



TC03971

Appeal number: TC/2013/03347

EXCISE DUTY APPEAL – whether understatement of betting duty/income – no -whether amount of duty assessed to best judgement of HMRC – no - whether on the facts assessments issued within one year from the time when the facts sufficient in HMRC’s opinion to justify making assessments came to their notice – yes. Appeal allowed in part.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PETER DEVINE

Appellant

- and -

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

**TRIBUNAL: JUDGE RUTHVEN GEMMELL,WS
MR IAN M P CONDIE, CA**

**Sitting in public at George House, 126 George Street, Edinburgh on 29 and 30
July 2014**

**Philip Simpson, Advocate, instructed by John Lynch & Co, Chartered
Accountants, for the Appellant**

**Graeme McIver, Advocate, instructed by the Advocate General for Scotland, for
the Respondents**

DECISION

1. This is an appeal by Peter Devine (“PD”) against a second assessment, the first assessment being incorrect and withdrawn, issued by the Commissioners for HM Revenue & Customs (“HMRC”) on 15 February 2013 for general betting duty and related penalties.

2. HMRC believed that PD’s actual business takings were in excess of his declared business takings; that he was inconsistent in admitting whether he took telephone bets; that he failed to keep records of personal betting; that he had unexplained income from cash betting which was different from his unsuccessful online betting and that his business gross profit rate was less than the industry norm. The assessment was based on deposits made into the ‘TopSport’ (PD’s trading name) account 00289002 between 1 January 2009 and 30 September 2012 and the net amount due to HMRC had been assessed at £14,768.

3. Penalties were intimated on 21 February 2013 for an amount of £6,119.14.

4. The decision was reviewed and upheld on 4 April 2013.

Legislation

Betting and Gaming Duties Act 1981, sections 1, 2, 5B and Schedule 1

Finance Act 1994, sections 12, 15C and 15F

General Betting Duty Regulations 2001/3088, regulations 4 and 5

Directions made under Betting and Gaming Duties Act 1981, Schedule 1, paragraph 6(1) and (2) (“Notice 451”)

Cases References

Associated Provincial Picture Houses Ltd v Wednesbury Corp (1948)

Brimelow (Inspector of Taxes) v Price (1965)

Van Boeckel v Customs and Excise Commissioners (1981) TSC 290

Rahman (trading as Khayam Restaurant)(No. 1) v CEC (1998) TSC 826

Betty Delores Butcher v Commissioners for HMRC LON/99/8017

Pegasus Birds v Her Majesty’s Revenue & Customs [2004] EWCA Civ 1015

Steven George O’Malley v Commissioners for HMRC (2012) UKFTT 499 (TC)

Evidence and Findings of Fact

5. The Tribunal had before them a bundle of documents including skeleton arguments for PD and for HMRC.
6. A schedule prepared by HMRC of payments made to PD's business bank account from his personal bank account was also submitted.
7. PD; Robert Duffin ("RD") a professional gambler and friend of PD; Robert McKinlay ("RM") and Keith McGregor ("KM") both former employees of PD TopSport; and Christine Nelson ("CN") an Assurance Officer of HMRC, all gave evidence and were credible.
8. PD who is 61 years old had been a contract manager and shareholder in a family builders firm for 15 years during which time he claimed he had no problems with HMRC. In 1997, PD became involved in bookmaking, operating from a number of places in Fife and, latterly, at 187 High Street, Leslie, Fife, being shop premises which were owned by PD's wife and were subsequently sold by her.
9. At this business, horse racing was the main sport on which bets were placed amounting to about 60% of the business, the rest split between dog racing, football, tennis, golf and other events.
10. Unaudited and "draft accounts" which appear to have been completed on 9 July 2014 for the year ended 31 March 2010, 31 March 2011 and 31 August 2012 were submitted to the Tribunal, all of which showed losses ranging between approximately £31,000 at worst and approximately £12,000 at best. The business was brought to an end on 31 August 2012.
11. In 2006, PD began to suffer ill health which became particularly serious in March 2008. After this, PD's involvement in the business was minimal and he kept track of it through CCTV cameras, linked to his personal home computer, which allowed him to monitor his staff.
12. PD explained that his business worked by the purchase of a package from SIS (Satellite Information Services) which provided odds originating from William Hill, the national bookmakers.
13. It was explained that when a bet was made the betting slip was "put through" the till which printed on it a date, being only the day of the month, the time the bet was made, the amount of the bet and a sequential serial number. Each betting slip was then photographed on a "flatbed camera".
14. There was only one till providing the sequential numbers and one camera capture machine. The film of the camera was taken away by a third party, Marteck Systems, about every two months. They would view and report any errors, such as an under or an overstated bet or a bet that did not have a time stamp on it, which happened occasionally and would then send the micro films back to PD. Unless there had been a problem the microfilms were disposed of after six months or so.

15. RM was employed in the shop from 14 July 2009 to 2 July 2010 and then KM was employed from 5 July 2010 to 30 August 2012. Both RM and KM opened the shop, looked after it, took bets and paid out money. They cashed up at the end of each day and balanced the cash and recorded the takings for the day in a spreadsheet/diary.
- 5 16. Betting slips were kept for a period of six months in accordance with the guidance provided by HMRC and it was PD's decision to only retain the microfilm evidence for a similar period of time as he considered this to be for his benefit in terms of dealing with disputes with customers and ensuring his staff were working honestly rather than this being provided as a record for HMRC.
- 10 17. PD explained that telephone bets were taken but that telephone credit bets were never taken. In order for telephone bets to be taken, the individuals placing the bet ("punters") had to deposit money in advance, a note of which was kept on a record sheet in the betting shop.
- 15 18. Most of PD's customers were local although there were occasional visitors and most of the punters were well known to PD. The normal bet was between £2 and £20 and nearly all of these were taken over the counter. The proportion of bets taken by telephone was very small.
19. Because of the limits and the system that PD operated, he did not find it necessary to lay off any bets with other bookmakers.
- 20 20. PD had a business bank account number 00289002 ("business account") in the name of PD trading as TopSport. PD had one personal bank account 00285589 ("personal account").
- 25 21. PD stated that he put money from his business through the personal bank account in order to save bank charges. There was no charge for depositing money in the personal account whereas there was a charge for depositing it in the business account. PD estimated that over the period covered by the assessments he saved approximately £1,800 in bank charges. PD considered himself lucky that the bank allowed this practice to continue and, at that time, he could obtain online account information from the business account and the personal account simultaneously. Despite this, the bank were not happy with this practice.
- 30 22. The business account received a number of debits for expenses. It was, therefore, PD's customary habit to look at the business account the night before, usually at about 11pm or midnight, and transfer sufficient funds to meet payments that were expected to be debited to the business account in the next few days to cover utility bills, wages etc because the business account would pre-warn what direct debits or fixed charge amounts were about to be deducted. The system was not always fool proof and did not entirely avoid bank charges.
- 35 23. PD stated that he did not consider how much money the business was bringing in when making these transfers. His main aim was to "bolster up the shop" and to keep transferring money through the business account as the business needed it to avoid the
- 40

business account being overdrawn. PD stated that he had thought of a more formal arrangement but was keen to avoid bank charges.

24. In addition to the payments from the business, there were also transfers from his wife and brother paid into PD's personal account, but, more significantly, other transfers which PD stated were as a result of his successful activities in personal cash betting.

25. This was in contrast to his online betting, most of which was detailed and could be audited to a large degree from the narratives shown on his personal account statements and which was financially unsuccessful to the tune of approximately £20,000 per annum over the period covered by the assessments.

26. PD stated that there was a distinction between the two types of betting. In respect of online betting, this was based on his own betting decisions and carried out, partially through boredom and as a test to see how successful he could be. This was in contrast to his personal cash betting which arose through his association with a professional gambler, RD. Although RD would sometimes place bets for PD, PD predominantly placed bets for RD because RD, as a professional gambler, was unwelcome and would not be entertained at a very large number of betting shops.

27. RD gave evidence that he had approximately 40 different people placing bets for him over a very wide range of betting shops. RD stated that he did not employ these people or pay them anything; his assumption, which PD said was appropriate in his case, was that each of these "associates" would obtain their "remuneration" for this activity by betting their own money in the same way as they had been instructed to bet RD's money. In other words they used RD's betting knowledge.

28. RD stated that he had been very successful as a professional gambler earning approximately £560,000 in 2008 although this began to reduce and more recently he had for several years been earning about £100,000 per annum. RD stated that PD used to ring him up almost every other day and was "keen".

29. RD said he did not know what PD did with the information he gave him. RD had been a bookmaker himself but for the past 24 years had been a professional gambler. He had known PD for about 15 years. All the bets PD made on RD's behalf were in the region of £100 to £200. At no time did RD or PD use TopSport to place their own or each other's bets. RD had no information to the amount of any winnings made by PD.

30. As a result of using 40 people to put on bets, RD confirmed that he kept records so that he knew what was going on. RD advised that he had reported all his winnings to HMRC in 1997 but they had told him the winnings were not taxable and, accordingly, he had continued to follow that advice.

31. PD said that betting duty was calculated and paid correctly and he completed the quarterly betting duty returns as he was required to, although most businesses are required by HMRC to provide monthly returns

32. Both RM and KM stated that all transactions were recorded through the till, were dated, timed and numbered and put through the capture camera. Both RM and KM stated that this was for their security. RM knew that PD was making bets but not through the shop and KM confirmed the same. Neither KM nor RM ever met RD although KM had heard of him.

33. When completing the betting duty returns for the shop, PD took the daily takings, including the payments, and payments from the daily diary (spread sheet) and worked out the betting duty which was 15% of the difference between takings and payouts.

34. PD said he did not work out the betting duty from money lodged in the business account. PD carried out all the banking usually once a week with a weeks' worth of cash which had been kept in the safe. The cash in the safe was balanced each day and then balanced again when the banking was removed.

35. The totals for the net difference between the bets taken and the amounts paid out was reconciled to the 'x' and 'z' totals on the till.

36. PD stated that he was aware the business was making losses but was not aware that there was any pattern to this.

37. CN has been employed by HMRC since February 1982 working in CITEX ("Customs and International Excise") local compliance since September 2001 and is a specialist in betting and gaming and makes approximately 15 to 20 visits each year to bookmakers.

38. CN visited PD's business on three occasions on 4 November 2004, 1 December 2004 and 19 March 2008. At these visits CN used a pro forma checklist/questionnaire and noted at each of these visits that PD stated that he used his personal account and accounts of family members in which to deposit business takings of TopSport to avoid banking charges and that he did not accept telephone bets. CN wrote to PD on 10 February 2005 and on 26 March 2008 reminding him what records he was required to keep.

39. On 31 August, 5 October and 9 November 2011, CN visited TopSport premises and met with PD and KM. The visit on 31 August 2011, took place as part of a national project to visit bookmakers who showed a consistently low profit. At this meeting, CN had noted on her checklist that PD again confirmed he did not accept any telephone bets and that he used his personal account and accounts of other family members for business purposes to avoid bank charges.

40. At this meeting, CN explained to PD that she and a colleague were going to remain on PD's premises for the remainder of the day in order to observe his business. PD was extremely unhappy with this proposal and telephoned CN's manager in order to complain about their presence. PD stated that he felt this presence would "put off the punters". Having read HMRC Notice number 451, PD agreed that HMRC staff could remain on the premises but not behind the shop counter which had a high counter which prevented CN seeing what was going on behind.

41. At the visit, CN uplifted betting slips for June, July and August 2011 and subsequently examined these and noted that some appeared to be for telephone bets as they had the name of a person written on them.
- 5 42. On a second visit to PD's premises on 5 October 2011, CN uplifted diaries for 2009, 2010 and made a copy of the 2011 diary. CN subsequently inspected these and noted that on a frequent basis there was a day near the end of the return period that showed a large loss. The effect of this was a reduction in the duty liable to be paid by PD in relation to those periods.
- 10 43. CN further examined the betting slips which she had uplifted on 31 August 2011 and noted that one slip number 5339 dated 25 June 2011 showed a winning bet of £4,585.00. CN noted that the writing on this slip appeared to be the same as the writing on other slips which appeared to have been written for telephone bets. Those slips showed the name of the "account" customer but slip number 5339 did not.
- 15 44. As PD submits quarterly returns and does not keep betting slips for longer than six months, CN was unable to inspect any other winning slips for large amounts.
- 20 45. During the visit on 9 November 2011, CN showed PD copies of the betting slips with the customers' names written on them which PD admitted were telephone bets. The betting slips showed a number of different styles of handwriting and in evidence PD admitted that he had written the odds and the sum that was payable, which would have been after the horse race had taken place, but thought that KM may have written the name of the horse and the place and time of the race. PD explained that there was no credit telephone betting but that telephone bets were sometimes taken if cash had been paid beforehand. PD stated that he did not know who had placed the bet and had no record of the payout but that he thought it had been paid in cash.
- 25 46. During this visit CN asked PD about his bank arrangements and the use of his personal account to deposit business takings and requested him to provide copies of his personal statements for 2009, 2010 and 2011. PD stated that he wanted a written request for the documents.
- 30 47. On 9 November, CN uplifted statements for the business account for the period 22 October 2009 to 10 November 2011 and betting slips for May, September and October 2011.
48. CN subsequently inspected these statements and found that there were very few direct deposits into this account with the majority of the credits being transferred from PD's personal account.
- 35 49. On 11 November 2011, CN wrote to PD requesting copies of the statements for PD's personal account for the period April 2009 to September 2011. On 23 November 2011, she wrote again requesting the same.
50. CN said that she had never in her 12 years working in the betting and gaming regime, encountered similar problems in gaining access to a trader's records.

51. On 9 December 2011, an HMRC officer visited the business premises of PD/TopSport and uplifted the bank statements for PD's personal account for the period April 2009 to September 2011.
52. On 20 December 2011, CN wrote to PD requesting clarification of the source of cash deposits made into his personal account for the period 9 April 2008 to 9 April 2009 and subsequently received an email stating that PD paid cash into his personal account which not only related to his betting business.
53. Accordingly, on 20 January 2012, CN wrote to PD requesting information about the deposits into his personal account for the period 9 April 2008 to 30 September 2011.
54. On 8 February 2012, CN received a letter from PD's accountants, J Lynch & Co, stating that the deposits of £60,456 made into PD's personal account were from private betting by PD and that PD did not hold any documentary evidence of these winnings which had accrued over the years and would have been kept in PD's house.
55. The letter also stated that PD was currently researching his records for the period 10 April 2009 to 30 September 2011 to provide clarity in respect of the deposits made into his personal account during the period.
56. CN did not have an authority which is required to reply to J Lynch & Co and so, accordingly, on 17 February 2012, she wrote to PD informing him that he had to supply a written authorisation and also requesting details of the bookmakers where the winning bets had been placed; documentary evidence regarding the source of the deposits paid into the personal bank account for the period 10 April 2009 to 30 September 2011 and details of any other bank accounts used to deposit the business takings of PD/TopSport.
57. On 16 March 2012, CN received a letter from J Lynch & Co which stated that PD would have over a number of years made cash bets in at least 30 to 40 locations throughout Edinburgh and Fife and gave no further information.
58. This letter also included a Schedule of Lodgements into PD's personal bank account and stated that the lodgements shown as transfers were made from "other bank accounts held" and that PD continued to bet privately and that these winnings were deposited as round sums.
59. The letter also stated "that the only other account used by PD in respect of his business was his business account 00289002".
60. On 2 May 2012, J Lynch & Co wrote saying that PD "did not deposit any of his betting shop takings into his personal account (No. 00285589) and that PD deposited private betting winnings into his personal account".
61. On 21 December 2011, CN examined PD's personal account which showed that PD was betting substantial sums online and appeared to be losing heavily. CN

considered that this was at odds with PD's claim that he had made significant wins through his private cash betting.

5 62. On 17 May 2012, CN wrote to J Lynch & Co again asking for documentary information to substantiate PD's statement that the unidentified deposits made into his personal account were from private betting winnings and asked for a reply by 31 May 2012.

10 63. On 6 June 2012, CN received a letter from J Lynch & Co which stated that the lodgements into PD's personal account were from private betting winnings and that PD had received advice from the Fife Bookmakers Association and the Gaming Commission that he could generate private betting winnings provided the gambling was wholly outwith his own premises and that PD did not require to record these winnings nor did this prohibit his ability to maintain his licence. There was no information enclosed with this letter to substantiate the lodgements and CN decided that she did not have enough information to identify the deposits made in the personal account and that PD was not going to provide any further information.

64. At this stage, on 6 June 2012, CN decided that she could not undertake an assessment on the basis of the personal account statements because of this lack of information and decided to further investigate the business account.

20 65. On 14 September 2012, CN wrote to J Lynch & Co requesting copies of bank statements for the business account for the periods April to October 2009 and from October 2011 until the close of business in August 2012 and that these be provided by 28 September 2012.

25 66. On 26 September 2012, CN received the requested bank statements for PD/TopSport and considered that she had sufficient information to undertake an assessment of PD's liability to pay general betting duty on undisclosed business takings.

67. CN noted there were a number of deposits made into the business account and felt it was reasonable to assume that certain of these deposits related to TopSport "takings" as they were paid into the business account.

30 68. On 5 October 2012, CN issued a Notice of Assessment based on the difference between the declared business takings of TopSport and certain deposits made into the business account.

69. On 27 November 2012, CN received an appeal against this assessment and on 3 January 2013 the assessment was withdrawn by HMRC due to technical errors.

35 70. On 15 February 2013, a second assessment was issued, GR60/13, for £14,768, based on the difference between the declared takings and certain deposits made into the business account.

71. On 21 February 2013, CN issued a Penalty Explanation Form and a Penalty Information Schedule giving information about the penalties. It stated that the

behaviour that gave rise to the assessments constituted “deliberate inaccuracy with a prompted disclosure”. No reduction was given for “telling” or “helping” but a 30% reduction for “giving” was granted as PD had responded to requests for information and documents.

5 72. Throughout his evidence PD maintained strongly that he had complied with all the HMRC requirements as regards paying the correct amount of betting duty and meeting the rules of the Gaming Commission. PD said that he had shown everything that he was asked for and had nothing to hide. He was adamant that there was no requirement to keep betting slips for longer than six months; that he decided not to
10 keep the microfiche for more than six months because he said “of the quantity of it” and that there was no need to keep a record of personal betting.

73. On receipt, however, of correspondence from HMRC, PD became concerned and sought advice by asking the British Betting Association, the Fife Betting Association and the Gaming Commission if he had to keep records of his personal betting. When
15 pressed PD did not recall much more of these conversations other than the advice he received but PD stated that he did now keep records of his personal bettings “since all this business started up”.

74. PD said that he had decided to involve J Lynch & Co because the matters on which he was being investigated and inspected by HMRC were “getting way above
20 his head”.

75. PD stated that he only had two accounts, the personal account and the business account and that no other family member accounts were involved and that transfers to his private account could only have come from his brother, John, or his wife. PD admitted that there had been a defunct account from a previous business but this was
25 not in use.

76. On 11 April 2012, HMRC had written to J Lynch & Co asking them to explain their statement that PD only used two accounts, the business account and the personal account, when by letter dated 1 March 2012, they had said that all PD’s cash deposits made into the personal account related to private betting, when no cash deposits were
30 made into the business account between 9 April 2008 to 9 April 2009.

77. HMRC stated that they believed PD was either using another account for business purposes for the cash deposits or that the cash deposits made into the private account related to betting shop takings. HMRC stated that went to the credibility of PD’s answers and the statements were inconsistent.

35 78. The letter continued “if PD is unable to substantiate the claim that the cash deposited into account number 00285589 (the personal account) is from winning bets then this cash shall be treated as betting shop takings and will be therefore liable to general betting duty”.

79. In evidence, PD stated the statement in J Lynch & Co’s letter of 2 May 2012, that
40 all cash deposits made into his private account related to private betting was incorrect and that whilst it was true that without any records no one else could prove what cash

earnings derived from gambling, the same was not true of the business side of the takings because the other witnesses had confirmed that all takings and pay outs were recorded in the daily diaries and were “legal and above board”.

5 80. HMRC suggested that PD’s contention that he made substantial sums up to £30,000 a year from his cash gambling on the back of RD was untrue. PD denied this and claimed that he was still earning this amount of income per year.

81. PD maintained that he always kept the business records correctly, that he did not under declare any income from the shop and, although he now realised the benefit of keeping records of his private gambling, he did not do so at the time.

10 82. PD stated that “it had never occurred to me to keep records until HMRC asked for them and by that time it was too late to create them retrospectively”.

15 83. PD confirmed that he had made substantial losses from online betting over a period of time and HMRC provided a schedule of these which showed losses between the period 1 April 2009 and 7 October 2011 of just over £30,000. PD did not accept these as being “substantial” sums.

84. PD refuted HMRC’s suggestions that it was not credible that he could be a successful cash gambler and such an unsuccessful online gambler and repeated the details of his arrangement with RD.

20 85. In regard to the contention that PD had lied or misled HMRC regarding the telephone betting activities, PD was adamant that he had never been asked about telephone betting but about telephone credit betting. PD stated that when he was confronted with a betting slip that was a telephone bet, one of which he considered to be relatively few; he confirmed that telephone bets were taken.

25 86. The particular betting slip in question had been signed “Wendy”. There was some confusion as to whether this related to an employee called Wendy, who RM remembered and KM thought helped out on days when he was not there, and the suggestion put forward by PD that it may be a nom de plume or an alias used by an individual when betting which he said was a traditional form of behaviour for punters.

30 87. It was explained in evidence that it was not only telephone betting slips that were, by their very necessity, written out by an employee of PD or by PD himself, but that this was also the procedure followed, without the addition of a name, for either inexperienced customers who were not familiar with the information that was required to write a betting slip. KM often felt it was quicker to do this for the customer, and was necessary, on PD’s evidence, for customers who were unable to write.

35 40 88. CN gave evidence that she was not aware that there was a camera capture facility as she had not been able to see this when she was on the premises because she could not see it over the counter. CN confirmed that in her experience only about 50% of businesses at that time would have had a capture camera facility and had been superseded now by more modern tills which had this facility inbuilt.

89. Over the four years to August 2012, PD confirmed that he had introduced capital of £186,000, taken out drawings of approximately £98,000 and that there had been a net introduction to the business over this period of £88,000.
- 5 90. PD stated that although he knew the business was losing money he was not aware that it was losing as much as, on average, £22,000 per annum but, subsequently, decided to stop the business and his wife sold the premises for £27,000.
91. KM could recall in his period of time, as manager, that bet winnings of the amount of £4,500 and above, would have arisen only two, three or four times.
- 10 92. KM stated that he did not find bets of that amount that memorable in comparison to winnings of £40,000 which he did remember had been paid out at a previous employment.
- 15 93. On the evidence of the betting slips that had been made available to her, CN had become concerned that two of these were clearly telephone bets when PD had in relation to the checklist questions stated that he took no telephone bets. Suspicions were further raised when it was noticed that the handwriting on the telephone bets appeared to be very similar to the 5339 betting slip which CN again believed to be one of the pattern of large end of quarter losses.
- 20 94. CN was of the view that this betting slip had been put through as blank because it had been clearly written by the same person who had written the telephone betting slips which had to be someone working for PD or PD himself.
95. Added to this, CN was suspicious by the unhelpful and, in her view, the unfriendly behaviour of PD during her visit and in response to her requests for information and in relation to her perception of the use of family bank accounts which then was subsequently denied.
- 25 96. CN thought throughout that the explanation about the difference between cash betting and online betting was unlikely and, in any event, at no time, was she advised of the relationship with RD, the professional gambler.
- 30 97. CN also thought given PD's health, that the prospect of him travelling to 30/40 shops was unlikely as was the fact that he could give no further information as to their locations.
98. CN's suspicions had been further raised during her attendance at the betting shop during the day as the telephone did not ring and CN concluded that the telephone had been disconnected, this being consistent with PD's statement that there were no telephone bets when CN concluded that there were.
- 35 99. Consequently, given these credibility issues and the unsubstantiated evidence about the cash deposits, CN decided to use best judgement and raise an assessment.

100. In relation to the assessment, CN confirmed that penalties had been assessed on 15 consecutive quarters, starting on 1 January 2009 (the first one ending on 31 March 2009) and so on until 30 September 2012.

5 101. CN confirmed that having decided to change the basis of her assessment to the business account on 6 June 2011, she only received the bank information she required on 26 September 2011.

Submissions by PD

10 102. PD says that there was no under declaration of betting duty, that he and his employees were credible witnesses, as was RD. There was no challenge to RD's credibility who was a successful professional gambler and who used PD to place bets for him, who with others were unpaid, in the belief that PD and others like him used the betting knowledge to place their own bets alongside RD's.

103. PD says that once this is accepted, HMRC made no challenge on the degree of the personal betting but merely said there was none at all.

15 104. PD says that the figures and cash sums realised seem plausible in RD's account.

105. PD says that the evidence of KM and RM confirms PD's statement that all bets placed were through the till and that betting receipts were photographed; that some betting slips were completed by PD or his employees for punters and that, if there was a telephone bet, which was rare, the name of the punter would be written on the slip.
20 That "name" might also be an alias or nom de plume.

106. PD says that CN uplifted the 2009 and 2010 diaries and copied the 2011 diary during her visits and made no suggestion that the totals were not consistent with what was put in the betting duty returns.

25 107. CN also checked the till rolls for a number of months and made no challenge on any perceived mismatch between the till rolls and the daily diary. PD says that there were no blank betting slips put through the till or photographed by capture camera and this was confirmed by KM and RM. This extra security measure, coupled with the use of consecutive serial numbers from the till, precluded this as a means of fraud.

30 108. PD says that there were no inconsistencies in his evidence and that he told the truth both to CN during her visits and at the hearing; in relation to the issue of telephone betting. PD says that this was more likely a misunderstanding than a deliberate attempt by him to deceive HMRC; that he has no reason to lie and as regards telephone bets they are irrelevant as to whether or not there was a fraud.

35 109. PD says that he only had two bank accounts, the personal account and the business account, and that payments into the personal account included those from his business, from his cash betting and there were transfers from his wife and brother. PD says that when J Lynch & Co said that his personal account was only credited with winnings from personal betting that was incorrect.

110. PD says that with over 30 years in the construction industry as a shareholder and contract manager and as an owner and director of a betting company in the betting industry, both of which are industries heavily scrutinised by HMRC, he had no prior serious problems with HMRC.

5 111. PD says that his evidence about contacting the Fife Betting Association and the Gaming Commission is correct, notwithstanding being unable to remember the exact dates of the calls; that was furthermore put in correspondence in 2012 and could have been investigated then. In any event, the advice was the same as the advice given by HMRC that there was no need to keep records of personal betting. Even if he had,
10 any corroboration would be difficult and could easily have been disbelieved by HMRC.

112. As regards the betting slips containing the same handwriting on the telephone betting slip 5339, PD says that the argument put forward by HMRC does not stack up. Had he been asked at the time he could have produced the camera/film evidence and
15 the fact that these records were no longer available and that there is no statutory requirement for him to retain them, should not be held against him.

113. PD says that if there had been any attempt to make fraudulent bets as suggested by HMRC this would have had to involve the staff, principally RM and KM who gave credible accounts of the working practices and both of whom confirmed that there
20 were no blank betting slips.

114. PD says that all takings were declared on the appropriate betting duty return, based on the full totals of takings taken from an accumulation of the till rolls and the daily diary.

115. PD says that the process of not using the business account in any formal way
25 meant that the deposits made from the personal account to the business bore no relationship to the takings nor to the amount of betting duty payable. He accepted that his bookmaking business was loss making but believed it would get better and might be sold together with the premises.

116. PD says that there is no corroborative evidence of CN's assertion that there was
30 a pattern of losses at the end of each quarter and the principal source of the diaries for 2011 were not submitted to the Tribunal to test any specific figures or a pattern. The only evidence produced was the betting slip 5339 which it is accepted is five days before the end of a return date but it is only one figure and it is not known whether on that date overall there was a profit or a loss made.

35 117. PD says that the proposition that the betting slip was fraudulent should be rejected.

Time Limit

118. PD says that the time limit within which HMRC are entitled to make an
40 assessment is dealt with under Section 12 of the Finance Act 1994 and is the earlier of three dates beginning with the time when the liabilities to duty arose (depending on

the basis on which the assessment is made) and one year beginning with the day on which evidence of the facts, sufficient in HMRC's opinion to justify making the assessment, comes to their knowledge.

5 119. PD says that the second assessment was made after the expiry of the time limit of one year in respect of a number of periods covered by it. HMRC have administratively chosen to combine assessments for different periods in to a single assessment in an attempt to circumvent the rules as regards time limits, albeit unintentionally.

10 120. PD says that the second assessment was dated 15 February 2013 and that it follows that this assessment is out of time unless there is some evidence that the facts that came to HMRC's knowledge after 15 February 2012 made the difference between the evidence known to them being insufficient and sufficient (in HMRC's opinion) to justify the second assessment.

15 121. PD drew attention to the assessment which set out the period dates as beginning 1 January 2009 to 31 March 2009 and then 1 April 2009 to 30 June 2009 and so on over eight quarters ending on 31 December 2010. This brought out a total of £7,511 and a further assessment dated 13 February 2013 dealing with the seven quarters from 1 January 2011 until 30 September 2012 and brought out a total of £7,257.

20 122. The second assessment stated the "net amount due to HMRC" as £14,768. It did not say that this is an assessment but states that it is a total.

123. PD referred to HMRC's calculation which showed the transfers from the personal account to the business account for each return period and compared this to the amount of declared gross profit for the calculation of betting duty.

25 124. PD says that there is no case law on the issue of what counts as "evidence of the facts sufficient in the opinion of the Commissioners to justify the making of an assessment, or when that information could be said to have 'come within the (Commissioners') knowledge'" for the purposes of Section 12(4) of the Finance Act 1994 but there is on the same issue as it arises in VAT law under Section 73(6) (b) of the VATA 1994. This provides that certain assessments shall not be made after the
30 later of two dates, one of which is, "one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment comes to their knowledge".

35 125. PD referred to the case of *Pegasus Birds v Customs and Excise Commissioners* where Lord Justice Aldous said "once that evidence has been ascertained then the date when the last piece of the puzzle fell into place can be ascertained. In most cases the date will be known to the taxpayer as he will be the person who supplied the information".

40 126. PD says that having set out the reasons for making the second assessment it was based on the deposits paid into PD's business account between 1 January 2009 and 30 September 2012 and that this information concerning the business account was

known to HMRC prior to 15 February 2012, so far as it related to the period 10 April 2009 to 30 September 2011.

127. So far as the second assessment is based on deposits on the period 1 October 2011 to 30 September 2012, it could be said to be based on the bank accounts provided to HMRC on 26 September 2012 and, therefore, within the one year prior to the second assessment. PD says that those bank statements had not previously been provided to HMRC. The second assessment is in time so far as relating to the period 1 October 2011 to 30 September 2012 but if the statements for the period up to 31 December 2011 were sent to the Respondents before 15 February 2012, the second assessment cannot be justified by the statements sent on 26 September 2012 and is, therefore, out of time.

128. PD says that the second assessment is only in time as regards the first period, 1 January 2008 to 31 March 2009, and from 1 October 2011 to 30 September 2012 and outwith those dates it is out of time and invalid.

129. To the extent that none of PD's business account statements for the period 1 October 2011 to 30 August 2012 had been provided to the Respondents before 15 April 2012, and the gross profit relied upon by the Respondents is that disclosed by the accounts to 31 March 2009, the remaining assessments are out of time and, therefore, invalid.

130. In conclusion, PD says that the second assessment is erroneous in fact; that there were no under declarations on betting duty returns; that in any event the second assessment is invalid as regards the period 1 April 2009 to 30 September 2011 as it was not made within the applicable time limits in respect of the periods within the longer period.

131. The appeal should be allowed.

HMRC Submissions

132. HMRC say that the onus is on the Appellant to demonstrate that the assessment should not be adhered to.

133. HMRC say that PD has failed to provide documentary evidence to call the assessment into question; that the account of cash betting when compared with online betting is not credible and, even if it is, it does not explain the transfer of funds to the business account.

134. HMRC say that PD has not demonstrated that the second assessment was wrong to found upon the credits made from the personal account to the business account and that PD's submission relating to the time limits are without merit. HMRC say that the basis of carrying out the assessment has not been challenged. All that has been challenged is the accuracy of the assessment nor has there been any challenge on HMRC's "best judgement".

135. HMRC say that the appeal proceeds on two grounds, one being “no under declarations” and the other being “time bar”.

5 136. HMRC say that the second assessment should stand on the basis that it was “a best judgement” properly reached; and that PD has advanced no reason for the total contained therein to be reduced in value; and the second assessment was made in all respects within the time limit specified at Section 12(4) of the Finance Act 1994.

137. HMRC say that the penalty appeal is entirely consequent upon the excise appeal and that if the former is successful the latter will also succeed.

10 138. HMRC say that during the three visits, CN and her colleagues became suspicious when PD stated that he did not accept telephone bets, that a pattern was distinguishable of a large loss appearing towards the end of a return period; that one such loss corresponded to an unattributable betting slip that appeared to have the same writing as a telephone betting slip; that PD subsequently said that telephone betting took place and, importantly, that PD repeatedly deposited his business takings into his
15 personal bank account.

139. HMRC’s investigations particularly centred upon an amount of £60,465 of deposits which PD attributed to his betting activities for which no records were kept; on PD’s online betting activities which were recorded in his personal account and led to heavy losses; on PD’s claim these deposits came from a wide range of betting
20 activities but did not provide further details beyond the generality; and from 2 May 2012, PD’s position changed and indicated that he had not deposited his business takings into his personal bank account.

140. HMRC conducted their investigations but having failed to obtain any further information in relation to PD’s personal account, sought access to the missing bank
25 statements for the business account and, on receiving a full set of records, proceeded to make an assessment.

141. HMRC took the view that the assessment could found on the transfers to the business account as relating to the Appellant’s business.

30 142. The assessment was based on the discrepancy between PD’s declared business takings and certain deposits made into his business account.

143. HMRC say that when considering the penalty that PD’s returns constituted “deliberate inaccuracy with a prompted disclosure” for which only a deduction for the Appellant’s willingness to respond to requests for information was granted. HMRC emphasised that no challenge had been made in the penalty appeal separate from the
35 outcome of the excise appeal.

144. HMRC say that the test for reducing an HMRC assessment is a high one with reference to the Wednesbury Test which states *inter alia* “an honest and genuine attempt to make a reasonable assessment is to stand; if no officer seeking to exercise best judgement could have made the assessment it should not stand. An honest and

bona fide attempt to exercise best judgement, taking into account material available, is to stand; it is not incumbent upon HMRC to undertake exhaustive investigations”.

145. HMRC referred to Mr Justice Wolfe in *van Boeckel v CEC* as follows, “what the words ‘best of their judgement’ envisage in my view is that the Commissioners
5 will fairly consider all material placed before them and on that material come to a decision which is reasonable and not arbitrary as to the amount of tax that is due”. He continued “the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgement should have been exercised. A much stronger
10 finding is required: for example the assessment has been reached dishonestly or vindictively or capriciously or a spurious estimate or guess in which all elements of judgements are missing or is wholly unreasonable”.

146. HMRC refer to Mr Justice Carnwath in *Rahman* where he stated “the relevant question is whether the mistake is consistent with an honest and genuine attempt to
15 make a reasoned assessment or if it is of such a nature that it compels the conclusion that no officer seeking to exercise best judgement could have made it... the Tribunal should remember that their primary task is to find the correct amount of tax so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing and the Tribunal
20 should not allow it to be diverted into an attack on the Commissioners’ exercise of judgement at the time of the assessment”.

147. HMRC say that they made an honest and genuine attempt to make a reasoned assessment taking into account the mismatch between the banking records and declared takings; the inconsistency in PD’s accounts of his practice in relation to
25 telephone betting; his failure to keep records of personal betting; the incredibility of the explanation of income attributed to personal betting; and his business profit being below the industry norm.

148. HMRC accordingly based the assessment on the deposits made into PD’s business account. An alternative approach would have been to found upon the
30 deposits made into PD’s personal bank account. The latter would also have been a reasonable approach.

149. HMRC say that they took into account all relevant material gleaned from the investigation into the Appellant’s affairs and did not take into account anything that was irrelevant.

150. HMRC say that PD is not a credible and reliable witness and gave self serving
35 evidence which operated in his favour. HMRC say that there were inconsistencies with his evidence and those of other witnesses.

151. HMRC say, for instance, that CN had warned PD about his record keeping who said that he took no telephone bets and admitted this only because he was shown
evidence to support that proposition.

40 152. HMRC say that his account of certain matters is inconsistent, in particular, his telephone conversations with the Bookmakers’ Association and the Gambling

Commission. HMRC say that PD was concerned enough to make these calls but believed he would have been told that it was advisable to keep records and that was certainly the advice from his accountants, J Lynch & Co.

5 153. HMRC say that PD was a bookmaker and record keeping was an important part of his industry; that PD's account does not stack up and that it is simply convenient that there is no legal requirement to keep personal betting slips and that the other witnesses' evidence is reliable but is of limited value because it does not relate to PD's own affairs.

10 154. HMRC say that CN is a credible and reliable witness and gave a thorough assessment of her treatment of this matter, that her oral evidence was consistent and logical, including the fact that she changed her view on how best to carry out an assessment based on her belief that there was a shortfall in the correct amount of betting duty.

15 155. HMRC say that the explanation for the gains on cash betting given the losses on online betting is not credible and that there are no records before the Tribunal to prove this and none given to HMRC.

20 156. HMRC refer to case of *Brimlow v Price*, a case where no records were kept but it was accepted that there was no legal requirement to do so. In this case, Mr Justice Ross stated "if a man makes substantial sums of money in betting – and a number of people do so – it is not unreasonable to expect him to keep records of his betting transactions so that if he is subsequently challenged by the Revenue authorities to explain an increase in his wealth, he can satisfy them that it is not due to any undisclosed taxable profits but to his betting winnings. If he chooses not to do that he runs the risk of having attributed to taxable profits what, if he had kept records of his betting transactions, he might have been able to convince the authorities were in fact untaxable betting winnings".

157. HMRC say that PD cannot attest to the amount of winnings and no one else can other than PD.

30 158. HMRC refer to the case of *Stephen George O'Malley*. This case involved an alleged understatement of income where Judge Cannan stated "if personal betting winnings was the explanation for a shortfall of income it would follow that the winnings must have all come from cash bets. That in turn suggests that for some reason Mr O'Malley's cash betting was much more successful than his online betting. There is no reason why that should be the case and Mr O'Malley did not suggest any reason why it should be the case. Indeed, he accepted his online betting was the same sort of betting as his cash betting".

40 159. He continued "we accept there is no legal requirement for Mr O'Malley to keep any record of his personal betting. However, given the nature of his business he must have realised it was important to distinguish between personal betting from hedge betting connected to the business".

160. HMRC say that PD claimed to be a good record keeper but kept no records of his personal betting and that he could not recall when he said he made the calls to confirm the position about keeping records of his personal betting and that if PD had chosen to keep records from June 2012, he would have been able to vouch for parts of the assessment but chose not to do so.

161. HMRC's calculation of the online betting losses amounted to approximately £30,000 over two and a half years which PD denied were "substantial losses" and HMRC say that no reconciliation had been given as to the difference between online betting and off line betting.

162. HMRC say this is not credible from someone who carefully arranged his banking arrangements to avoid banking charges which involved a saving of £1,800.

163. HMRC referred to letters of 10 February 2005 and 26 March 2008 reminding or telling PD that he must keep the following records –

- a) A general betting duty account showing how you calculate your duty payment;
- b) A daily record of the bets made with you;
- c) A daily record of the bet related winnings paid out;
- d) Copy betting slips;
- e) Any till rolls you produce;
- f) Your bank statements;
- g) Your cash and credit records including hedging account statements
- h) Your annual records.

164. The letter in 2008 stated that records must be kept for three years although "you may destroy betting slips six months after the date after the bets were made with you. However, in the case of winning bets you must retain betting slips for a period of six months after the date you paid out the winnings".

165. HMRC say that PD was repeatedly asked for records throughout the investigation, in particular of the 30 to 40 shops he visited.

166. In addition, PD made no disclosure about RD throughout the entire correspondence with HMRC.

Tax Due

167. HMRC say that PD had presented no documentary evidence to demonstrate that the total assessment should be reduced in light of the material presented to it by PD.

168. HMRC say they reasonably assessed the Appellant's takings to be reflected in payments made into his business account.

169. HMRC had regard to the evidence suggesting the Appellant was artificially reducing the duty paid to him with no credible explanation being offered as to why such reduction was genuine.

170. HMRC say that whether or not telephone betting was engaged in is immaterial to the assessment which was based on payments made into the Appellant's business account. Whether or not PD's account was inconsistent in this regard did not affect the total reached in the making of the assessment and, accordingly, the total should not be reduced.

171. HMRC say that PD failed to provide credible evidence to attribute payments to his business to a personal source, ie to personal betting, nor has he offered an explanation why he should have paid personal winnings into his business bank account. It is a reasonable and appropriate inference that the sums paid into his business bank account were part of his business takings. The total in the assessment should not be reduced. HMRC say that PD has failed to demonstrate the total reached in the second assessment should be reduced and that the assessment should be upheld in full.

Time Bar

172. HMRC say that once they had sufficient evidence (ie once the last piece of the puzzle had fallen into place (*Pegasus Birds*)) that they may carry out their assessment of that puzzle at any time before (emphasis added) *the one year period* in Section 12(4)(b) *has expired*.

173. By virtue of Section 12(4)(a) that puzzle may not extend historically before four years duration – in other words HMRC may not include within that assessment duty liable to have been paid in respect of an accounting period ending more than four years before the assessment is made.

174. HMRC say that the point in time at which HMRC reached a position where they were in possession of sufficient evidence to make their assessment was the date on which they received the full set of the Appellant's business accounts – namely on 26 September 2012. It was then the last piece of the puzzle fell into place. HMRC could not have made this assessment without the full business banking records.

175. Accordingly HMRC had thereafter until 25 September 2013 in which to make their assessment (which in fact was made well within this deadline on 15 February 2013). HMRC state that, as this year progressed, the structure of Section 12(4) meant that the period that the assessment could cover periodically reduced as the Appellant's default dates receded beyond the four year limit.

176. Those default dates occurred quarterly on the last day of March, June, September and December in any year (as is noted in the second assessment) – hence on 15 February 2013, it was open to HMRC to make an assessment of all amounts which became due on any date from 15 February 2009 onwards.

177. The second assessment assessed the Appellant in respect of the accounting period from 1 January 2009 to 30 September 2012. The first accounting period assessed by the second assessment is the quarterly period 1 January 2009 to 31 March 2009. For an accounting period, general betting duty becomes due at the

end of the period. Hence for the period 1 January 2009 to 31 March 2009, the duty became due at the end of 31 March 2009.

5 178. In respect of the subsequent periods assessed by the second assessment, duty became due at the end of those periods. All such times at which duty became due fell within the four year period immediately before 15 February 2013.

179. HMRC say that the contention that they were only able to use the business bank accounts within a period of one year from the date of their provision is incorrect.

10 180. HMRC say that the relevant date for the commencement of the one year period is “the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of an assessment, come to their knowledge”.

15 181. HMRC say that the earliest date in which it became apparent that it would be necessary to assess PD on the basis of his business accounts was 6 June 2012 and that became so only because that was the day on which it became apparent that PD would not cooperate to the extent of providing further details regarding the operation of his personal account.

182. HMRC did not obtain the full set of business accounts and, consequently, did not become able to make an assessment until 26 September 2012.

20 183. HMRC say that PD’s assertion that HMRC ought to have issued an assessment on any part of PD’s business account within a period of one year from the date of the provision of that part cannot be correct:-

a) The reference in *Pegasus Birds* is “to the last piece of the puzzle” and not to each piece as it arises;

b) that HMRC were conducting one single investigation into the Appellant’s affairs to culminate in a single assessment;

25 c) and that a meaningful assessment of the Appellant's affairs could not be done when part of the business account records were still pending.

184. In any event, HMRC only received the business accounts for the period April to October 2009 on 26 September 2012.

30 185. HMRC state that the assessment was not out of time; it was carried out within the time limit envisaged by Section 12(4) of the Finance Act 1994 and that there is one relevant date by which that time limit is to be calculated, which is the receipt of the full set of PD’s business accounts. Assessment was made less than six months after that date; it made no assessment of any duty due more than four years prior to the date of assessment.

35 **The Issues**

186. The following broad issues arise for determination in this appeal.

187. Did PD underdeclare his takings on excise duty returns which had a consequent effect on the amount of betting duty paid?

188. If there was an understatement of income, was an assessment carried out to HMRC's "best judgement" and, if the understatement was deliberate on the part of PD, do penalties arise?

189. Were the assessments and, consequently the penalties, in or out of time?

Legal Framework

General Betting Duty

190. General Betting Duty ("betting duty") is chargeable in accordance with the Betting and Gaming Duties Act 1981. The amount of duty is calculated by reference to the net stake receipts.

191. The provisions by which HMRC can assess betting duty are contained in Section 12(1) of the Finance Act 1994. Briefly, they may do so, where a person has failed to keep proper accounts. Any assessment must be made to best judgement. The burden is on PD to satisfy the Tribunal that the assessments are excessive. Liability to penalties arises under Section 8(1) of the Finance Act 1994 where a person has dishonestly engaged in conduct for the purposes of evading duty.

192. The right of appeal in relation to betting duty and penalties follows the review procedure in Section 15(B) of the Finance Act 1994.

193. This appeal is governed by Section 16(5) of the Finance Act 1994 and the Tribunal has full appellate jurisdiction in relation to the review of the assessments and the penalties.

194. The Tribunal's finding of facts in relation to all matters in the appeal, including whether PD has acted dishonestly or fraudulently, are made by reference to the balance of probabilities.

Decision

195. In this appeal, the Tribunal considered the credibility of the witnesses and the sufficiency of the documentary evidence, before it.

196. The Tribunal found all the witnesses before it truthful and, to the extent that memory extended to it, reliable. According to CN, PD had shown an unhelpful attitude towards CN on her visit to his premises when she wished to stay but, historically, PD appeared to have had been of little concern to HMRC and had admitted as far back as 2005 and 2008 that he used his personal account to bank his business takings.

197. HMRC's response was to send letters both in 2005 and 2008 reminding PD of the records he ought to keep and, on the evidence before the Tribunal, he had adhered to this.

5 198. A particular issue in this case, is the statutory requirement to hold records for what appears to be a relatively short period of time which has not assisted HMRC in carrying out enquiries historically.

10 199. The Tribunal considered that CN's suspicions were quite understandably raised as she looked into the business affairs of PD but, in the evidence before the Tribunal, she was unaware of a number of factors which the Tribunal considered to be significant and one which should have been notified by either PD or J Lynch & Co to HMRC related to PD's relationship with RD. The Tribunal considered RD's evidence to be credible and his *modus operandi* as a professional gambler of using a number of associates in order to enable him to place bets and to allow them to use his tips or information as their "remuneration" to, as it were, piggy back on his success or, no
15 doubt, his occasional losses, was understandable.

200. Although PD suffered serious illness and had the facility to oversee his betting shop from his home with close circuit television, the Tribunal did not accept that he would have been unable to visit betting shops in Edinburgh and Fife as he was able to travel to his own shop to carry out the banking activities.

20 201. There was clearly no consensus in relation to the issue of telephone betting but although pointing to the credibility of PD, it added nothing to assist the Tribunal in understanding how PD could have used this to depress his takings and therefore the amount of betting duty.

25 202. It was clearly unfortunate that when CN did spend time at the betting shop she was unable to see the capture camera beyond the counter but, given that she was aware that 50% of betting shops had such a facility she could no doubt have enquired if there was such a facility and PD could have mentioned it. There was no actual legal requirement to keep photographic evidence and it was not mentioned in Notice 451 or in any of the 2005 or 2008 letters sent to PD.

30 203. PD says that if he had been questioned about the 25 June 2011 betting slip, he would have offered the camera evidence but this was not available at the time of challenge. Accordingly, both in relation to the issue of telephone betting, or telephone credit betting as PD would have it, and in relation to proving whether blank slips were put through the till and then caught on the capture camera with sequential
35 serial numbers, there was no common understanding between PD and CN.

204. Consequently, with her suspicions raised, CN then noted that the telephone did not ring during her visit. PD said that telephone bets were few and far between and there was no evidence from either party whether telephone calls were made rather than received.

40 205. HMRC's premise is that blank betting entries were put through the till and then marked up afterwards to produce large wins towards the end of each quarter when the

betting duty return was due to be completed and the betting duty calculated. HMRC saw this as a pattern of behaviour, having examined the daily diaries but these were not produced at the Tribunal by either party nor was the 2011 diary which HMRC had copied. Whereas the Tribunal had no doubts as to the credibility of CN, it was unclear to them why anyone deliberately trying to suppress the amount of takings would always have chosen a period toward the end of a quarter, rather than, for instance, throughout each quarter.

206. CN then compared the amount declared for betting duty with the national statistics and came to the conclusion that there was a shortfall which then led her to examine PD's bank accounts. In this, she was correct and entitled to do.

207. The evidence of KM and RM is that one of the reasons that there was a capture camera was to protect them against any allegations by PD of misappropriation and, on PD's evidence, clearly to provide proof, should there be a dispute with a punter.

208. CN's suspicions were again raised when she came across three betting slips, all which appeared to be in the same handwriting on the same date, one of which was later confirmed to be a telephone bet. Clearly, in relation to there being a telephone bet at all, this is contrary to what CN said PD had told her about him taking no telephone bets but the other issue was that the two other betting slips which were clearly not telephone bets were in the same handwriting and one of those slips related to a large end of quarter loss to PD of £4,585 on 25 June 2011 ("the winning betting slip"). The winning betting slip had been completed in one handwriting but finished, as regards the calculation of the odds and the amount to be paid, in different handwriting, which PD admitted he added after the bet had been taken and the race won. As the other betting slips were clearly telephone bets these had to have been written by members of his staff and the writing was identical or, at least, extraordinarily similar, to the winning betting slip. The Tribunal considered that for HMRC's view, that the winning betting slip had initially been completed as blank and completed after a race, to be correct then it would have required the collusion of a member of staff. The Tribunal then considered the evidence and credibility of KM and RM and considered them to be truthful and reliable in their evidence. They confirmed that telephone betting slips had to have been written by a member of staff because the bet was taken by telephone and that other betting slips were completed by members of staff in circumstances where it was just simpler and easier from an administrative point of view for a member of staff to write the betting slip for a punter or, in presumably rarer cases, where the punter could not write.

209. Accordingly, the Tribunal were not persuaded that blank betting slips were placed through the till and in the absence of any film or camera evidence relied upon the three witnesses' oral evidence.

210. CN understandably, without the knowledge of how the betting slips were completed in the shop and without the knowledge of the capture camera facility, then considered the practice of PD paying his takings into his personal bank account.

211. The Tribunal accepted PD's evidence that he did this in order to save substantial bank charges as credible and that this would cause suspicion and concern to HMRC.

212. No evidence was produced as to whether PD's income and lifestyle was matched by his income or the extent to which his bookmaking activities appeared to lag behind the national norms. The Tribunal accepted that PD had only two bank accounts and that the number of people paying into PD's personal account were primarily PD, but also his wife, his brother, John, and payments on behalf of PD from online bookmakers. When considering the contradictory statements from J Lynch & Co which indicated that PD used his personal account for his personal use and did not pay business takings into it, the Tribunal, on the evidence of the statements and PD's oral evidence, accepted that business takings were paid into the personal account.

213. The Tribunal did not believe there was any collusion between KM, RM and PD in relation to the production of blank betting slips and accepted that PD's own attempts at betting were not successful and resulted in losses.

214. The Tribunal then considered PD's claim that the substantial and positive cash inflows into his personal account came from cash betting and found this to be credible. The Tribunal considered that PD was unwise not to have kept records of his personal betting and opened himself to challenge but accepted that he sought reassurance that, legally at least, he was not required to do so.

215. PD's attitude to the request for records, particularly of his personal account, was not in the Tribunal's view helpful to HMRC but in the Tribunal's experience, this is not uncommon amongst many taxpayers who might also receive advice from their personal advisers to be reticent about producing personal bank accounts to HMRC in relation to an enquiry relating to their business.

216. Clearly, however, this simply added to CN's suspicions and on 6 June 2012 she took the pragmatic view that, given that she believed that dishonesty had taken place, an assessment should be considered, based on the business account to which she could obtain full access.

217. Based on the evidence before it, the Tribunal did not consider that dishonesty had taken place and that the takings had been underdeclared. The Tribunal accepted the evidence that the takings were all put through the till, that the pay outs were all recorded and that the record keeping requirements intimated to PD in 2005 and in 2008 were met. HMRC made much of the discrepancy between the cash betting which was successful and the online betting which was unsuccessful for which quite understandably, at the time their enquiries were carried out, and, at the time of the review, they were given no explanation.

218. At the hearing, the Tribunal were given an explanation which was that PD followed RD's tips in relation to cash betting and was very keen to get them.

219. The Tribunal, accordingly, consider that the reviewed decision was incorrect and that no assessment should have been raised and so should fall.

220. When PD transferred funds into the business account he did so with the prime purposes of “topping up” the account to avoid it becoming overdrawn and incurring bank charges. This meant that the transfers to the business account did not necessarily bear any relation to the takings of the business not paid into the business account. It was not as though payments were made from the personal account to the business account so as to show any true accounting of results. The amounts transferred which HMRC considered might be missing takings were in fact no more than amounts used to keep the business account at a positive but not very high overall balance. It was entirely possible that if there were any missing takings they might be larger or lower than the amounts transferred into the business account.

221. The Tribunal could not accept, on the basis of this evidence, that HMRC could have come to a decision which was reasonable and not arbitrary as to the amount of the tax that was due “in terms of the opinion of Mr Justice Woolf in *van Boeckel* when considering HMRC’s exercise of the best of their judgement”.

222. Had HMRC disclosed the variation from the normal levels of payment of duty of PD’s business, this may have completed the picture but that evidence was not available to the Tribunal.

223. As the Tribunal have decided that the assessment should fall, the penalties then fall and those penalty assessments are reduced to nil.

224. The Tribunal considered whether the penalties and the assessments were in time in terms of the arguments put forward by PD and HMRC. The Tribunal accepted HMRC’s submissions in full as being the correct and logical interpretation of Section 12(4) of the Finance Act 1994 in relation to whether the assessments and penalties were in time.

225. The Tribunal agree that there was one relevant date by which that time limit in Section 12(4) was to be calculated which was the receipt of the full set of PD’s business account records. The assessment was made less than six months after that date and it made no assessment of any duty more than four years prior to the date of assessment.

226. 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.

**W RUTHVEN GEMMELL
TRIBUNAL JUDGE**

RELEASE DATE: 29 August 2014