Court of Appeal decision it was of higher authority than *Sahib*. Miss Brown submitted that in the circumstances of this appeal a two-stage test of dishonesty had to be applied.

41. Miss Brown sought to distinguish the previous penalties imposed on the appellant under Section 26. These did not show dishonesty. Further, the terms of the Indictment (tabs 38 and 29) related to events in 2012. These were criminal not civil matters. In her view they were not cogent evidence of the company's attitude in relation to these landings. She noted para 22 of the F-t T's decision in *Walker and Walker* –

"In the context of civil evasion penalties it has been specifically held that mere carelessness, even recklessness, does not constitute dishonesty: see *Stuttard v HMRC* [2000] STC 342."

42. HMRC had not demonstrated how the appellant company had been dishonest, Miss Brown continued. It had not concealed the landings. HMRC were aware of these from the IMO's. There had been full compliance on the part of the appellant

(hence the substantial mitigation of the penalty). The key flaw in the respondents' case was that they were aware of the landings. That was inconsistent with the evasion of duties.

43. Miss Brown then addressed us on her reserve argument, that of further mitigation. In terms of Section 29 FA 2003 the Tribunal (and HMRC) had power to amend or vary the level of penalty. She suggested that in the present case a nil penalty was appropriate. Full information had been given to HMRC. There were "exceptional" circumstances in terms of the official Guidance at para 3:2 (see Auth 27). There had been complete, voluntary and unprompted disclosure. She referred to para 32 of her Skeleton. There were also the IMO declarations sent by the appellant company, and delivery notes (see GL2) were attached to email correspondence from the company. *Esto* Section 25 were satisfied, the penalty should be further reduced from 20% to nil.

Decision

44. The issue in this appeal is whether the respondents, HMRC, were correct in proceeding to impose a Civil Evasion Penalty under Section 25 FA 2003, rather than a "contravention" penalty under Section 26. There is a secondary issue too, in that *esto* the Section 25 "evasion" penalty were appropriate, whether further mitigation beyond the 80% allowed, is proper. Section 29 enables the Tribunal to make a further reduction, even to nil.

45. Section 25 depends on two aspects, viz evasion of tax and dishonesty. Both should be present. We agree with Mr Komorowski that evasion extends to securing a deferral of liability or cash-flow advantage. We note and follow the guidance in *Fairclough* as approved in *Dealy*: evasion does not imply permanence. Both of these decisions relate to revenue matters. We observe too that in any event subsection (4) provides that *evading* includes "… (c) any deferral or other postponement of… liability to pay any relevant tax or duty …".

46. In the circumstances of the present case the appellant company purported to act on the basis that it was to obtain Inward Processing Relief, which would have had the effect of relieving liability to pay import duties on the landings. At the very least that achieved a cash-flow advantage in not having to account for duty at the time of import. (If IPR were not granted, and there were no later disclosure, then there would be a permanent loss of revenue to HMRC.)

47. We consider in the present appeal that the necessary element of *evasion* is established for purposes of subsection (1)(a) of Section 25. On any view of the evidence at least a temporary advantage was obtained, and the appellant's board must have appreciated that. Mr Komorowski suggested that we should infer an intention to evade payment of duties permanently. We hesitate to do so, and given our earlier views, it is unnecessary for us to so find. It is difficult to reconcile such a permanent intention – at least on a continuing basis – with the appellant company's subsequent cooperation.

48. We now turn to the sense of *dishonesty* for the purposes of Section 25 and consider this in light of our assessment of the oral evidence, particularly that of Mr Anderson, and the Bundle of documents. Counsel differed somewhat in their interpretations of the term. Mr Komorowski argued that the test was essentially objective, but Miss Brown considered that there was crucially a subjective element too. She stressed as persuasive the Court of Appeal's decision in *Ghosh* (which relates to the Theft Act 1968) and *Dealy*, *supra*. While *dishonesty* should (initially) be judged against the view of "ordinary right-thinking people", some account should be taken too of any reasonable view held by the particular subject.

49. At this stage we should set out our assessment of the witness evidence. We found Mr Laing's evidence entirely satisfactory. It was delivered in a straightforward, matter of fact way, and substantially supported by contemporaneous documentation. Our narrative of his evidence may be read as factually accurate and reliable. Miss Delea's evidence was the subject of agreement and we refer again to our narrative of its terms. However, we have serious misgivings about Mr Anderson's evidence. He was the only witness led for the company but he was intimately involved in its management at the crucial time when these six landings were made. On the critical aspect of the company's intention in not declaring for customs duty purposes or "presenting" the landings, we found his account entirely unsatisfactory, and particularly so when viewed in the context of the emails exchanged, and the guidance in specific terms given by HMRC's officers. Mr Anderson – and the company's other officials – were not open and transparent in their actings. There was a deliberate delay in reporting the landings for duty purposes. The consequence of that was to defer payment. Given the substantial sums involved (about £300K) that gave a significant cash-flow advantage to the appellant company at the very least. The appellant company, it seems, had no financial difficulties at that time.

50. Having regard to the twofold test of dishonesty which emerges from the case-law noted, we consider that the actings of the appellant company's officers was dishonest, so justifying the imposition of a CEP in terms of Section 25. Having regard to its officers state of awareness, particularly from the emails, they ought to have known that they were not complying with their obligations to declare. While the company was cooperative once HMRC was alerted to the liability, that is a matter for mitigation rather than avoidance of a penalty. The appellant's argument as to a "constructive" declaration by way of relaying IMO's does not impress us. There was a prescribed procedure which the appellant company should have followed, and of which it had been advised. Yet it chose not to comply with this.

51. In short we consider that there was dishonesty on the part of the appellant company's officers at an objective level ie what the ordinary citizen would consider appropriate, but also at the higher subjective level. They had been left in no doubt about what was expected of them. The evidence in support of *dishonesty* is both cogent and compelling. Indeed, we consider that this conclusion is inevitable in the circumstances.

52. Finally, we have to consider Miss Brown's reserve argument that any penalty should be reduced further, even to nil. HMRC has allowed an 80% reduction,

reflecting 40% for "disclosure" and a further 40% for "cooperation". We consider this reduction perfectly reasonable and taking full account of the appellant company's response. We were referred to HMRC's Notice 300, para 3.2 (tab 27). That contemplates a further reduction beyond 80% where, for example, there has been "a complete and unprompted voluntary disclosure". Section 29(1)(a) permits a reduction up to nil. We remain of the view that there has been a degree of culpability on the part of the appellant company. It chose not to follow prescribed procedure of which it was well aware. Accordingly we confirm the CEP of £59,862 and dismiss the appeal.

53. Finally, we are grateful for the assistance of counsel and those advising them in the course of the appeal. We were provided with written Skeleton Arguments in advance and assisted throughout the hearing on the complex aspects of interpretation of the relevant authorities.

54. 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.

JUDGE MURE
TRIBUNAL JUDGE

RELEASE DATE: 22 MARCH 2016

APPENDIX

Joint List of Authorities

Legislation

1. Customs and Excise Management Act 1979, section 35
2. Finance Act 2003, sections 25, 29 & 33
3. Ship's Report, Importation and Exportation by Sea Regulations (SI 1981/1260) regulations 3 and 4.
4. Customs Controls on Importation of Goods Regulations (SI 1991/2724), regulations 3, 4 and 5.
5. Council Regulation 2913/92/EEC, (the Customs Code) articles 4, 36a, 40, 48, 49, 50, 51, 59, 83, 84, 85, 114, 201 and 202
6. Commission Regulation 2454/93/EEC (the Implementing Regulation) articles, 183, 184a, 186 and 205
7. Directive 2002/6/EC
8. Directive 2010/65/EU

Statutory Directions

9. Directions of Customs and Excise entitled "SHIPS REPORT DIRECTIONS INWARD AND OUTWARD" issued on 11 August 2003

Case Law

10. R v Ghosh [1982] 1QB 1053
11. Gandhi Tandoori Restaurant v HMCE (1989) VATTR 39
12. R v Dealy [1995] 1 W.L.R. 658
13. Royal Brunei Airlines Sdn. Bhd. V Tan [1995] 2 AC 378
14. Meridian Global Funds Management Asia Ltd v. Securities Commission [1995] 2 AC 500
15. in re H [1996] AC 563
16. 1st Indian Cavalry Club Ltd v C&E 1998 SC 126
17. McNicholas Construction Co Ltd v HMCE [2000] STC 553
18. Secretary of State for the Home Department v Rehman [2003] 1 AC 153
19. Miah v HMRC [2005] UKVAT v19215
20. Barlow Clowes International Limited (in liquidation) and others v Eurotrust International Limited and others [2005] UKPC 37
21. Khan (t/a as Greyhound Dry Cleaners) v C&E [2006] STC 1167
22. Sahib restaurant Ltd v HMRC (unreported), 9 April 2008, (Judge Pelling)
23. Walker v HMRC [2013] UKFTT 375 (TC)
24. Tariq Mahmood t/a Port Street Fashion v HMRC [2014] UKFTT 910 (TC)
25. Azam v HMRC [2015] UKFTT 0188 (TC)
26. Azhar Iqbal v HMRC [2015] UKFTT 0429 (TC)

HMRC Public Notices

27. Excise Notice 300: Customs Civil Investigations of Suspected Evasion