



TC06437

Appeal number: TC/2017/05643

EXCISE DUTY – customs civil evasion penalty and excise civil evasion penalty – whether or not conduct dishonest – claim that the Appellant believed that the Canary Islands are in the European Union

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN NEAVE

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR MOHAMMED FAROOQ**

Sitting in public at Norwich on 29 March 2018

J Hamey, counsel, for the Appellant

**N McNamee, counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

Introduction

5 1. This is an appeal against a civil evasion penalty imposed under s 25(1) of the Finance Act 2003 for the evasion or attempted evasion of customs duty and/or import VAT, and under s 8(1) of the Finance Act 1994 for the evasion or attempted evasion of excise duty.

2. The following matters are not in dispute.

10 3. On 8 February 2016, the Appellant arrived at Gatwick Airport on a flight from Tenerife in the Canary Islands. He collected his baggage, and exited the baggage hall via the green (“nothing to declare”) channel. He was stopped in the green channel by UK Border Force Officer Small, who ascertained that the Appellant was carrying 17 kilograms of hand rolling tobacco in his suitcase. This quantity of tobacco exceeded
15 (by some 68 times) the 250 gram personal allowance for tobacco for passengers arriving from places outside the European Union. Although the Canary Islands are a territory of Spain, they are by law treated as being excluded from the territory of the European Union for present purposes. The tobacco was seized by Officer Small.

20 4. Subsequently, on 26 January 2017, HMRC notified the Appellant of their intention to investigate whether his conduct was dishonest and whether it was appropriate to issue a penalty. That letter invited the Appellant to make disclosures and to cooperate in the HMRC enquiry, noting that any penalty imposed could be reduced if he did. The Appellant did not respond to that letter, or to a subsequent reminder letter from HMRC dated 9 February 2017.

25 5. On 13 March 2017, HMRC notified the Appellant of their decision that his action was dishonest and that it was appropriate to impose a penalty equal to the amount of duty that the Appellant had sought to evade. In other words, no reduction in the penalty was given for disclosure or co-operation. The Appellant requested a review of this HMRC decision, and on 19 June 2017, HMRC issued a review decision
30 upholding the penalty. The Appellant now appeals to the Tribunal.

6. The Appellant has not disputed that the amount of the penalty is equal to 100% of the duty that was payable on the tobacco that he was bringing into the UK from the Canary Islands. That is to say, the Appellant has not disputed HMRC’s valuation of the tobacco or calculation of the duty.

35 7. The Appellant contends that his actions in bringing the tobacco into the UK was not dishonest, and that therefore he is not liable to a penalty, which can only be imposed in cases of dishonesty. Although not originally part of the Appellant’s grounds of appeal, his counsel, when asked by the Tribunal at the hearing, submitted in the alternative that the Appellant should have benefitted in a reduction in the
40 penalty. Counsel for HMRC did not object to the Appellant raising this alternative submission at the hearing.

Applicable legislation

8. Section 8 of the Finance Act 1994 relevantly provides:

8 Penalty for evasion of excise duty

- 5 (1) Subject to the following provisions of this section, in any case where—
- (a) any person engages in any conduct for the purpose of evading any duty of excise, and
 - (b) his conduct involves dishonesty (whether or not such as to give rise to any criminal liability),
- 10 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.

...

- 15 (4) Where a person is liable to a penalty under this section—
- (a) the Commissioners or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
 - (b) an appeal tribunal, on an appeal relating to a penalty reduced by the Commissioners under this subsection may cancel the whole or any part of the reduction made by the
- 20 Commissioners.

9. Section 25(1) of the Finance Act 2003 provides:

25 Penalty for evasion

- 25 (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),
- 30 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.

10. Section 29 of the Finance Act 2003 provides:

29 Reduction of penalty under section 25 ...

- 35 (1) Where a person is liable to a penalty under section 25 ...—
- (a) the Commissioners (whether originally or on review) or, on appeal, an appeal tribunal may reduce the penalty to such amount (including nil) as they think proper; and
 - (b) the Commissioners on a review, or an appeal tribunal on an appeal, relating to a penalty reduced by the Commissioners

under this subsection may cancel the whole or any part of the reduction previously made by the Commissioners.

5 (2) In exercising their powers under subsection (1), neither the Commissioners nor an appeal tribunal are entitled to take into account any of the matters specified in subsection (3).

(3) Those matters are—

(a) the insufficiency of the funds available to any person for paying any relevant tax or duty or the amount of the penalty,

10 (b) the fact that there has, in the case in question or in that case taken with any other cases, been no or no significant loss of any relevant tax or duty,

(c) the fact that the person liable to the penalty, or a person acting on his behalf, has acted in good faith.

15 11. The burden of proof is on HMRC to prove the matters mention in s 8(1)(a) and (b) of the Finance Act 1994 and s 25(1)(a) and (b) of the Finance Act 2003, but it is otherwise for the Appellant to establish his grounds of appeal (see Finance Act 1994, s 16(6); Finance Act 2003, s 33(7)).

The Appellant's evidence

20 12. In his witness statement, the Appellant states amongst other matters as follows. He travelled to Tenerife to visit a friend and his children in February 2015. As it was just after Christmas, his suitcase was full with presents for the children. While in Tenerife, he saw how cheap tobacco is there. As his suitcase was now empty, he decided to take back tobacco as a present for a friend in the UK who was on a low wage and supporting 3 children. Knowing that Tenerife is a Spanish island and that Spain is in the EU, the Appellant assumed that Tenerife is in the EU. Nobody told him anything at any point about restrictions on bringing tobacco to the UK from Tenerife. He went through the green channel at Gatwick as he genuinely believed he had nothing to declare. When the UK Border Force officer asked if he had anything to declare, he answered "yes" without hesitation. When asked how much, he showed his suitcase and said "It's full". The officer said that the tobacco would be confiscated but that he would be given a warning and that there would be no further action unless he committed an offence again. At no time did the officer find him to be dishonest. It is unfair of HMRC to tell him months after the event that he is dishonest.

35 13. In examination in chief, the Appellant said amongst other matters as follows. He instructed solicitors one or two months after receiving a letter from HMRC. When asked at Gatwick airport if he had any tobacco, he immediately said yes. When told that he was committing an offence by bringing so much into the UK, he said it was for family and friends. It was for his uncle, and for a person he works with, and for another friend who does not work and is on benefits. They said to him at the time
40 they were quite short of money and asked if he could bring it in. Although the Appellant travels in and out of the UK a lot, tobacco has never interested him.

14. In cross-examination, the Appellant said amongst other matters as follows.

15. The suitcase he was carrying was sufficiently large that it had to be checked in. On the outward journey he was carrying presents for 11 children from two families. On the return journey the suitcase contained nothing other than the tobacco.

5 16. In Tenerife, he saw how cheap tobacco is there. He is not a smoker, so has never previously concerned himself with duty free limits for tobacco. He does not know if tobacco has a use-by date. No one there told him anything about getting stopped. He is not short of money and did not need to sell it.

10 17. He was asked whether he had positively addressed his mind to the question whether Tenerife is in the EU, or whether he simply never addressed his mind to the question. He responded that people he spoke to did not say that it would be a problem. When asked if he had been told by anyone that it would *not* be a problem, he said yes. He said more than once that he was told this by “tourists”.

15 18. He could not remember if there was a blue channel at Gatwick on arrival, or whether there was any reason why he chose the green channel over the blue channel; subsequently he said that he just followed everyone else through the green channel.

20 19. He is an experienced traveller. He has been to mainland Spain about 5 times this year. He had never been to Tenerife before this incident. He has frequently been stopped at customs since this incident, but had never previously been stopped. When he arrived at Gatwick airport he was travelling alone, and waited perhaps 20 minutes for his bag to arrive, but he denied that he took any notice of the signs while he was waiting. He did not need to do so as he did not think he was doing anything wrong. He does not look at signs unless he has a reason to do so.

25 20. He denied Officer Small’s account of their conversation, and said that he told Officer Small immediately that he was carrying tobacco. At the time of the seizure, he signed documents without reading them.

30 21. It was put to him that he had told Officer Small that he did not intend to sell the tobacco even though Officer Small had not asked him whether it was intended for sale, and that this indicated that the Appellant was aware that this was relevant. The Appellant responded “If that is what you say, yes”.

35 22. It was put to him that he did not give his version of events in response to the HMRC letters of 26 January and 9 February 2017, or in a telephone call that he made to HMRC on 1 February 2017, and that it was only after he received the 13 March 2017 penalty decision that he for the first time gave his version of events, claiming that he thought that Tenerife was in the EU. He said that he had been in the process of thinking that he needed legal advice. He had never been stopped before and was panicky. He said that he had told Officer Small that the tobacco was for family and friends, and denied that he told her only that it was for family.

23. In re-examination, the Appellant thought that a 31 March 2017 letter from his solicitors to HMRC was correct in stating that he had first spoken to his solicitors on 24 March 2017, and first saw them on 29 March 2017.

The evidence of UK Border Force Officer Small

5 24. In her witness statement, Officer Small states amongst other matters as follows. When she intercepted the Appellant in the green channel at Gatwick airport, the following conversation took place:

HS [Officer Small]: You are in the customs green channel which means that you have nothing to declare, is that correct?

10 IN [the Appellant]: Yes, I've got nothing

HS: Are you aware of your UK customs allowance for cigarettes, tobacco and alcohol?

IN: I'm not sure but I don't have any of those things anyway.

HS: Nothing at all?

15 IN: OK, I have a bag of tobacco.

Officer Small then searched the Appellant's suitcase and found 17 kilograms of hand rolling tobacco, which she seized together with the suitcase. She issued the Appellant with a seizure information notice, a warning letter and other documentation. The Appellant then stated that the tobacco was for himself and his family and that he did not intend to sell it.

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25. In a supplementary witness statement dated 27 March 2018, Officer Small added as follows. At all baggage reclaim belts at Gatwick Airport two signs are clearly displayed. One, which lists the countries in the EU, includes the entry "Spain (but not the Canary Islands)". The other sign states that the duty free allowance for tobacco brought from outside the EU is 200 cigarettes or 100 cigarillos or 50 cigars or 250 grams of tobacco. Similar but much larger signs are displayed outside each customs channel.

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26. In examination in chief, Officer Small said amongst other matters as follows. Her handwritten notes of the events of 8 February 2016 were made about 1 and a half hours after the event. Her witness statement was based on those notes.

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27. In cross-examination, Officer Small said amongst other matters as follows. She stops hundreds of passengers a week. Her witness statement was based on her notes rather than her memory, although the notes sometimes jog her memory and she remembers this incident quite well. She denied that the first question she asked the Appellant was whether he had any tobacco. Her first question was about which customs channel he had used. She denied telling the Appellant that if he committed no further offences there would be no further action.

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The evidence of HMRC Officer Hands

28. HMRC Officer Hands gave a witness statement describing the HMRC enquiry leading up to the decision to impose a penalty, and the subsequent review decision. At the hearing he adopted his statement, and there was no cross-examination.

5 **The Appellant's arguments**

29. The Appellant was not dishonest. Rather, he was unaware that Tenerife is not in the EU, and so was unaware of the duty free restrictions. This is not a case of ignorance of the law, but rather, a case of mistake of fact (ie, the fact that Tenerife is to be treated as outside the EU).

10 30. A person is not dishonest by the standards of an ordinary, reasonable person if
doing something that he would have been entitled to do had the fact he believed been
true. For instance, it is not dishonest for a person to leave a public house without
paying in the genuine but mistaken belief that his wife had paid while he was in the
toilets. The test of dishonesty must be applied to the facts as the Appellant believed
15 them to be. What the Appellant believed is a question of fact.

31. The circumstances of this case point strongly to a genuine belief on the part of
the Appellant that the Canary Islands were in the EU. The quantity of tobacco was so
great that it was unlikely to escape detection, and the Appellant in any event made no
attempt to conceal it. There is no evidence that the Appellant looked at the signs in
20 the baggage hall or wilfully failed to look at them, and if the Appellant genuinely
believed the Canary Islands to be in the EU, he would have had no reason to look at
them. Going through the green channel and stating that he had nothing to declare was
consistent with the Appellant believing that the Canary Islands are in the EU.

32. Even if the Appellant made the statements to Officer Small as claimed by her,
25 this can be explained as a momentary loss of concentration and is not remarkable
enough to be cogent evidence of dishonesty. On Officer Small's own evidence, the
Appellant told her that he was carrying tobacco before he was told that his case would
be searched. Officer Small, who observed the Appellant at the time of his entry into
the UK, was best placed to make an assessment of his honesty at the time, and she
30 gave no indication at that time that she considered the Appellant to be acting
dishonestly. The Appellant did not go to Tenerife for the sole purpose of bringing
back tobacco and has a credible explanation for having had an empty suitcase.

33. Even if the Appellant is liable to a penalty, the level of the penalty should be
reduced. There are different levels of dishonesty. The fact that the Appellant was
35 merely doing a favour for family and friends in difficult economic circumstances
justifies a mitigation of the penalty.

The HMRC arguments

34. The test of dishonesty is an objective one, and involves assessing whether the
acts of the person were dishonest by the standards of ordinary and honest people. In
40 the majority of cases the course of conduct adopted by the person is such that the

mental element of dishonesty can be readily inferred. HMRC must prove dishonesty, on a balance of probabilities.

35. In the present case, dishonesty is proved to the requisite standard, by the combination of circumstances in the case. There was clear and unambiguous signage in the arrivals hall at Gatwick airport. The Appellant when questioned by Officer Small twice stated that he had nothing to declare, and only said that he had a bag full of tobacco when asked for a third time, by which time it was apparent that that his bag was likely to be searched. The Appellant admits to being a frequent traveller, and thus must have been aware that there things such as duty free allowances. It is implausible that he would consider that he could bring in such a large amount of tobacco without declaring it. The Appellant has not produced witness statements from the friends for whose children the Appellant claimed he was carrying presents on his outward journey. At the time that the tobacco was seized, the Appellant was issued with a warning letter explaining that HMRC may issue a penalty.

36. The Appellant has not established grounds for mitigation of the penalty. HMRC policy provides for mitigation of the penalty for disclosure and co-operation. The Appellant made no disclosure and did not cooperate with the HMRC enquiry.

The Tribunal's findings

37. The burden of proof is on HMRC to establish all of the matters mentioned in s 8(1)(a) and (b) of the Finance Act 1994 and s 25(1)(a) and (b) of the Finance Act 2003. Thus, HMRC must prove that the Appellant engaged in conduct involving dishonesty for the purpose of evading tax or duty.

38. The standard of proof is the balance of probability.

39. At the hearing, both parties agreed that the applicable legal test for dishonesty was adequately stated for purposes of this appeal in the following passages:

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. (*Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476 at [10].)

Honesty ... [has] a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. (*Royal Brunei Airlines v Tan* [1995] 2 AC 378 at 389.)

It would seem that a claimant in this area needs to show three things: first, that a defendant has the requisite knowledge; secondly, that, given that knowledge, the defendant acts in a way which is contrary to

5 normally acceptable standards of honest conduct (the objective test of honesty or dishonesty); and thirdly, possibly, that the defendant must in some sense be dishonest himself (a subjective test of dishonesty which might, on analysis, add little or nothing to knowledge of the facts which, objectively, would make his conduct dishonest). (*Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 at [16].)

10 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. (*Yosefi v Revenue and Customs* [2017] UKFTT 814 (TC) at [34].)

15 40. A significant point of disagreement in the evidence of the Appellant and that of Officer Small concerns the matter of what questions were asked by Officer Small before the Appellant stated that he had tobacco in his suitcase. The Appellant's evidence is that when he was asked if he had anything to declare, he answered "yes" without hesitation. Officer Small's evidence is that the conversation set out at paragraph 24 above took place, in which the Appellant said in response to a first question from Officer Small that he had nothing to declare, then said in response to a
20 second question that he had no tobacco, and then said only in response to the third question that he had a bag of tobacco.

25 41. On this point, the Tribunal prefers the evidence of Officer Small. Her evidence is based on a handwritten note of the event which the Tribunal accepts was made only one and a half hours after the event. Furthermore, she is an official with considerable experience of conducting examinations of this kind.

30 42. Another point of disagreement between the evidence of these two witnesses is whether the Appellant was told at Gatwick airport that if he committed no further offences, no further action would be taken. On this point, the Tribunal also prefers the evidence of Officer Small. When the goods were seized at the airport, the Appellant was given and signed a form BOR162, which states that the seizure was "without prejudice to any further action that may be taken against you in connection with this matter", and that the information might be shared with HMRC who "may take action against you such as issuing you with an assessment for any evaded tax or duty and a wrongdoing penalty". Even if the Appellant signed that document without
35 reading it as he claims, there is simply no reason why Officer Small would have stated that no further action would be taken if the Appellant committed no further offences.

40 43. The above two findings cast some doubt on the reliability of the Appellant's evidence more generally. Furthermore, it follows from the above findings that the Appellant made a clear statement to Officer Small that was not true, when he said in response to her second question that he did not have any tobacco, when in fact his whole suitcase was full of tobacco. That casts more significant doubt on the reliability of the Appellant's evidence more generally.

44. The Tribunal also takes into account that there are certain inconsistencies in the Appellant's evidence. In his witness statement, the Appellant says that he bought the

tobacco for “a friend”, while in his oral evidence, he said that it was for his uncle and for two other friends. Also, in his witness statement, the Appellant says that he made the decision to buy the tobacco when he was already in Tenerife, once he discovered how cheap it was and realised that he would have an empty suitcase on the return trip.

5 On the other hand, in his oral evidence he said that the intended recipients of the tobacco had told him they were quite short of money and asked him to bring the tobacco back.

45. The Appellant acknowledged in his evidence that he is an experienced traveller, and that in the last year alone he has travelled to Spain some 5 times. As such, he must have frequently passed through airports, and the Tribunal finds that he cannot have been unaware that passengers arriving on international flights go through a customs barrier on arrival, and that virtually all countries in the world including the UK impose limits on the amount of goods that can be brought in duty free, including in particular alcohol and tobacco. The Appellant also cannot have been unaware that
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15 virtually all countries in the world warn arriving passengers that they face penalties for bringing in goods in excess of the duty free allowance without declaring them. In such circumstances, it would have been very apparent to any honest passenger that there was a serious question as to whether it was possible to bring in such a large quantity of tobacco without declaring it.

20 46. The Appellant claims that he thought that Tenerife was in the EU, but does not explain the basis of his belief that he would have been entitled to bring in such a large quantity of tobacco from another EU Member State without declaring it. The Appellant claims not to have noticed signs at the airport stating that the Canary Islands are excluded from the list of EU countries. If so, he presumably also did not
25 notice the statement on that sign that unlimited duty paid tobacco can be brought into the UK from other EU Member States provided that it was for his “own use”. In any event, even if he had noticed the sign, or had noticed similar signs during previous travels, he would have realised that there was a question whether this tobacco counted as being for his “own use” given that he was not a smoker, and it was intended for the
30 use of his uncle and friends. Furthermore, the sign stated that “If we have reason to suspect the goods are not for your own use, you may be stopped and questioned”. Thus, an honest passenger, even one erroneously believing that Tenerife was in the EU, would have realised that there was a serious question as to whether it was possible to bring in such a large quantity of tobacco without declaring it. Realising
35 the potential penalties for getting it wrong, an honest passenger would likely have made appropriate enquiries before bringing such a large quantity of tobacco into the UK, even from another EU Member State. A passenger who had made such enquiries would have known that HMRC might question a passenger as to whether such a large quantity was for “own use”, and would have been prepared to answer such questions.
40 However, when it was put to the Appellant in cross-examination that he was aware that it was relevant whether he intended to sell the tobacco or not, he was reluctant to accept that he knew this to be the case.

47. The Appellant stated in his witness statement that nobody told him that there were any restrictions. This is not a positive statement that he made appropriate
45 enquiries and that he was told positively told that could bring this tobacco to the UK

in the circumstances. Rather, it is a negative statement that no one alerted him to the existence of any problem. However, for the reasons given in the previous paragraph, the Tribunal does not find it plausible that he would not have realised that there was an issue that he needed to address. In his oral evidence, the Appellant did suggest that he was positively told in Tenerife that bringing that amount of tobacco to the UK would not be a problem, but he gave only the vaguest details of who told him. The Tribunal is not satisfied that he was ever told this. First, it is not true. Secondly, he has been vague about who told him this. Thirdly, the Tribunal has found above that there are doubts as to his reliability as a witness. The Tribunal considers that the true position would have been easy enough to establish, and that an honest passenger making appropriate enquiries would have established that true position.

48. The Tribunal also takes into account that aspects of the Appellant's account, although not wholly implausible, are somewhat unusual. According to the HMRC duty calculations, the value of the tobacco (net of duty and import VAT) was £1,644.92. The Appellant says that it was much cheaper in Spain and that he paid EUR 600 for it. Although not wholly implausible that a person would be willing to spend so much on gifts for three people (EUR 200 per person on average), this seems unusual. The Appellant also confirmed that his only check-in luggage was his suitcase. This means that on the Appellant's account, he went on holiday to Tenerife with personal effects as hand luggage only, taking a checked in suitcase that contained only presents on the outward journey and that would otherwise have been empty on the return journey. Again, while not wholly implausible, this seems unusual.

49. The Tribunal further takes into account that the Appellant did not advance his explanation that he believed Tenerife to be in the EU until after HMRC had already issued the 13 March 2017 penalty decision. Given the value of the tobacco (even if it had cost the Appellant only EUR 600), it might have been expected that a passenger who honestly believed that the tobacco could be imported duty free due to the fact that Tenerife was in the EU would have questioned Officer Small about this at the time of the seizure. The Appellant's evidence did not suggest any particular shock or surprise when the tobacco was seized. Furthermore, it is difficult to understand why he did not at least give his explanation when he received the 26 January 2017 letter from HMRC. That letter made clear that the imposition of a penalty was being imposed, and that disclosure and co-operation could significantly reduce the penalty. If at that point the Appellant thought he had a good explanation for his conduct, it must have been clear to him at the time that it was contrary to his interests not to raise it. Even if, as he says, he felt that he needed to get professional advice, it must have been clear to him at that point that it was in his interest to get professional advice quickly and to respond within the time limit given by HMRC. If his version of events is correct, then the Appellant's failure to raise his explanation earlier is difficult to understand.

50. The Appellant says that Officer Small never suggested to him at the airport that she considered him to be acting dishonestly. However, it was not her function to make that decision. Furthermore, there is no reason why the Appellant should have been entitled to infer, from Officer Small's omission to express any view that he was dishonest, that she considered him to have acted honestly. If the Appellant never put

to Officer Small his reasons why he claimed to have made an honest mistake, there is no reason why Officer Small should have said anything on the subject.

51. The Tribunal finds that all of the matters in paragraphs 40 to 50 above, considered cumulatively, are sufficient to establish dishonesty on a balance of probability. The Tribunal finds it more likely than not that the Appellant knew that he was not entitled to bring that quantity of tobacco into the UK without declaring it and paying the applicable duty and import VAT on it. The Tribunal finds it more likely than not that the Appellant failed to declare it, and then in response to a question from Officer Small denied having any tobacco, in the hope that he would be permitted to pass the customs gate unchecked without having to pay the tax. The Tribunal finds it more likely than not that the Appellant admitted to having tobacco after the third question was posed, having by then realised that his bag was going to be checked. The Tribunal finds that the Appellant thereby deliberately acted in a way that 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. HMRC has accordingly established the matters referred to in the first sentence of paragraph 37 above.

52. The Tribunal therefore finds that the Appellant was liable to the penalty.

53. The Appellant argues in the alternative that the penalty should have been mitigated. This alternative argument was only raised at the hearing. The Tribunal suggested that written post-hearing submissions might be needed to address this new issue, but neither party requested permission to make such submissions.

54. While the burden of proof is on HMRC to establish the matters referred to in the first sentence of paragraph 37 above, the Appellant bears the burden of establishing an entitlement to mitigation.

55. The Appellant argues that he was merely doing a favour for family and friends in difficult economic circumstances. Given the Tribunal's findings as to the reliability of the Appellant's evidence, the Tribunal is not satisfied that this has been established. Furthermore, the Appellant has advanced no developed arguments in support of the contention that such circumstances would justify mitigation.

56. The Appellant provided no disclosure to HMRC or co-operation in its enquiry. His only disclosure prior to the imposition of the penalty consisted of telling Officer Small, before she searched his suitcase, that the suitcase contained tobacco. However, the Tribunal has found that this disclosure was made only once it had become apparent to the Appellant that the suitcase was about to be searched, having previously just denied that he was carrying any tobacco. While it is true that HMRC ultimately did not need any further disclosure or co-operation before imposing the penalty, HMRC did not receive any answers from the Appellant to various of the specific questions posed in their letter of 26 January 2017 prior to the imposition of the penalty.

57. The Tribunal concludes that the Appellant has not established that in the particular circumstances of this case any mitigation is warranted.

Conclusion

58. The appeal is accordingly dismissed.

5 59. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”
which accompanies and forms part of this decision notice.

15 **DR CHRISTOPHER STAKER**
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2018