



TC06882

Appeal number: TC/2017/05740

*EXCISE DUTY and CUSTOMS DUTY – civil evasion penalties –
s 8 of FA 1994 and s 25 of FA 2003 – dutiable goods abandoned and not
taken down the green channel – whether engagement in conduct for evading
excise duty – the fact at issue regarding ownership of dutiable goods – the
test of dishonesty after Ivey & Genting – whether any penalty reduction due
– appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM REED

Appellant

- and -

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

**TRIBUNAL: JUDGE HEIDI POON
SUSAN STOTT**

Sitting in public at Manor View House, Newcastle on 3 December 2018

Mr William Reed in person for the Appellant

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

DECISION

Introduction

1. Mr William Reed ('the appellant') appeals against civil evasion penalties of £3,158 imposed by notice dated on 6 January 2017. Of the total penalties charged, £2,595 relates to excise duty evasion, and £563 relates to customs duty and import VAT evasion.

2. The principal issue in this appeal is to determine whether the penalties have been correctly imposed for dishonest evasion of:

- 10 (a) excise duty under section 8 of Finance Act 1994, and
(b) customs duty under section 25 of Finance Act 2003.

3. The secondary issue for determination is whether the penalties should be allowed any reduction. The assessment of the penalties is at 100% with no reduction.

The Relevant Law

15 *Travellers' Allowance Order 1994 (SI 1994/955)*

4. The statutory instrument provides for the personal allowances for dutiable goods to be imported from a third country. For tobacco products as cigarettes, 200 is the duty-free allowance for a person entering the UK from a third country.

Excise duty penalty

20 5. Section 8 of FA 1994 provides as follows:

8 Penalty for evasion of excise duty

(1) Subject to the following provisions of this section, in any case where –

25 (a) any person engages in any conduct for the purpose of evading any duty of excise; and

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

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

30 6. Under s 16(1B) FA 1994, there is a right of appeal to the Tribunal against a 'relevant decision', which is defined to include a decision that a person is liable to a penalty under s 8.

35 7. Under s 8(4) of FA 1994, on an appeal the Tribunal 'may reduce any penalty to such amount (including nil) as they think proper', but not on the grounds of inability to pay.

Customs duty and import VAT penalties

8. The provisions for the imposition of penalties for the evasion of customs duty and import VAT under s 25 of FA 2003 are, in all material respects, identical to those set out above for the evasion of excise duty under s 8 of FA 1994.

5 *Burden of proof*

9. Whilst penalty proceedings of the nature at issue in this appeal are ‘criminal’ for the purposes of article 6.2 of the European Convention on Human Rights (‘ECHR’), it is established that such penalty proceedings are civil proceedings under domestic law, see *Khawaja v HMRC* [2008] EWHC 1687 (Ch), and *Khawaja v HMRC* [2012] UKFTT 0183 (TC).

10. Under article 6.2: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. The relevance of an appellant’s Convention rights under article 6.2 in a penalty case therefore concerns the burden of proof, in that HMRC have the onus to establish that the evasion of duty involves dishonesty for the penalty to be imposable.

11. Under s 16(6) of FA 1994, it is provided that on an appeal under this section, the burden of proof as to –

(a) the matters mentioned in subsection (1)(a) and 9(b) of section 8 above,

[...]

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

12. The burden of proof in establishing ‘conduct involving dishonesty’ therefore lies with HMRC as provided under s 16(6) of FA 1994 (for excise duty), and similarly for customs duty and import VAT under s 33(7)(a) of FA 2003. Otherwise, the appellant has the burden to show the grounds on which the appeal is brought.

13. The standard of proof is the civil standard of the balance of probabilities. See *Khawaja v HMRC* [2008] EWHC 1687 (CH) at [25], and *Krubally N’Diaye v HMRC* [2015] UKFTT 0380 at [53] - [83].

The Evidence

14. For the respondents, Officer Ryan Beattie of UK Border Force, and Mr James Terry of HMRC, each lodged a witness statement. Their evidence was led by Mr Stubbs as counsel for the respondents, and cross-examined by Mr Reed.

15. Mr Reed also gave evidence and was in turn cross-examined; he did not lodge a witness statement.

16. A documents bundle contains the relevant pages of Officer Beattie's notebook, and the seizure notices given out to Mr Reed following his interview with Border Force, and the correspondence between HMRC and Mr Reed.

Officer Beattie's evidence

5 17. Officer Beattie has been employed by the Home Office as a Border Force Officer since May 2014, and is currently based at Newcastle International Airport in Woolsington. He is designated as a General Customs Official and a Customs Revenue Official under the Borders, Citizenship and Immigration Act 2009 (ss 3 and 11), and an Immigration Officer under the Immigration Act 1971.

10 18. On Sunday 22 November 2015, Officer Beattie was on duty in the Customs area of Newcastle Airport when he intercepted Mr Reed at 00:50 hour. Mr Reed had entered the Green 'Nothing to Declare' channel after having disembarked from an Easyjet flight from Tenerife.

15 19. The Tribunal is provided with a copy of Officer Beattie's notebook recording the interview he conducted with Mr Reed, who stated that he had been in Tenerife since Tuesday, and that he was travelling alone.

20. In relation to the hand luggage (in a blue holdall) which Mr Reed carried with him into the green channel, the notebook entries record the following:

20 RB: Is this your only bag? (indicated to the blue holdall)
WR: Yes.
RB: So you have no checked-in luggage?
WR: No None.
RB: Did you pack it yourself?
WR: Yes.
25 RB: Are you aware of its contents.
WR: Yes.
RB: Are you carrying anything for anyone else?
WR: No.
RB: Have you purchased anything to bring to the UK?
30 WR: 5 cartons of cigarettes.

21. At 00:52 hour, Officer Beattie carried out a bag search of the hand luggage and found 800 L&B Original and 400 L&B Menthol; notebook entry was made at 01:15.

35 22. At 00:54 hour, Officer Beattie exited the Customs clearance and went to the Baggage Reclaim carousel where he found one 'large Blue Suitcase – With significant damage – Tied together with grey string'. Officer Beattie noted: 'I requested the Easyjet Representative – check if the bag belongs to Mr Reed.'

23. Officer Beattie took the suitcase to Mr Reed and the excerpt of this part of the interview is as follows:

RB: Is this bag yours?

WR: Yes.

RB: Why did you not say before?

WR: I left it.

5 RB: Why?

WR: I couldn't afford the duty on the cigarettes.

RB: Did you pack it yourself?

WR: Yes.

RB: Are you aware of its contents?

10 WR: Yes.

RB: Is it all cigarettes?

WR: Yes, 50 sleeves.

24. At 01:03 Officer Beattie searched the large blue suitcase and found that it contained 10,000 Canary Kingdom cigarettes; notebook entry was made at 01:20.

15 25. At 01:05, Officer Beattie seized the 10,000 Canary Kingdom, 800 L&B Original, 400 L&B Menthol, and completed the Seizure Information Notice BOR156, and the Warning letter (BOR162) with the relevant details before Mr Reed signed and dated both BOR156 and 162; notebook entry was made at 01:21.

20 26. The Warning Letter stated that HMRC 'may take action against you such as issuing you with an assessment for any evaded tax or duty or duty and a wrongdoing penalty'. Public Notices 1 and 12A were also issued to Mr Reed.

27. Mr Reed's signature featured after the notebook entry made at 01:21. Mr Reed wrote 'agree' after his signature, and dated his agreement as on '22.11-2015' at '1.24'.

28. Officer Beattie replied to Mr Reed's questions in cross-examination as follows:

25 (1) At no time will an officer be on duty alone; that two or three officers are always on duty at the same time for health and safety reasons.

(2) If a bag is declared in the Red Channel, then tax will be charged on the duty goods carried over the allowance; that if a passenger says he cannot pay the duty, then the goods will be seized with no duty paid.

30 (3) That the blue suitcase had significant damage already when retrieved from the middle carousel at the Baggage Reclaim area.

(4) The suitcase was split; it was so damaged that the contents of cigarettes were visible.

35 (5) That if the blue suitcase had been left at the carousel unclaimed, then the flight operator Easyjet would have got in touch with Mr Reed as the passenger who had checked in the suitcase, and arranged for the case to be delivered to him.

29. In re-examination, Officer Beattie confirmed:

(1) That the Customs channels are not always manned; that not always will there be somebody standing at the channels.

5 (2) But if it is manned, it will be 'apparent' to a passenger approaching the Customs channels that an officer is standing at the Exit.

Officer Terry's evidence

30. Officer Terry has been working in the Customs International Trade and Excise Operations team ('CITEX') since February 2016, but was not previously involved with Mr Reed's case. In his witness statement, Officer Terry confirmed that he had
10 read the case papers and 'would have made the same decision as Officer Dodd', who made the decision on review to uphold the penalties.

31. The chronology of correspondence from HMRC to Mr Reed is as follows:

15 (1) By letter dated 18 November 2016, Post Detection Audit Officer White opened an enquiry into the Customs Duty, Import VAT and Excise Duty affairs in relation to the seizure on 22 November 2015. Mr Reed was invited to co-operate with the enquiry 'by making a full and prompt disclosure, providing full details of [his] involvement in the smuggling or attempted smuggling of alcohol and/or tobacco products into the UK
20 between 22 November 2014 and 18 November 2016'. The disclosure sought was listed under 10 bullet points to be made by 18 December 2016. Public Notices 300 and 160 were enclosed to inform Mr Reed of the benefit of co-operation.

25 (2) On 12 December 2016, Officer White wrote to extend the response deadline to 26 December 2016, advising that a penalty of £2,487 *or more* may be imposed in the absence of any reduction through co-operation.

(3) On 6 January 2017, Officer Dodd issued the penalty assessment in the total sum of £3,158, being 100% of the penalties imposable for customs and excise duty evasion in relation to seizure event on 22 November 2015. Two schedules of calculation accompanied the notice of assessment.

30 (4) By letter undated, but received on 6 March 2017, Mr Reed replied as follows:

'I went through the green channel with 5 or 6 cartons of cigarettes for presents. So the duty is nowhere near the amount you calculate.'

35 (5) On 6 March 2017, HMRC replied to confirm the penalty assessment, and advised the options of internal review or appeal to the Tribunal.

(6) By letter dated 10 March 2017, Mr Reed requested a review, giving as grounds the following:

40 '...the case with Canary Kingdom in did not belong to me. It was in Tenerife airport when I was checking in the persons in front of me were overweight and as I had no case they asked if they could put it through with me so they did not have to pay extra.

When I was in Newcastle Airport I only signed the officer's note book because I was told it did not matter about the suitcase as I had not taken it through the green channel.'

5 (7) On 12 April 2017, HMRC issued their review conclusion decision, upholding the penalty assessment, highlighting to Mr Reed that when he was asked by Officer Beattie about the suitcase, he had confirmed that it belonged to him; that he left the suitcase because he could not afford to pay the duty on the cigarettes; that he was aware of the contents being 50 sleeves of cigarettes. The review officer also checked that the calculations
10 in the duty schedule were 'arithmetically correct'.

32. When asked why there was no reduction given in the penalty assessment, Officer Terry referred to the fact that there was simply no reply from Mr Reed prior to the issue of the penalty assessment on 6 January 2017 to enable any reduction for disclosure to be given. The first time Mr Reed responded to HMRC was by the
15 undated letter received on 6 March 2017, which was a request for review after the penalty assessment had been issued. The second letter was to give an account of the origin of the blue suitcase which was in contradiction to what was recorded at the interview by Officer Beattie.

The appellant's evidence

20 33. Mr Reed gave evidence after Officer Terry. Mr Reed was able to confirm that he 'definitely got the letters' from HMRC; that he was not disputing that.

34. In reply to the Tribunal's questions, Mr Reed stated that he went to Tenerife regularly, with his wife, once or twice a year, for holiday. The trip in November 2015 was for a 'stag night' and he went without his wife; that he returned earlier than
25 originally planned because he had broken his wrist.

35. Asked how he broke his wrist, he said he fell on being drunk. Mr Reed said that he was 'in agony'; could not possibly have handled the blue suitcase; and had to go to hospital on return to the UK.

30 36. Mr Reed then told the Tribunal that when he checked in at Tenerife airport, he only had hand luggage due to his broken wrist; that the passengers 'behind' him 'in the queue' at the check-in had no hold luggage allowance and asked if they could use his luggage allowance; that the blue suitcase did not belong to him but to those passengers to whom he had given his luggage allowance; that he did not tell Officer Beattie of the contents in the suitcase before the case was opened; that he did not
35 know the contents before the case was opened; that the 50 sleeves of cigarettes were piled up after the case was opened for him to count.

37. In cross-examination, Mr Reed was asked if he was claiming that Officer Beattie's note was 'inaccurate'; and if so, there was no reason for him to sign at the end of the notebook entries to indicate his agreement. Mr Reed replied that he was
40 told if he would sign and agree, then he would be free to go; that he just 'wanted to be out' and so he signed and agreed.

38. Mr Reed was then asked why he would purchase hold luggage allowance if he had no hold luggage to check in, to which he replied that the hold luggage allowance was inclusive in the ticket price for his flight.

5 39. In relation to the 1,200 cigarettes in his hand luggage, Mr Reed admitted that the total was over the personal allowance and that he should have gone down the Red channel. He accepted that he was due the penalty in relation to the excess cigarettes in his hand luggage.

10 40. The Tribunal then asked Mr Reed what his occupation was. He said that he has been the carer of his wife, who is disabled and has cancer. When asked how his wife could be going on holiday with him in Tenerife in her conditions, Mr Reed said his wife was diagnosed of cancer in 2018 (after the seizure event), that it is lungs cancer which has spread to her brain and bones. When asked of the extent of her disabilities that have required him to be the full-time carer, Mr Reed said that she has been of the 'Higher Rate Disabilities', 'can't walk very far', needs 'personal care'. When asked
15 how he took his wife on holiday to Tenerife every year, Mr Reed said that he used a wheel-chair. When asked who looked after his wife when Mr Reed undertook the trip to Tenerife in November 2015, he said his wife's sister 'came down and stayed'.

20 41. When asked if he smokes, Mr Reed said that he 'gave up a few years ago'. Mr Stubbs pointed out that Mr Reed was seen smoking outside the hearing venue, to which Mr Reed replied that he was smoking an e-cigarette (vaporised cigarette).

The appellant's grounds of appeal

25 42. By notice of appeal dated 4 July 2017, Mr Reed appealed against the review conclusion decision of 12 April 2017. The appeal was made late and Mr Reed made an application for a late appeal, stating that the appeal was late due to the wrong contact details being given by HMRC to make the appeal. (The matter of the late appeal is not in front of the Tribunal).

43. The substantive ground of appeal against the penalty assessment is as follows:

30 'The Canary Kingdom did not belong to me. I did not try to take them out (sic) the airport. I was told it did not matter about the Canary Kingdom as I had not taken them through the green channel.'

44. Mr Reed stated as his second ground of appeal that he was 'misled and misinterpreted throughout the interview'.

35 45. At the hearing, Mr Reed insisted that the suitcase was not his. The main ground of his appeal, as we understand it, is to say the suitcase did not belong to him; the contents of 50 sleeves of cigarettes could not have belonged to him therefore for a penalty to be imposable.

46. Secondly, Mr Reed questioned the basis of imposing a penalty on him in relation to the 10,000 Canary Kingdom, when he had *not* in fact entered the green channel with the suitcase.

47. Thirdly, Mr Reed questioned the basis of the different treatment as the matter now stands. If Mr Reed had declared that he could not afford to pay the duty at the red channel, the cigarettes would have been seized, but the difference is that no penalty would have been imposable. Mr Reed disputes that the penalties should be imposable in relation to the cigarettes which he factually did not take into the green channel.

HMRC's submissions

48. Mr Stubbs submitted that HMRC 'do not accept the veracity of the appellant's account' and that on the evidence in this case 'dishonesty would be readily inferred by ordinary decent people in possession of the facts':

- 10 (1) Officer Beattie's notebook confirms that the appellant had entered the green channel with 1,200 cigarettes;
- (2) The appellant originally said that he had no checked-in luggage and then later admitted to Officer Beattie that the suitcase was his;
- (3) The appellant signed the notebook agreeing what has been recorded;
- 15 (4) The appellant signed the notices of seizure at the time confirming all 11,200 of the cigarettes were his;
- (5) Newcastle airport has significant signage of personal allowances; and that the green channel means that there is nothing to declare;
- 20 (6) The appellant's account in relation to the 10,000 Canary Kingdom only changed after the penalties were imposed;
- (7) The appellant's current account that the suitcase did not belong to him is not credible. Where were these people for whom the appellant claimed that he had checked in their suitcase? What are their details? Why would they have left the bag on the carousel?

25 49. It is submitted that the appellant was able to see that Customs Officers were on duty, and that he would have been stopped if he had attempted to go down the green channel with the damaged suitcase.

30 50. In terms of a reduction of the penalty, the appellant was invited to co-operate and was advised of the benefit of co-operation by the Public Notices 300 and 160. The appellant did not respond to HMRC at all until after the penalty assessment was issued. There is no basis for any reduction since the appellant had offered no co-operation, and did not disclose anything.

Discussion

Findings of fact

35 51. From the oral evidence of Officers Beattie and Terry, and of Mr Reed, and from the documents provided, we make the following findings of fact:

(1) The appellant travels regularly to Tenerife. He admitted to knowing the personal duty-free allowance for cigarettes for a passenger returning from Tenerife to be 200.

5 (2) The appellant agreed that he was in possession of 1,200 cigarettes in his hand luggage when he went down the green channel on 22 November 2015. He does not dispute that he was carrying an excess of cigarettes over his duty-free allowance in his hand luggage, which made him liable to the penalty in relation to the 1,000 cigarettes.

10 (3) The blue suitcase that remained in the carousel was split and badly damaged, revealing its contents as cigarettes.

(4) The airline operator Easyjet confirmed that the blue suitcase had been checked in by the appellant; nor did the appellant deny that he had checked in the suitcase at Tenerife airport.

15 (5) In relation to the suitcase, Mr Reed said the following in sequential order during his interview by Officer Beattie: (i) that he had no checked-in bag; (ii) that he was not carrying anything for anyone else; (iii) he then confirmed the suitcase was his upon it being retrieved by Officer Beattie from the carousel.

20 (6) The appellant can read and write. He would have seen signage around the airport advising him of the duty-free allowances. He would have read the notebook entries and signed to indicate his agreement. He would have read the seizure notices to have included the 50 sleeves of Canary Kingdom carried in the suitcase when he signed the notices.

25 (7) It was in his letter to HMRC dated 10 March 2017 that the appellant started to assert that the contents of the suitcase did not belong to him.

The fact at issue

52. Having made the above findings of fact, there remains a central fact which is in dispute, and of which the Tribunal has to make a finding of fact based on the balance of probabilities. Mr Reed's appeal is staked on the fact that the suitcase did not belong
30 to him. He does not assert that he did not check in the suitcase, and he is right not to try, since the check-in details are irrefutable as confirmed by Easyjet.

53. Furthermore, the fact at issue is not so much whether the suitcase belonged to Mr Reed, but whether the *contents* of the suitcase belonged to Mr Reed for the penalties in relation to the 10,000 Canary Kingdom cigarettes to be impossible.

35 54. In relation to the contents of the suitcase, Mr Reed's replies to Officer Beattie were: (i) he had packed the suitcase himself; (ii) he was aware of the contents; and (iii) he was able to give the exact quantity of cigarettes contained as 50 sleeves.

40 55. We consider Mr Reed's answers in relation to the contents of the suitcase to be clear and unambiguous. The quantity of cigarettes was given *before* the suitcase was searched. The fact that Mr Reed was able to state the exact quantity of the cigarettes

before the bag search is fully consistent with the replies he gave that *he* packed the suitcase, and was consequently fully aware of its contents.

56. It is significant that the account given by Mr Reed at the interview was consistent with his reply given before the suitcase was retrieved from the carousel: he had replied in the negative when asked: ‘Are you carrying anything for anyone else?’

57. Mr Reed’s explanation given to Officer Beattie why he had left the suitcase unclaimed appears to us to be an honest answer: ‘I couldn’t afford the duty on the cigarettes’. The explanation cannot be construed in any other way than that: (i) Mr Reed considered himself the owner of the cigarettes, and (ii) as the owner, Mr Reed considered that he would be liable for the duty.

58. All these replies by Mr Reed during the interview were recorded in Officer Beattie’s notebook. The notebook entries were read by Mr Reed before he signed to indicate his agreement. We do not accept that the notebook record of the interview is inaccurate as Mr Reed suggests; nor do we accept that his signed agreement is to be taken as having been given under false representations, or devoid of evidential value.

59. We have also considered the assertion made by Mr Reed that the suitcase was somebody else’s and not his. This version of the ownership of the suitcase was first mooted by Mr Reed for a review of the penalty assessment. There was no evidence to support such an account, such as the passengers’ details asking for Mr Reed to check in their case, or why those passengers were not at the carousel to claim their suitcase.

60. Furthermore, Mr Reed’s various accounts about checking in the suitcase for other passengers are full of inconsistencies: (i) the accounts contradict his categorical reply when intercepted at the green channel that he was not carrying anything for anyone else; (ii) he first claimed that the other passengers’ luggage was ‘overweight’ when he requested a review of the penalty assessment; (iii) he then claimed that the passengers had ‘no luggage allowance’ in his oral evidence; (iv) he stated the passengers as ‘in front of’ of him in the queue; (v) he then said that the passengers were ‘behind’ him in the queue on being cross-examined.

61. The inconsistencies in Mr Reed’s account that the suitcase belonged to these unknown passengers mean that the Tribunal cannot accord it with any credence whatsoever, not to mention that the account is devoid of any circumstantial and evidential support.

62. We also find Mr Reed’s account of checking in a suitcase for other passengers unacquainted with him inherently implausible: the range of pitfalls in becoming the carrier of some unknown person’s luggage is well within the understanding and knowledge of the average traveller. We do not doubt that Mr Reed is equally aware of these pitfalls as a regular traveller.

63. For these reasons, we find that on the balance of probabilities, the contents of the suitcase, being the 10,000 Canary Kingdom cigarettes, did belong to Mr Reed.

The two elements in the charging provisions

64. If Mr Reed's first ground of appeal is a factual challenge, his second ground of appeal raises a legal challenge. His argument is that since he did not carry the 10,000 cigarettes into the green channel, he could not be held as having attempted to evade the duty and tax in relation to these cigarettes for the penalties to be impossible.

65. In other words, Mr Reed contends that the nexus to enable the penalties to be imposed on the 10,000 cigarettes is absent, based on the obtainable fact that he did not clear customs with those cigarettes.

66. The charging provisions under s 8 of FA 1994 (for excise duty), and s 25 FA 2003 (for customs and import VAT) are otherwise identical, and we consider them together. Both provisions are under the heading of 'Penalty for evasion'. The charging provisions have the same two elements as follows:

- (1) a person engages in any conduct for the purpose of evading any duty of excise (or any relevant tax or duty), and
- (2) his conduct involves dishonesty.

67. Mr Reed's main ground of appeal is in effect a challenge that the first element in the charging provisions is not proved; that he had not taken the 10,000 cigarettes with him into the green channel, and therefore he did not engage in any conduct for the purpose of evading any duty or tax.

Whether the appellant engaged in any conduct for the evasion of duty and tax

68. The element that HMRC need to prove under this heading concerns whether the appellant engaged in any conduct for the evasion of duty and tax. The legislation does not stipulate how this element is to be proved.

69. By design, the uniform customs clearance channels are used in airports to streamline the process of proving a person's engagement in any conduct for the evasion of duty and tax. If a traveller is found to be in the green channel in possession of excess dutiable goods, then this element is readily proved.

70. The green channel is merely a mechanism for proving the engagement of conduct for the evasion of duty by establishing two essential facts: (i) being in possession of excess duty goods; (ii) no intention of declaring the duty on the excess.

71. In relation to the 1,000 cigarettes, the first essential fact is established by the very fact that Mr Reed was found to be carrying excess dutiable goods in his hand luggage. The second essential fact is established by the choice of the green channel, which was to signify that Mr Reed had nothing to declare; that is, Mr Reed had no intention of declaring the duty on the excess. Indeed, Mr Reed accepts that he was evading duty and tax by choosing the green channel for customs clearance in relation to those 1,000 cigarettes.

72. In relation to the 10,000 cigarettes, not taking the suitcase into the green channel does not mean that these two essential facts cannot be otherwise established. In terms of possessing excess dutiable goods, the fact at issue concerning the ownership of the 10,000 Canary Kingdom is determined as above and fixes the ownership with Mr Reed. In terms of intention, by leaving the suitcase unclaimed, Mr Reed had demonstrated that he had no intention to declare the duty on those 10,000 cigarettes.

73. The corollary is therefore that if Mr Reed had taken the suitcase to the red channel, that would have signified his *intention* to declare the duty on the excess. In the light of the above analysis, the second essential fact as regards intention to evade would have been absent for the penalties to be impossible if Mr Reed had entered the red channel with the suitcase. It is inconsequential whether Mr Reed could afford to pay the duty in question.

The test of dishonesty

74. The second element required to be proved for the penalties to be impossible under s 8 of FA 1994 and s 25 of FA 2003 is that the conduct of the person being charged the penalty ‘involves dishonesty’.

75. Until recently, the test of dishonesty apposite to civil proceedings was distinguished from the two-stage test in *Ghosh*¹ applicable in criminal proceedings. The Supreme Court decision in *Ivey v Genting*² makes it clear that *Ghosh* is no longer good law, even for criminal proceedings. Following *Ivey v Genting*, the test of dishonesty to be applied in both criminal and civil proceedings is Lord Nicholls’ test in *Tan*³ as clarified by Lord Hoffmann in *Barlow Clowes*⁴.

76. In the words of His Honour Judge Pelling QC (sitting as a Judge of the High Court) in *Sahib Restaurant Ltd v HMRC* (Case M7X 090, 9 April 2009, unreported):

‘In my view, in the context of the civil penalty regime [contained in what was then s 60 of the Value Added Tax Act 1994] at least the test for dishonesty is that identified by Lord Nicholls in *Tan* as reconsidered in *Barlow Clowes*. The knowledge of the person alleged to be dishonest that has to be established if such an allegation is to be proved is *knowledge of the transaction sufficient to render his participation dishonest* according to normally acceptable standards of honest conduct. *In essence the test is objective* – it does not require the person alleged to be dishonest to have known what normally accepted standards of honest conduct were.’ (emphasis added)

77. That the civil test of dishonesty is essentially objective is confirmed by Lord Hoffmann in *Barlow Clowes*, where it is stated at [10]:

¹ *R v Ghosh* [1982] 2 QB 1053

² *Ivey v Genting Casino (UK) Ltd t/a Crockfords* [2017] UKSC 67

³ *Royal Brunei Airlines v Tan* [1995] 2 AC 378

⁴ *Barlow Clowes v Eurotrust International Ltd* [2006] 1 WLR 1476

5 85. The subjective element we take into consideration includes: (i) Mr Reed is a regular traveller to Tenerife; (ii) he is aware of the duty-free allowance for cigarettes, (iii) he knew he was carrying excess in the suitcase and hand luggage; (iv) he knew duty was payable as he said he could not afford to pay it; (v) he understood the significance of choosing the green channel to clear customs.

86. By ordinary standards, Mr Reed's behaviour would be characterised as dishonest. HMRC have met the burden of proof required in establishing dishonesty on the balance of probabilities for the penalties to be imposable.

Whether reduction applicable

10 87. Reduction to the penalties is provided by the legislation where co-operation is given to HMRC in their enquiry, and disclosure is made as requested. It is a fact that Mr Reed gave no co-operation or made any disclosure at the stage of HMRC's enquiry into the matter. The Tribunal has no basis to interfere with HMRC's decision in this regard therefore.

15 **Decision**

88. For the reasons stated, the appeal is dismissed.

89. The penalty assessment in the total sum of £3,158 is confirmed.

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

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**DR HEIDI POON
TRIBUNAL JUDGE**

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RELEASE DATE: 19 DECEMBER 2018