[2020] UKFTT 0070 (TC)

TC07566

VALUE ADDED TAX – assessments for VAT on under declared takings – assessments to best judgment but some out of time – in time assessments not displaced and upheld – appeal allowed against out of time assessments – penalty for deliberate and concealed inaccuracies – held neither but inaccuracies were careless – penalty reduced.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04474

BETWEEN

ANSAR ALI T/A INDIAN VOOJAN **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Sitting in public at Cardiff on 21 October 2019 with further submissions from the Respondents received on 27 November 2019

Mr Nathanial Monk of TM Sterling Ltd for the Appellant

Mr Daniel Hopkins, Officer of HM Revenue & Customs, for the Respondents

DECISION

PREAMBLE

1. This is a revised decision of the Tribunal following a review conducted pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

2. As can be seen from paragraph [11] below, the appellant has been assessed for VAT on underdeclared takings for VAT periods 06/11 to 06/16 inclusive. HMRC has also assessed the applicant to a penalty. This was on the basis of deliberate and concealed behaviour. A decision notice giving full findings of facts and reasons was released on 4 February 2020 (the "**Original Decision**").

3. The Original Decision upheld the VAT assessments but concluded that the appellant's behaviour was not deliberate and concealed, but careless, and so reduced the penalty.

4. By notice dated 27 March 2020 the appellant's new representative, Vatangles Consultancy Ltd applied for permission to appeal the Original Decision to the Upper Tribunal.

5. The grounds of that application were that the Tribunal having concluded that the appellant's behaviour was careless, and not deliberate, HMRC could not raise assessments for the VAT more than 4 years after the end of the described accounting period. Since the VAT assessments were made on 31 October 2016, the earliest period that could be validly assessed was the period 12/12, and so the assessments made prior to that date were out of time.

6. If that was correct, then that part of the Original Decision dealing with the penalty was also incorrect since it was calculated as a percentage of the VAT assessed.

7. In their application to appeal, the appellant's representative asked me to review my Original Decision in light of their foregoing grounds of appeal. I considered, in accordance with Rule 40(1), whether to review the Original Decision and decided to undertake a review as I was satisfied that there was an error of law in the Original Decision.

8. I therefore sought representations from HMRC on the merits of the appellant's application. In their letter to the Tribunal dated 19 May 2020, HMRC submitted that they had no objection to the application and accepted that the period which could be validly assessed, and so in respect of which the appellant owed VAT, should be reduced from the original period of assessment of 06/11 to 06/16 to the period 12/12 to 06/16 (inclusive). In their view this reduction resulted in the appellant owing VAT of £22,120, rather than £36,585 which was the amount of the original assessment.

9. I have therefore decided, in accordance with section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2007 to set aside those parts of the Original Decision which relate to the assessments for the periods prior to 12/12, and to the penalty for those periods and to re-make the Original Decision in respect of those matters. This Decision (the "**Remade Decision**") is that re-made decision. It has been considered in draft by the parties who have both confirmed that they are satisfied with it and with the outcome of my review.

10. The Remade Decision was released on 28 July 2020. On 22 September 2020 the appellant's representative made a further application for permission to appeal which included

a request for review of my Remade Decision. Having considered that application and sought representations from HMRC (who raised no objection to my proposal to review the Remade Decision), I have decided to review my Remade Decision and remake it which I have done. This Decision therefore is the remade Remade Decision.

INTRODUCTION

11. This is a VAT case. The respondents (or "**HMRC**") believe that the appellant has deliberately suppressed his takings for the VAT periods 06/11 to 06/16 inclusive (the "**periods**") and that he had concealed this suppression from HMRC. They have raised VAT assessments for each of those periods which amount, in total, to £36,585 (the "**VAT assessments**"). They have also assessed the appellant to a penalty (the "**penalty**") under Schedule 24 Finance Act 2007 ("**Schedule 24**") for £27,440 on the basis of deliberate and concealed behaviour (the "**penalty assessment**").

12. The issues that I have to consider therefore are:

(1) are the VAT assessments valid in time best judgment assessments;

(2) if so, has the appellant displaced these by establishing that they are more likely than not to be incorrect;

(3) if not, is the penalty assessment a valid assessment;

(4) if so, what degree of culpability has the appellant demonstrated which might exonerate him or reduce the penalty.

THE LAW

13. There was no dispute between the parties concerning the relevant law which I summarise below.

The VAT assessments

14. By virtue of section 73(1) Value Added Tax Act 1994 ("**VAT Act**"), where it appears to HMRC that tax returns made by a taxpayer are incomplete or incorrect, HMRC may assess the amount of VAT due from him to the best of their judgment and notify it to him.

15. Under section 73(6) VAT Act an assessment must be made not later than either 2 years after the end of the prescribed accounting period or 1 year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge (whichever is the later).

16. This is, however, subject to the general rule that the time limit for making an assessment is capped at 4 years after the end of the relevant accounting period. This is found in section 77(1) VAT Act 1994.

17. This time limit is extended by virtue of section 77 (4) and (4A) VAT Act where deliberate or deliberate and concealed behaviour is established. In these circumstances, the assessment period is 20 years after the end of the prescribed accounting period.

18. Section 83 VAT Act provides:

"Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters..."

19. There is then set out a series of actions, decisions, and other matters arising under the Act listed under paragraphs (a) to (z). Paragraph (p) is as follows:

"An assessment-

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act....

or the amount of such an assessment."

20. In *Van Boeckel v Customs and Excise Commissioners* [1981] AER 505 ("***Van Boeckel**")* the High Court (Woolf J as he then was) considered the application of best judgment.

"..It should be recognised...that the Commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgement is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgement' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due."

21. In the Court of Appeal decision of *Customs & Excise Commissioners v Pegasus Birds Ltd* [2004] EWCA Civ 1015, that court approved the approach of Woolf J. It went on to add that the tribunal's primary task is to find the correct amount of tax on the basis of the material before it and in all but very exceptional cases this should be the focus of the hearing; any mistake which I consider that HMRC has made in its assessment may still be to best judgment if it is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; and an assessment which appears to be unreasonable or wholly unreasonable may still be the result of an honest and genuine attempt to assess the VAT properly due.

22. As regards time limits, these were considered in the High Court decision of *Pegasus Birds* ([1999] BVC 56) in which Mr Justice Dyson set out the legal principles to be applied as follows:

"1. The Commissioners' opinion referred to in section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question: C & E Commissioners v Post Office [1995] STC 749, 754G.

3. The knowledge referred to in section 73(6)(b) is actual, and not constructive knowledge: C & E Commissioners v Post Office at p755D. In this context, I understand

constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii): Heyfordian Travel Ltd v C & E Commissioners [1979] VATTR 139,151; and Classicmoor Ltd v C & E Commissioners [1995] V &DR 1, 10.I.27.

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury: Classicmoor paras 27 to 29; and more generally John Dee Ltd v C & E Commissioners [1995] STC 941, 952D-H.

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in section 73(6)(b) of VATA."

23. Generally, the burden lies on the taxpayer to establish the correct amount of tax due:

"The element of guesswork and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (Bi−Flex Caribbean Ltd v Board of Inland Revenue (1990) 63 TC 515, 522−3 PC, per Lord Lowry)."

The penalty assessment

24. The provisions of Schedule 24 that are relevant to this case are as follows:

(1) The respondents may assess a taxpayer for a penalty if a tax return contains a deliberate and concealed inaccuracy (paragraphs 1 and 3).

(2) The penalty for an inaccuracy which is deliberate and concealed is 100% of the potential lost revenue (paragraph 4). An inaccuracy is deliberate and concealed if the inaccuracy is deliberate and the taxpayer makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(3) This can be mitigated to 50% if a taxpayer makes a prompted disclosure (paragraphs 9 and 10).

(4) The respondents may reduce the penalty for special circumstances (paragraph 11).

(5) A taxpayer may appeal against a penalty assessment (paragraph 15).

(6) On an appeal, the Tribunal may affirm HMRC's decision or substitute for it

another decision that HMRC had the power to make (paragraph 17(2)).

(7) If the Tribunal substitutes its own decision it can rely on paragraph 11 (i.e. special circumstances) to a different extent to HMRC but only if HMRC's decision in respect of the application of paragraph 11 is flawed.

BURDEN AND STANDARD OF PROOF

25. The burden of showing that the VAT assessments are valid best judgment assessments lies with HMRC.

26. However, it is for the appellant to show that they were made outside the relevant time limit.

27. The burden of showing that the VAT assessments are incorrect and that they overcharge the appellant lies on the appellant who must also establish the extent of this overcharge i.e. what, on the balance of probabilities, the correct amount should be.

28. The burden of establishing that the penalty assessment is valid and that the penalty arises from either careless or deliberate and concealed behaviour lies with HMRC.

29. In each case the standard of proof is the balance of probabilities or that it is more likely than not.

THE EVIDENCE AND FACTS

30. I was provided with a bundle of documents which included witness statements from HMRC Officers who took part in the covert visit to the Restaurant on 22 February 2013. None of these Officers were present at the hearing. In addition, both the appellant and Officer Shaun Foster ("**Officer Foster**"), the HMRC Officer who was responsible for the VAT investigation and for issuing the VAT assessments, gave oral evidence.

31. From the written evidence in the bundle and the oral evidence of the appellant and Officer Foster I find the following:

32. The appellant is the owner of an Indian restaurant called Indian Voojan which is located in the Montpelier area of Cheltenham (the "**Restaurant**"). In 2012 HMRC's national restaurant task force decided, on the basis that the business appeared to show lower than average sales, that it should be investigated as potentially it was not declaring its full sales.

33. Two unannounced visits were therefore undertaken. The first on 27 September 2012 at approximately 10 pm in the evening, and the second on 23 November 2012 at around the same time. On both occasions the visits were led by Officer Foster (the "**unannounced visits**").

34. At the first visit it was found that the total takings came to £1,371.15 of which card takings were £1,068.55 which represented 78% of the total. Cash takings therefore represented 22% of the takings.

35. At the second visit a similar exercise was undertaken and cash represented 26% of the takings.

36. HMRC decided that the total takings on these nights appeared to be low when taking

into consideration the location of the Restaurant and its reputation and so decided that covert test eats would be undertaken. This involved pairs of Officers buying meals in the Restaurant in four shifts. This exercise took place on the evening of 22 February 2013 (the "**covert visit**"). HMRC's evidence is that these meals were paid for in cash. This evidence was not seriously disputed. HMRC Officers also counted the number of diners at the restaurant throughout the evening. Officer Foster's evidence is that these observations showed that the number of diners was higher than those shown on the meal slips for that evening. In the notes of the meeting held on 10 August 2016, this is particularised and HMRC's position is that 95 diners were observed including the eight officers but when Officer Foster checked the meal slips declared that evening, only 54 diners were recorded. The evidence of the number of diners and payment in cash at the covert visit is contained in written evidence comprising photocopies of statements (some illegible) from the Officers who undertook the covert visit. They were not present at the hearing and so could not to be cross-examined.

37. A further VAT inspection visit took place on 11 June 2013. Officer Foster was present at this visit, and his evidence is that none of the Officers' meals purchased at the covert visit had been declared by the appellant. He also conducted a drinks to total exercise based on the records for the VAT period 09/12 to test the credibility of the records. His conclusion was that this also suggested a shortfall in the sales declared.

38. The results of the covert visit were not put to the appellant until a meeting which took place between him and Officer Foster (amongst others) on 10 August 2016. There were two reasons for this delay. The first was because the business was involved in a wider investigation covering linked businesses by HMRC's Financial Intelligence Service ("**FIS**"). The appellant knew nothing of this investigation.

39. Officer Foster could not act independently of this broader investigation and so could not put his findings to the appellant until the FIS gave him permission to do so. This did not occur until November 2013.

40. The second reason why nothing was put to the appellant until August 2016 was because HMRC deemed that a cross tax approach should be adopted to address potential direct tax (income tax) under declarations. And so a direct tax enquiry was instigated. Throughout this both Officer Foster and the HMRC Officer dealing with the direct tax investigation maintained regular contact with the FIS.

41. Officer Foster had decided that the appellant had undeclared his takings. In order to identify the extent of that under declaration, for the VAT periods in question, he needed information from the credit card company (the merchant acquirer) so that he could analyse the extent of the card sales made by the appellant. He did not obtain these until November 2015. Once he had that information, he decided that the most appropriate method to provide a truer indication of the takings was to take the card sales and then add to it additional cash based on the two unannounced visits. In his view the appropriate percentage was 24% (namely the difference between the 26% figure found at the second unannounced visit and the 22% figure found at the first unannounced visit).

42. The reason why Officer Foster did not raise the assessments before the outcome of the direct tax investigation was because he thought the direct tax investigation might reveal behaviours which could not be revealed through a VAT enquiry.

43. The basis of the VAT assessments, as mentioned above, was the cash under declared as evidenced by the unannounced visits. In Officer Foster's view, this gave a more beneficial

result for the appellant than would have been the case if he had used the information obtained from the covert visit. However the results from the covert visit did influence Officer Fosters decision to raise the VAT assessments, and were an important basis for the penalty assessment.

44. At the meeting on 10 August 2016, Officer Foster told the appellant that he would be issuing the VAT assessments on the basis mentioned above. Those assessments were made on 31 October 2016 and notified to the appellant on 19 December 2016. On 15 February 2017 HMRC issued a penalty explanation letter to the appellant which explained that HMRC were proposing to raise a penalty assessment for the penalty based on deliberate and concealed behaviour. The penalty assessment itself was notified to the appellant on 20 March 2017.

45. The appellant had requested a review of HMRC's decision on 14 March 2017, and in his review conclusion letter dated 4 May 2017 the reviewing Officer upheld both the VAT assessment and the penalty assessment. On 26 May 2017 the appellant gave notice of appeal to the tribunal.

46. The appellant is the sole proprietor of the business carried on at the Restaurant but employs staff to assist him. During the period under appeal, he employed a manager (who no longer works for him) and another gentleman, who was "third in charge". The relevance of these two individuals is that their responsibilities included the cashing up exercise which is undertaken at the end of each evening. This involves taking the receipts for the evening (cash, card, and tips) and then collating the meals slips by stapling them together along with the card receipts and the card machine Z readings. These papers were then put in a box which went into safe storage.

47. The appellant is clearly in overall charge of the business, but delegates responsibility for a number of tasks to others. He himself undertakes a variety of tasks including setting up the restaurant, ordering food, taking bookings, and helping out wherever he is needed. Amongst those responsibilities is cashing up.

48. The Restaurant is a busy one and therefore taking orders quickly and slickly is important. So waiters and waitresses are trained in a form of shorthand when taking orders which was understood by members of staff, but would not generally be understood by outsiders.

49. The majority of the customers at the Restaurant during the week are business customers who pay by card. At the weekend, the customers are both locals and visitors to Cheltenham who stay in hotels which are close to the Restaurant. Most of these customers also pay by card.

50. Take away orders are sometimes aggregated into a single sale (for cashing up purposes) as they are often paid for by cash. The appellant's evidence is that on some evenings the Restaurant does not receive any cash payments and all customers pay by card.

51. The Restaurant is open from 5:30pm to 11:30pm each evening and has 86 seats with the majority of the tables being for four people. There are times when tables for four are occupied by only two or three people.

52. For each of VAT quarter of the appellant provides all the financial information including the purchase invoices, bank statements, and sales information, to his accountant

who then compiles the VAT return and submits it to HMRC.

SUBMISSIONS

53. HMRC submit that the VAT assessments are in time and are made to best judgment. The appellant has suppressed his takings and has deliberately concealed this from HMRC.

54. The appellant contends that he has not suppressed his takings. He has declared all of them. If sales had not been reported, that was not a result of deliberate behaviour on his part He leads a frugal lifestyle which would not be the case if he had under declared his takings. HMRC have all of his bank accounts which show no hidden money. Gross profit margins for the periods in question have remained remarkably consistent and there is no suggestion that he has suppressed his purchases. The VAT assessments are not made to best judgment. The Restaurant does not have the level of cash customers other Indian restaurants might have. This has been explained to HMRC who have ignored it. He cannot recall the covert visit since it was so long between that visit and his being challenged about it at the meeting in August 2016. He can give no explanation why, if HMRC are right, the cash paid for the test meals was not declared. But given the shorthand used by the serving staff, HMRC might have been mistaken and failed to accurately read the meals slips or correlate them with the cash takings for that night.

DISCUSSION

VAT Assessments – best judgment and timing

55. I remind myself that the burden of proof that the VAT assessments were made to best judgment lies with HMRC. And that, given the principles set out at [21] above, the threshold is a low one. The question is whether Officer Foster fairly considered the material which was before him and came to a reasonable decision. In my view, the answer to that question is that he did and that he has.

56. His decision to raise the VAT assessments was based on information gleaned from three sources. Firstly the unannounced visits; secondly the covert eats and thirdly the information from the merchant acquirer. In addition, there was background information supplied in connection with the FIS investigation (but I am not privy to the relevance of that information).

57. The appellant submits that the information from the two unannounced visits is statistically suspect. Only two visits is not sufficient to compile a statistically significant picture. He also challenges the evidence of the suppression of the cash gleaned from the covert eats by suggesting that the shorthand used by the serving staff might not have been properly interpreted by Officer Foster.

58. But I do not accept these submissions. The results of the unannounced visits suggested to Officer Foster (which is the important point) that overall takings were low given that the restaurant was in an area where takings might be expected to have been greater. This seems a rational basis to undertake the visits in the first place; and the fact that cash accounted for 22% of takings on the first visit and 26% of the takings on the second paints a reasonably consistent picture. The result of the covert eats (and the evidence of the number of diners on that evening and the weighted mark up exercise) served to confirm Officer Foster's initial suspicion that takings were being suppressed. And that this arose from cash being under declared in the appellant's VAT returns. I accept the evidence of Officer Foster that the

covert eats were paid for in cash and were not declared. I do not think that Officer Foster made any mistake about this notwithstanding any difficulty that a lay person might have had in interpreting the restaurant shorthand as suggested by the appellant.

59. Officer Foster then needed the information from the merchant acquirer to make his assessments for the years in question. He took the credit card sales and increased that amount by 24% to reflect what, in his judgment, was likely to be the cash taken by the appellant for the periods in question. This method was, in his view, an appropriate one and indeed benefited the appellant compared with an uplift which would have been consistent with the findings from the covert eats. I accept that, and it is my view that this is a rational basis for the VAT assessments.

60. As far as timing is concerned, I have decided (see [98] below) that the appellant has not submitted his returns deliberately inaccurately and concealed that inaccuracy. So the time limit for making the VAT assessments is the basic one set out in section 73(6) VAT Act which in this case is one year after the date on which Officer Foster had in his possession, in his opinion, sufficient evidence of the relevant facts to justify the making of the VAT assessments. In Officer Foster's view the one-year period starts the date of the meeting with the appellant on 10 August 2016. And so the VAT assessments, made in October 2016, were clearly made in time.

61. It is for the appellant to show that the VAT assessments were made late, and he has made out no serious challenge to HMRC's assertion that they were made within the one year period. My view is that the facts on which Officer Foster bases the VAT assessments might have been affected by what was discovered at that August 2016 meeting, but given that the assessments were based on the 2013 unannounced visits and covert eats, and the information gleaned from the merchant acquirer in November 2015, the information which Officer Foster obtained at that meeting did not provide positive evidence on which he based his decision to make the VAT assessments. Although the August 2016 meeting provided the appellant with an opportunity to explain why HMRC's view of his suppression was wrong, HMRC did not seem to obtain further information at that meeting which provided positive evidence on which the VAT assessments were based.

62. So it is my view that the one year period started in November 2015 when Officer Foster obtained the merchant acquirer information. Given that the VAT assessments were made in October 2016, they were made within the one year time limit.

63. However, as can be seen from paragraph [98] below, I have concluded that whilst the appellant might have been careless when submitting his VAT returns, his behaviour has not been deliberate nor deliberate and concealed.

64. In these circumstances the general rule concerning time limits for issuing VAT assessments applies. An assessment may not be made more than 4 years after the end of the prescribed accounting period. The VAT assessments were made on 31 October 2016. They were therefore valid for the period 12/12 and subsequent periods, but invalid for any periods assessed prior to the period 12/12. This means that the assessments for periods 06/11 to 09/12 (inclusive) were out of time and were therefore not valid in time assessments.

VAT Assessments - quantum

65. Having decided that the VAT assessments for the periods 12/12 to 06/16 (inclusive) were valid in time best judgment assessments, the burden then switches to the appellant to put

forward a positive case. In order for me to come to a conclusion that those assessments overcharge the appellant, I need to have evidence from him as to what the correct amount of the assessments is more likely than not to be.

66. Unfortunately for the appellant, he has provided me with little or no substantive evidence to enable me to conclude that a different amount from the amount assessed (and it is the appellant's contention that the correct amount is that set out in his returns) is more than likely to be correct.

67. The appellant has asserted that given the location of the Restaurant and the extent of its business customers, a higher proportion of takings are card takings than would be the case for another restaurant in a different location. But he has not supported this bold assertion with any supporting evidence. In the meeting on 10 August 2016, the appellant's then representative suggested that on some evenings, no cash was received and takings were only by way of card. But again no corroborating evidence was provided either to me or to HMRC to support this assertion.

68. On each of the two unannounced visits, HMRC found that a considerable proportion (22% and 26%) of the takings for those evenings was in cash. If, as the appellant suggests, this is statistically unreliable, and that these were "blips", and that generally the cash takings were considerably lower (given the location of the Restaurant and the nature and paying habits of its customers) I would expect to see an analysis of the daily takings (and from the appellant's evidence, it is clear that he had the records of these – I do not know whether he still has them) from which the appellants position could be judged. But no such analysis has been provided to me, and no explanation as to why, on the two unannounced visit days, the cash takings were unusually high and were exceptional gauged against the appellants usual pattern of takings which, on his case, would reflect a considerably lower percentage of cash.

69. At the hearing I was given a document which I was told was a gross profit analysis for the business for the years between 5 April 2012 and 5 April 2018. No supporting paperwork was given to support these figures, and HMRC had not been given a copy of this analysis prior to the hearing. In this document is a heading for gross profit margin percentage under which is a column of figures which the appellant says shows a profit margin for each of these years ranging between comparatively narrow parameters of 66.36% and 71.87%. These figures are being used to support the appellant's submission that he has not suppressed his takings because, had he done so, the figures would not have been as consistent as they are. I cannot see that. It seems to me that all these figures suggest is that the gross profit margin percentage did not vary much year-on-year. But this could have been the case if the sales had been suppressed on a consistent basis. It does not provide me with sufficient evidence on which I can say that, in light of the case made out by HMRC that takings have been suppressed, and that the cash takings on average amount to 24%, it is more likely than not that the takings declared by the appellant are correct.

70. And so I am afraid that I simply do not have sufficient evidence to displace the VAT assessments for the periods 12/12 to 06/16 and to find, in favour of the appellant, that his takings for those periods were more likely than not to have been those which were set out in his returns.

71. Accordingly, whilst I find that the assessments for periods 06/11 to 09/12 (inclusive) were not valid in time assessments, and I allow his appeal against the assessments for those periods, I find that the appellant's appeal against the VAT assessments for the periods 12/12

– 06/16 (inclusive) fails and I uphold those assessments in the amounts set out in them. This amounts to £22,120.

The Penalty – principles

Deliberate

72. As mentioned above, HMRC's view is that the failure to complete the VAT returns correctly stems from deliberate and concealed behaviour. The definition of deliberate behaviour is not defined in Schedule 24 but I derived help in interpreting the phrase, firstly from the case of *Auxilium Project Management v HMRC* [2016] UKFTT 0249, where Judge Greenbank said as follows:

> "62. Schedule 24 Finance Act 2007 does not further define the word "deliberate". HMRC's manuals state that "a deliberate inaccuracy occurs when a person gives 5 HMRC a document that they know contains an inaccuracy" (HMRC Compliance Handbook CH81150). We adopt a similar approach.
>
> 63. In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.
>
> 64. The test of deliberate inaccuracy should be contrasted with that of careless inaccuracy. A careless inaccuracy occurs due to the failure by the taxpayer to take reasonable care (see paragraph 3(1)(a) of Schedule 24 Finance Act 2007 and *Harding v HMRC* [2013] UKUT575 (TCC) at [37])."

73. And secondly, from *HMRC v Raymond Tooth* [2018] UKUT 38 in which (and oddly enough the paragraphs are exactly the same as in *Auxilium*). The Tribunal said as follows:

> "62. Assuming, for this purpose, that the Return and the Computation were inaccurate within the meaning of section 118(7) TMA, the next question is whether such (putative) inaccuracies were deliberate.
>
> 63. It is clear that, in terms of the applicable time limits, the relevant legislation contains a hierarchy based upon culpability. As was set out in paragraph 25 above in the case of discovery assessments, the normal period is one of 4 years, increasing to 6 in the case of carelessness and to 20 in the case of deliberation. An allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud.
>
> 64. Self-evidently, the mere completion of a return – whilst a deliberate act, in the sense that the taxpayer deliberately fills it in and submits it – cannot of itself amount to a deliberate inaccuracy in a document. The deliberation must relate to the inaccuracy, not merely the completion and submission of the document."

Careless

74. It is open for me, if I decide that the behaviour was not deliberate, to come to a decision that the behaviour was, however, careless. I deal with this in more detail below.

75. In the First-tier Tribunal case of *Mr J R Hanson v HMRC* [2012] UKFTT 314, Judge Cannan set out what he considered the test for carelessness (or failing to take reasonable care.). I set it out below.

> "19 In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under section 29 Taxes Management Act 1970. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer. The test was described by Judge Berner in Anderson (deceased) v Revenue and Customs Commissioners [2009] UKFTT 206 at [22], cited with approval by the Upper Tribunal in Colin Moore v Revenue and Customs Commissioners [2011] UKUT 239 (TCC):
>
> > "*The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.*""

76. Although Judge Cannan's view is not binding on me, I agree with it and adopt it as the test which is to be applied in this case.

77. As stated above, it is open to me to consider whether the inaccuracies were careless given the provisions of paragraphs 15(2) and 17(2) of Schedule 24 to the Finance Act 2007 which permits me to substitute for HMRC's decision (i.e. deliberate and concealed) another decision which HMRC had power to make (i.e. careless).

78. However following *HMRC v William Ritchie and Hazel Ritchie* [2019] UKUT 0071 ("***Ritchie**")* it is my view that I cannot consider the issue of carelessness unless HMRC specifically allege, as an alternative to deliberate behaviour, that the appellant had submitted inaccurate returns as a result of carelessness; and if they do, that the appellant has then been given an opportunity to make submissions and provide evidence that that is not the case.

79. The relevant extract from *Ritchie* is set out below:

> "36. In *Tower MCashback LLP 1 and anor* v *HMRC* [2011] UKSC 19 the Supreme Court considered, inter alia, the question of whether HMRC could pursue arguments supporting a conclusion in a closure notice which had not been advanced in the notice itself. Lord Walker at [15] quoted with approval the words of Henderson J in the High Court:
>
> > "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners [the predecessors of the FTT] in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners [that is to say now the FTT] are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, **or may be introduced by the commissioners on their own initiative**. (emphasis added by Judge Popplewell).
>
> 37. These sources make clear that in determining what arguments the tribunal may

permit to affect its decision the guiding principle must be fairness in the circumstances of the case. Fairness does not require formality, and Rule 2(2)(b) expressly requires formality to be avoided. Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.

38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account.

39. When the argument gives rise to the possibility that it may be rebutted by further evidence, the other party must have a fair opportunity to bring that evidence to the tribunal. Depending on the circumstances that may mean no more than asking a few extra questions of a witness who is at the hearing in any event; or it may mean arranging for documents to be provided, or further evidence called, the next day; or seeking a longer adjournment. We do not wish to be thought to be laying down any particular rules, as what fairness requires will depend on all the circumstances of the case, and cases in the FTT vary enormously from informal appeals that take a very short time to elaborately argued cases that last for many days.

40. On the other hand, there will be circumstances where it is simply too late for a point to be raised. Where it is not reasonably possible in the circumstances of the case – having regard in particular to the resources of the parties and the need to avoid delay – for the other party to have a fair opportunity to rebut a new point, that is likely to mean that it would be unfair for a new point to be taken."

80. Following the hearing, I trawled through the statement of case, the HMRC's skeleton argument and the parties witness statements. I could not find any submissions from HMRC that as an alternative to alleging deliberate behaviour, they alleged carelessness. They had plumped for deliberate and had not suggested carelessness as a fall back.

81. It is clear from the extract from *Ritchie* set out above that I may consider introducing a point into an appeal on my own initiative but if I am considering doing that, I can only do so fairly and in accordance with proper case management. In these circumstances, and given *Ritchie*, I did not feel that I could, on my own initiative, consider carelessness without having given the parties the opportunity to put forward their submissions and evidence on the point. It would not have been fair to either party to do so.

82. In *HMRC v Nigel Rogers and Craig Shaw* [2019] UKUT 0406 the Upper Tribunal said this about an argument introduced by the Tribunal which concerned the validity of a notice under section 8 of TMA, which had not been made by either the taxpayers or HMRC:

"45. It follows, therefore, that in determining that any notice under s8 of TMA was not valid, the FTT was deciding the appeals on a basis for which neither taxpayer had argued and against which HMRC had been given no opportunity to respond (or to provide evidence) ……..

48. We therefore conclude that it was procedurally unfair for the FTT to determine that

the s8 notices were invalid without first giving HMRC the opportunity to respond, or to provide evidence addressing the FTT's concerns……."

83. My take from the foregoing cases which are binding on me is that if I wish to introduce a new point into an appeal, which I am entitled to do, especially in light of the power that I have to substitute a penalty for failing to take reasonable care in place of one for deliberate behaviour, it would be procedurally unfair if I were to do so without seeking submissions from the parties regarding that point. I therefore issued directions seeking an indication from HMRC as to whether they alleged careless inaccuracies by the appellant and if so, their submissions in this regard. HMRC did make that allegation and provided submissions, to which the appellant made no response. I deal with this later.

The Penalty - deliberate?

84. The penalty of £27,440.25 which has been visited on the appellant is based on deliberate and careless behaviour. The maximum penalty that can be so assessed is 100% of the potential lost revenue. HMRC have allowed a discount to 75% on the basis of the quality of the appellant's disclosure.

85. It is for HMRC to satisfy me, on the balance of probabilities, that the appellants behaviour was deliberate. This is a high bar. As can be seen from the extracts above, it is tantamount to fraud. It is a subjective test. The appellant must know that the information which he is submitting to HMRC is incorrect and must intend HMRC to rely on it. And this is just for deliberate behaviour. HMRC allege concealment which to my mind aggravates the "offence". Whilst deliberate, on its own, brings with it a connotation of dishonesty, concealment exacerbates that. HMRC have certainly gone on record, when considering the statutory offence of cheating the revenue, of indicating that concealment is the touchstone of criminality.

86. And so if I am to make a finding of dishonesty against this appellant, I need to base that finding on compelling evidence. Unfortunately for HMRC, they have not provided such evidence.

87. In the penalty explanation letter, the reason given for HMRC's view that the appellant's behaviour was deliberate and concealed was "our findings show that you have not declared the true amount of cash takings".

88. This reason was amplified in HMRC's statement of case and skeleton argument.

89. HMRC justify the penalty on the basis that the appellant supplied the VAT returns to HMRC suppressing his true VAT liability and excluding the missing test purchases which should have been included. The meal slips which reflected the meals eaten by the officers on the covert visit were not included in the records for the relevant VAT period, nor were the cash takings for those meals.

90. HMRC allege that "the appellant has taken action, prior to submission of the VAT return, to destroy, or conceal the meal slips to support the suppression evidenced by Mr Foster in his witness statement. In any case, HMRC submit that the actions of the appellant must be deemed deliberate given the numerous errors permitted and failure to provide reason for these discrepancies".

91. HMRC also make the point that the appellant was the sole proprietor of the Restaurant

and so must be held responsible not only for its day-to-day management and bookkeeping but also "the deliberate and concealed actions identified in this case".

92. It is HMRC's view that the appellant has been given ample opportunity to explain why he has under recorded his takings and has not taken that opportunity at any stage.

93. In response, the appellant says that he has not suppressed his takings and has not destroyed or concealed any meal slips. He passed all of his records on to his accountant who reflected the true amount of his takings in the returns. It was put to the appellant, when giving evidence, that he had behaved dishonestly. He denied this. He said that he had provided everything (including his bank accounts) to HMRC and that he is telling the truth. In cross examination, Mr Hopkins did not seriously challenge the appellant's evidence on this point. He did not seek to undermine the appellant's assertion of honest behaviour.

94. I consider that the appellant gave accurate and truthful evidence, and I believe him when he says that as far as he was concerned, he passed all his records on to his accountant who correctly reflected what he had received in the VAT returns. It might be the case that those records were incorrect. But it is my view that the appellant did not know this. He was running a restaurant which took payment in cash and by card. There was ample opportunity for that cash to be removed from the system (to use a neutral term) between customer and the appellant.

95. I have found that it is more likely than not that the amount of VAT assessed by HMRC, is correct. The Restaurant received more in in takings from customers than it declared to HMRC. But that does not mean that the appellant knew that to be the case. It would have been perfectly possible for an employee to have taken cash received from a customer, destroyed the corresponding meal slips, and failed to tell (obviously) the appellant about it. This could have occurred to the meal slips and cash for the covert visit. The appellant in these circumstances would have been in total ignorance of the additional takings, the records for which would not have been included in those which he then passed on to his accountant.

96. HMRC appear to have undertaken no investigation into alternative reasons as to why the takings from the Restaurant were under declared. They have not, for example, undertaken any forms of means testing, which in my experience is often used to verify HMRC's preliminary suspicions that a trader is not declaring his full takings. This involves testing a trader's reported income against his outgoings. Too often (from a trader's perspective) there appears to be a gap, the outgoings exceeding the income. This is then 'filled in' by an assessment reflecting additional income which HMRC allege must have been received by the trader. But HMRC have not (or have not indicated that they have) undertaken such an exercise. The appellant says that he has given HMRC all his bank accounts from which HMRC can see that he has no additional takings. This is a somewhat naïve assertion given that if there were additional cash takings it is very unlikely that a fraudster would pay them into a bank account. He would simply have used the cash to pay for outgoings. But a VAT liability of some £36,585 reflects additional takings of approximately £180,000 over a five year period. HMRC have not indicated that they have undertaken any form of means analysis and concluded that the appellant has lived a lifestyle that is consistent only with the appellant having received this level of additional income.

97. HMRC say, too, that because the appellant was the sole proprietor of the Restaurant, he must be held responsible for any under declaration of takings. Whilst I think this is broadly speaking correct as regards the day-to-day business, and properly accounting for its takings,

and I deal with it later in the context of careless behaviour, it is insufficient for HMRC to succeed in an allegation of deliberate behaviour. HMRC must show that the appellant actually knew that the VAT returns underdeclared the additional cash takings. It is insufficient to show that simply because the appellant was in overall control of, and had responsibility, for, the business, that he is deemed to have that actual knowledge.

98. And so for all these reasons it is my view that the inaccuracies in the VAT returns were not caused by deliberate and concealed behaviour on the part of the appellant.

Penalty – careless?

99. As I have mentioned above, Schedule 24 allows me to substitute a finding of careless behaviour for HMRC's finding of deliberate and concealed behaviour. Given HMRC's submissions on this point, I am comfortable that the appellant has been given ample opportunity to deal with this alternative submission. He has not done taken that opportunity. The burden of showing that the inaccuracies in the VAT returns arises because of the failure by the appellant to take reasonable care lies with HMRC. They must establish, on the balance of probabilities, that the appellant has failed to take reasonable care and that the inaccuracies in the VAT returns arise from that failure.

100. HMRCs submissions are that the appellant has failed to take reasonable care in that; he underdeclared his takings in the VAT returns; he omitted sales from those returns which had been recorded by HMRC; those omitted sales evidenced by the omission of the takings from customers who were observed as having had and paid for meals in the restaurant on the night of the covert visit but whose payments were not included in the records of takings for that evening (see [36] above); they are also evidenced by the exercise undertaken by Officer Foster in raising the assessments when he took the under declared cash (as evidenced by the unannounced visits) and added to that the card sales (see [41-43] above); this evidence of under declaration was put to the appellant by HMRC at their meeting in August 2016 but the appellant gave no reasonable explanation for the discrepancies identified by Officer Foster.

101. I have found as a fact that the appellant under declared his takings and I have accepted the evidence of Officer Foster that the covert eats were paid for in cash and were not declared. In considering whether the inaccuracies in the VAT returns arose from the failure by the appellant to take reasonable care, I need to consider more than simply transcriptional inaccuracies; in other words simply because a taxpayer accurately transcribes information from a primary record (for example a record of takings) on to a return does not mean that the taxpayer has taken reasonable care in ensuring that the return is accurate. This will of course depend upon the accuracy of the primary records, and so failure to ensure that those records are accurate is likely to render the taxpayer liable to a penalty if that failure is a result of the taxpayer's failure to take reasonable care.

102. The test of whether the appellant has failed to take reasonable care requires me to consider an objectively reasonable taxpayer, but in this appellant's particular circumstances. Customers in the restaurant paid by cash and by card. It seems clear to me that the systems which were in place in the Restaurant, and for which the appellant is responsible, were inadequate to safeguard against cash being taken and meal slips being destroyed, thus rendering the information submitted to HMRC, unreliable. Had there been such systems in place (and I recognise that is unlikely that they would be 100% effective) then it is likely that the under declared cash which I have found to be taken by the Restaurant, and which should have been reported to HMRC, would have been so reported. The objectively reasonable

taxpayer in the appellant's position would have put in a more reliable and robust system than that which appears to have been in place at the relevant time. I say "appears to be" because I have very little detailed evidence of what actually took place between a customer paying cash at the beginning of the process and the meal slips and other records being put in a safe place, at the other. This is where the appellant's lack of submissions on this point let him down. A detailed synopsis of the process together with an explanation as to why the appellant thought that this system was robust and reliable would have given me something to take into account when considering careless behaviour. But no such evidence was forthcoming. HMRC say that the fact that takings were under declared evidences deliberate behaviour. To my mind, as set out above, I do not think this is correct. But the fact that takings were under declared suggests to me, very strongly, that whatever system the appellant had in place was insufficiently robust and reliable to ensure that the correct amount of takings was accurately reported to HMRC. By failing to ensure that such systems were in place, it is my view that the appellant has not taken reasonable care, and so it was inevitable that the VAT returns on which the takings were declared, were unreliable.

103. I can see no tension between this conclusion and the fact that I have found the appellant to be an honest and truthful witness and that he passed all his records on to his accountant who correctly reflected the information contained in those records in the VAT returns. I accept that the appellant did not know that the information was incorrect, and of course had he known the information to be incorrect, then I would have found that he was liable to a penalty for a deliberate inaccuracy. But because the systems that he had in place were not sufficiently robust to ensure the accuracy of his records, particularly his cash takings, the information which he passed to his accountant was inaccurate. And that inaccuracy arises, in my view, by a failure by the appellant to take reasonable care in ensuring that he had systems in place to accurately record his takings.

104. It is my decision that HMRC has established, on the balance of probabilities, that the appellant has failed to take reasonable care to ensure that his records accurately reflected his cash takings, and that failure led to the inaccuracies in the VAT returns. This means that I need to recompute the Penalty. HMRC have given the appellant a discount of 50% for the quality of his disclosure. The maximum level of penalty for a careless inaccuracy is 30% of the potential lost revenue. A 50% discount to this gives a penalty percentage of 15%. When this is applied to the underassessed VAT for the period 12/12 to 06/16 (inclusive) which amounts to £22,120, it results in a penalty of £3,318.

105. HMRC have not considered special circumstances and the appellant has made no submissions that there are special circumstances which apply to his situation, and/or that HMRC's failure to consider special circumstances is a flawed decision. I cannot see anything in the appellants circumstances which are special and justify a reduction in the penalty.

DECISION

106. I dismiss the appellant's appeal against the VAT assessments for the periods 12/12 to 06/16 (inclusive).

107. I allow the appellant's appeal against the VAT assessments for the periods 06/11 to 09/12 (inclusive)

108. I allow the appellant's appeal against the penalty assessment but substitute a penalty of £3,318 based on careless behaviour for the period 12/12 to 06/16 (inclusive) in place of the penalty assessment of £27,440 for deliberate and concealed behaviour for the period 06/11 to

06/16.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

109. 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.

NIGEL POPPLEWELL

TRIBUNAL JUDGE

RELEASE DATE: 6 JANUARY 2021