Neutral Citation: [2022] UKFTT 00207 (TC)

Case Number: TC08530

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/09550
TC/2020/00900

VAT and Corporation Tax – HMRC assessments to both based on their view that the appellant had supressed its takings by use of the no sales and 1p sales buttons on its tills – assessments to best judgment? – yes – penalty assessments based on deliberate behaviour - has appellant shown the assessments to be incorrect? – yes – appeals allowed

Heard in public on: 7&8 June 2022
Judgment date: 29 June 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR CHRISTOPHER JENKINS

Between

QUALITY CONVENIENCE STORE LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: John O'Donnell of Tax and Forensic Services Limited

For the Respondents: David Corps and Victoria Halfpenny presenting officers of HM Revenue and Customs

DECISION

INTRODUCTION

1. This case concerns VAT and Corporation Tax. There are two appeals, one against assessments to VAT and associated penalties, and one against assessments to Corporation Tax and associated penalties. Both are based on HMRC's assertion that the appellant has suppressed its takings by the excessive and incorrect use of the no sale till button and the 1p till button and so has underdeclared its supplies for VAT purposes and its turnover for corporation tax purposes.

2. HMRC have issued assessments in the sum of £7,754 for VAT for periods 07/16 to 04/18, and for penalties for deliberate but not concealed inaccuracies in the sum of £3,663.73.

3. HMRC have also issued assessments in the sum of £8,873.96 for Corporation Tax for the years ending 31 March 2017 and 31 March 2018, and for penalties for deliberate but not concealed inaccuracies in the sum of £4,192.94.

4. As far as VAT is concerned, we need to consider whether the assessments are valid, in time, best judgment assessments, and if so, whether the appellant has discharged the burden of demonstrating that they are incorrect. As for Corporation Tax, we need to consider whether the assessments are valid, in time, discovery assessments and whether the appellant has discharged the burden of demonstrating that they are incorrect. We also need to consider, in the light of our decisions on the foregoing, whether the penalty assessments have been validly made and whether any further mitigation might be given to the appellant in respect of those penalties.

THE LAW

5. There was no dispute between the parties as to the relevant law which we set out, in summary, below.

The VAT assessments

6. 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.

7. 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).

8. 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.

9. 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.

10. Section 83 VAT Act provides:

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

11. 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".

12. 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".

13. 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 we 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.

The Corporation Tax assessments

14. Paragraph 41(1) of Schedule 18 to the Finance Act 1998 states that:

> "If an officer of Revenue and Customs discovers as regards an accounting period of the company that:
>
> (a) an amount which ought to have been assessed to tax has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given which is or has become excessive.
>
> The officer may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax."

15. The general rule is that a discovery assessment must be made within 4 years from the end of the accounting period to which it relates, but in the case of careless or deliberate behaviour, that time limit is extended to 6 and 20 years respectively.

Displacing the assessments

16. 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)".

Penalties

17. The provisions of Schedule 24 Finance Act 2007 which 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 unconcealed inaccuracy (paragraphs 1 and 3).

(2) The penalty for an inaccuracy which is deliberate and unconcealed is 70% of the potential lost revenue (paragraph 4).

(3) This can be mitigated to 35% 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 has 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.

THE EVIDENCE AND FINDINGS OF FACT

18. We were provided with a bundle of documents. Oral evidence on behalf of the appellant was given by its sole director, Mrs Humera Ahmed and her husband, Mr Adeel Iqbal. Oral evidence on behalf of the respondents was given by Officer Michael Doherty (as regards VAT) and Officer Isobel Ford (as regards Corporation Tax). From this evidence we find the following facts:

Background

(1) The appellant was incorporated on 2 March 2016 and its business is as a general retail convenience store selling groceries, tobacco, newspapers and other items that are usually found within a convenience store. The business is run from a property in Glasgow. The appellant

acquired the business from a company owned by Mr Iqbal, and has been registered for VAT with effect from 1 May 2016. The business also has a post office branch within its premises. Mr Iqbal is the postmaster.

(2) When the appellant acquired the business, Mrs Ahmed had little experience in running a retail business. In 2015/2016 she undertook a masters degree in medical sciences and between 2016 and 2020, studied for, and achieved, a PhD. However, on its acquisition in 2016, an EPOS till recording system was introduced which meant that items could be scanned into the tills which made things faster and more efficient on the sales side and assisted in stock management on the purchasing side. During the years in question, Mrs Ahmed worked only 10 to 12 hours in the shop, each week. Mr Iqbal, whose primary responsibility was running the post office, worked approximately 10-12 hours in the shop (post office section) each week. The day-to-day running of the business was left very much to the staff. If Mrs Ahmed or Mr Iqbal were absent from the shop, they could be contacted, by the staff, using mobile telephones. During the period relevant to this appeal, the shop opened between 7am and 10pm, seven days a week.

(3) Training of staff was undertaken by other members of staff. Members of staff were also responsible for cashing up at the end of a day, and for pricing items sold in the shop, that pricing being based on the recommended retail price set out in the purchase invoices given to the appellant by its suppliers. Cash taken by the shop was initially put in the post office safe in the post office section of the shop, and then taken to the bank. The cash banked with the post office and the till receipts were reconciled on a daily basis. Till reports which identified the use to which the buttons on the tills had been put, were available every day, but were not checked every day. They were only checked when there was a problem. Such a problem was demonstrated by Officer Doherty's analysis of the use of the no sales button.

Officer Doherty's investigation

(4) Officer Doherty conducted an unannounced visit to the premises in December 2016 and on 27 March 2017 conducted a test purchase at the premises. He recorded his observations and stated in evidence that after he had conducted his transactions and been given his change, he saw a member of staff open the till again by pressing a button on the till. He could not identify which button. On 29 March 2017 Officer Doherty conducted another unannounced visit with two systems and data compliance officers, during which visit Mr Iqbal was spoken to and who confirmed that staff could use the no sales button, that it was used to provide change, and that the no sale button was not often used.

(5) Following correspondence and meetings with the appellant and its representatives, and having reviewed the data analysis compiled by the systems and data compliance officers, Officer Doherty calculated that between 1 May 2016 and 30 April 2017 the no sale button was used on 22,580 occasions which averaged 61.86 uses per day. On 23 August 2017, he wrote to Mrs Ahmed seeking an explanation for this usage. On 29 September 2017 the appellant's agent responded stating that the no sale button was used to open the till without recording a sale to give change to customers, or to put change into the till.

(6) Following the submission of further information by Mrs Ahmed in December 2017, on 27 February 2018, Officer Doherty wrote to Mrs Ahmed indicating that notwithstanding Mr Iqbal's assertion that the no sale button was not often used, the till report showed that it was used on average 61.86 times per day and that this suggested to him that it was being used to suppress sales. In his view an estimated usage of 15 times per day would account for provision of change and shift changes.

(7) Following this letter, Mrs Ahmed informed her staff that they should no longer use the no sales button for providing change and that if people wanted change, they would have to purchase an item at the shop.

(8) In the period 1/11/17-31/01/18, the sales recorded were £230,482.40. The no sales button was used 4,715 times, and the 1p sales button used 17 times. In the period 1/02/18-30/04/18, the sales were £224,999.54, the no sales button was used on 1,939 occasions, and the 1p button used on 908 occasions. In the period 1/05/18-31/07/18, the sales were £247,296.51, the no sales button was used on 79 occasions and the 1p sales button on 514 occasions.

(9) On 28 March 2018, Officer Doherty received a letter from the appellant's agent stating that the no sale button was used for a number of purposes namely: to provide change, particularly to schoolchildren, for the bus; to enter change into the till; to empty notes in the till for security purposes; for counting cash prior to handing over the till at a shift change; for counting cash following a shift change, and counting cash at the end of the day.

(10) Officer Doherty did not accept the validity of this explanation and sought further information including a copy of a logbook which the agent had indicated that the appellant was then keeping. That logbook was never provided to Officer Doherty.

(11) Further information was, however, provided, by Mrs Ahmed on 13 June 2018 explaining the use of the no sale button, details of the shift changes, cash counting, and cash extraction from the till. This information, however, did not cause Officer Doherty to change his view that the high usage of the no sales button was being used to suppress sales. He conducted a best judgment calculation to estimate the extent of that suppression. He determined the average transaction value by taking the gross sales figure from audit trail reports provided by the appellant's agent, deducted Pay point and lottery income, and divided the resulting figure by the number of transactions. This resulted in an average transaction value of £5.96. He allowed a daily no sale button usage of 16 and then calculated that between 1 May 2016 and 31 January 2018 the appellant had suppressed its takings by £153,976.60. On 20 June 2018 he sent a letter to Mrs Ahmed setting out this conclusion.

(12) On 26 July 2018, the appellant's agent wrote to Officer Doherty indicating that they did not agree with this proposal and provided a copy of the audit trail report for the period 04/18 which showed that turnover did not increase despite the use of the no sale button decreasing, and indicated that the additional sales that Officer Doherty was proposing increased the gross profit margin to 23% while the agent believed it was between 13% and 13.5%.

(13) On 12 October 2018 a further unannounced visit to the shop was conducted by two systems and data compliance officers who obtained data from the electronic journal of the tills for the VAT periods 01/18 and 04/18. They analysed this information, which showed that 1p transactions increased from 67 occasions in period 01/18 to 1,087 occasions in period 04/18.

(14) HMRC's internal guidance regarding gross profits for various trade sectors indicated that the gross profit rate of shops carrying on activities similar to those of the appellant should be between 15 to 25% with 18% expected for businesses with a turnover above £650,000. Following the agent's letter of 26 July 2018, on 2 April 2019, Officer Doherty discussed his best judgment calculation with Officer Ford. They reviewed the transaction value of £5.96, in light of the trade sector statistics, and conducted a test on values of £1 and £2 against the expected gross profit rate. If the average transaction value was £1, that would generate a gross profit rate of 16.6%, and at £2, would produce a gross profit rate of 17.9%. As this £2 value was close to the gross profit rate of 18% provided by the trade sector statistics, and Officer

Doherty had been advised by the appellant that it had not suppressed its purchases, he concluded that he should use the average transaction value of £2 in his best judgment calculation.

(15) He then undertook his best judgment calculation, providing an allowance of 16 no sales per day, an allowance for genuinely required 1p sales of 87 (thus reducing the number from 1,087 to 1,000) which provided an overall allowance for the period 04/18 for instances that the till was genuinely required to be opened averaging 16.98 per day. He allowed for zero rated sales, and this resulted in a calculation that the gross amount of underdeclared sales was £54,700, of which £7,757.56 was VAT.

(16) He shared this calculation with Mrs Ahmed in a letter dated 8 May 2019 in which he also explained that in his view, the increasing 1p transactions, which coincided with a decrease in no sales transactions, was simply a change in the appellant's method for concealing sales. On 4 June 2019, the appellant's agent sent a response to Officer Doherty, explaining that the volume of 1p sales was normal and that the appellant used the 1p transactions to remove the cash at the end of a shift, to put the cash drawer in the till at the start of a day, and for identifying cash during the day when the shifts change. It was also used for selling sweets which were originally found in large packets but which, when nearing the end of their expiry date, were taken out of the packets and sold individually.

(17) Officer Doherty did not accept this explanation and on 8 July 2019 issued a penalty explanation letter indicating his intention to charge inaccuracy penalty for deliberate behaviour. He allowed a reduction of 65% for the quality of disclosure. The penalty percentage applied was 47.25%, so the total penalty was £3,663.73. The penalty assessment for that amount was issued on 8 August 2019.

(18) A USB drive containing CCTV images purportedly showing staff entering 1p transactions to provide change was supplied to Officer Doherty on 28 August 2019. His review of those images did not change his view of the matter, and on 12 September 2019 he wrote to Mr O'Donnell explaining this. Mr O'Donnell requested an independent review which, on 28 November 2019, upheld Officer Doherty's decision. Following an unsuccessful ADR meeting, on 22 December 2019 the appellant appealed against the VAT assessments and the VAT penalties.

(19) Officer Doherty had been provided with financial information which showed that around 30% of the turnover of the business came from cigarette/tobacco sales which we were told had a margin of between 2 to 4%. He accepted that he did not take this into account when coming to his best judgment assessment but had assumed that the trade sector statistic would take this into account.

(20) Officer Doherty also knew that there were a number of bus stops in the vicinity of the shop as he had been told this by both Mr Iqbal and Mrs Ahmed, something which he acknowledged.

Corporation tax

(21) On 26 June 2019, HMRC wrote to the appellant indicating that for the years ended 31 March 2017 and 31 March 2018, HMRC believed, based on the VAT compliance check, that the appellant had underreported sales and that those sales had been omitted from the accounts and company tax returns for those years and that HMRC intended to assess based on the VAT figures. On 4 December 2019 HMRC wrote to the appellant advising it that they would be

assessing the appellant to penalties for submitting inaccurate returns. On 5 December 2019 HMRC issued the appellant with Corporation Tax assessments in the sum of £8,873.96 for those two years, and on 20 December 2019 HMRC issued a notice of penalty assessment letter for penalties of £4,192.94. The appellant appealed against these assessments on 1 March 2020.

Use of the till buttons

(22) Mrs Ahmed's evidence was that when she took over the business she was not aware that it was a problem to use the no sale button and so did not issue an instruction to her staff not to use it. However, once she had been told by HMRC that it was a problem, she did so instruct her staff. The no sales button was only used to open the till to give out change, move cash to the safe, cash monitoring on change of shifts, cash payments to traders, (for example the milkman) and to add change to the till (for example replacing a £10 note with change). It was not used to suppress sales which she vehemently denied doing.

(23) Once she had told her staff not to use the no sales button and had told them that they could not give change but should ask someone who wanted change to buy an item from the shop, the staff then used the 1p sales button for the purposes for which they had previously used the no sales button. She had included a table in her witness statement showing that as the number of uses of the no sales button decreased from 4,715 for the period ended January 2018, to 1,939, for the period ended 30 April 2018 to 79 in the period 31 July 2018 and to 16 for the period ended 31 October 2018, the 1p transactions increased from 17 in that first period to 908 in the second, 514 in the third and 1,722 in the fourth. Following HMRC's criticisms of the usage of the 1p transaction, these have now fallen further, and in the quarter ended 31 October 2019, there were only 55 uses of the no sales button and two uses of the 1p sales button. There has been no significant increase in the quarterly sales notwithstanding the diminishing use of the no sales button and the 1p sales button. For example in the period ended 30 April 2018, when the no sales button was used 1,939 times and the 1p sales button 980 times, turnover was approximately £224,999. For the period ended 31 October 2019, when the no sales button was used 55 times and the 1p sales button only twice, turnover was approximately £225,233.

The CCTV footage

(24) Mrs Ahmed's evidence was that the purpose of providing the CCTV footage to Officer Doherty was to demonstrate that members of staff used the no sales or 1p sales buttons. It therefore comprised several two-minute snippets rather than significant continuous footage. It was not intended to be comprehensive footage of the activities of all members of staff throughout a number of days.

DISCUSSION

19. Both parties accept that the burden of establishing that valid assessments have been visited on the appellant for both the VAT and Corporation Tax lies with HMRC and the standard of proof is the balance of probabilities. They also accept that if HMRC satisfy us that the assessments are valid, then the burden of demonstrating that they are incorrect lies with the appellant. Again, the standard of proof is the balance of probabilities.

20. The parties have also agreed that the Corporation Tax position follows, largely, the VAT position. If, therefore, we find that the figures set out in the VAT assessments are correct, the appellant accepts that the same figures can be used for the Corporation Tax assessment.

21. We are grateful for the clear and helpful submissions, both written and oral, provided by each party's representatives which we have carefully considered in reaching our conclusions, even though we have not found it necessary to refer to each and every argument advanced on behalf of the parties.

VAT assessment

22. Mr O'Donnell's primary submission was that the VAT assessments had not been made to best judgment. In addition to the principles set out in *Van Boeckel,* he also cited the Special Commissioner's decision in *CA McCourtie* (Lon/92/91) as authority for the proposition that there are further principles which apply to best judgment, namely that facts should be objectively gathered and intelligently interpreted; the calculations should be arithmetically sound; any sampling technique should be representative.

23. When tested against those principles, Officer Doherty's assessment was not made to best judgment. He had seen on his first test purchase visit that staff members opened the till without a sale; he had provided no credible explanation as to why the figure of initially 15, and then 16 legitimate no sale transactions were allowed; this was an arbitrary figure with no factual basis; in calculating his initial assessment with an average sales value of £5.96, he did not consider the impact of that gross profit margin nor use it to cross check the reasonableness of his assessment; the test sector average of 18% was used to calculate the assessment but Officer Doherty took into account no other factors; no thought was given to whether the 18% margin was reasonable for this specific business; the information regarding the percentage of cigarette sales was available to him but he did not take it into account; once the use of the no sales and 1p buttons had been drawn to Mrs Ahmed's attention, tighter controls were introduced.

24. In Mr O'Donnell's view, HMRC have not fairly considered all of the material before them and have come to a decision based on several arbitrary assumptions. Having calculated their initial assessment with an unrealistic gross profit margin of 23%, they then sought to make the figures "fit" to an expected margin of 18% without objectively considering all material factors.

25. Mr Corps relied on *Van Boeckel* and *Pegasus Birds.* He observed that the former makes clear that HMRC are not required to carry out exhaustive investigations. He also relied in the case of *MH Rahman v CCE* [2002] EWCA Civ1881 as authority for the proposition that in best judgment cases where an assessment is challenged as being inconsistent with the material before the assessing officer, "the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or if it is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed, arbitrary".

26. It is his submission that Officer Doherty's assessment was not arbitrary but was an honest and genuine attempt to assess what, in his view, was the additional VAT payable by the appellant. He started off arriving at an average transaction value of £5.96 on the basis of information provided by the appellant (namely the gross sales figures derived from audit Trail reports divided by the number of transactions having first deducted Pay point and lottery income. He then drafted an assessment based on this figure which he shared with the appellant and its agent. Following observations from the agent that this would mean that the appellant was making a gross profit margin of 23% which the agent believed to be excessive as they considered that the correct margin was between 13 and 13.5%, he then discussed the position

with Officer Ford taking into account the trade sector statistics which were available to him and which suggested that a margin of 18% might be expected for similar businesses with a turnover above £650,000. He then reduced the average transaction value to £2 since this was more consistent with the 18% figure and reassessed on that basis. This was using reasonable judgment and was a genuine attempt to arrive at a more accurate assessment using the industry standard. If the appellant thought that this was excessive, it could have provided a different calculation. The appellant's log has never been provided. Officer Doherty genuinely attempted to provide an accurate assessment.

27. We agree with Mr Corps' submissions. The bar for making a best judgment assessment is a low one. The cases are clear that there must be some basis for the assessment which cannot be arbitrary or capricious or irrational. But provided HMRC fairly consider the material before them and come to a decision based on that material which is reasonable and not arbitrary, and that decision is a result of an honest and genuine attempt to assess the VAT properly due, then an assessment which reflects that decision has been made to best judgment. In our view Officer Doherty has made his assessment in accordance with those principles. We say this for the reasons submitted by Mr Corps.

28. The basis for the initial assessments using the average transaction value of £5.96 was based on information provided by the appellant and the statistical analysis undertaken by HMRC regarding the use of the no sales button. Mr O'Donnell criticises the arbitrary allowance permitted by Officer Doherty of 15 or 16 allowable uses of that button per day, but this reflects a reasonable view that whilst the no sales button could be used, it could not be to the extent that it was actually used by the appellant. We will come back to this when considering quantum, but this was a genuine attempt to make an allowance in favour of the taxpayer.

29. Having come up with this average value and shared it with the appellant and its advisers, Officer Doherty then reviewed this in light of the profit margins suggested by the adviser, and the internally available trade statistics. He then changed his position and sought to finesse the original assessment so that it was consistent with those statistics. We accept that he did not consider the specific mix of items sold by the appellant, nor did he consider the impact on his statistics of the extent of tobacco sales and their low profit margins. But we do accept his evidence that he considered that these would have been taken into account in the 18% statistic in the internal manual.

30. To our mind, Officer Doherty acted entirely rationally. Having tested his original assessment, he then reassessed once he had reconsidered the position in light of the foregoing information. He fairly considered the material with which he was provided and came to a reasonable and not arbitrary assessment as to the amount of tax due. He acted honestly and genuinely. We find that the VAT assessments were made to best judgment and are valid.

Corporation Tax assessments

31. We also find that the Corporation Tax assessments are valid in time assessments. It is clear that Officer Ford made a discovery, based on the information provided by Officer Doherty and his colleagues, and that, in her view, amounts which should have been assessed to tax, had not been so assessed. She therefore issued discovery assessments within the permitted time period.

Quantum

32. Having found that the assessments are valid, the burden now shifts to the appellant to show, on the balance of probabilities, that they are incorrect. As we have mentioned above, Mr O'Donnell's primary focus was on the validity of the VAT assessments rather than on the amounts assessed. But many of his submissions are equally relevant to this aspect of the appeal.

33. Mr Corps' submissions on quantum are that the appellant has consistently provided weak explanations and evidence to demonstrate that the VAT assessments are incorrect. The explanations of the use of the no sales and 1p sales buttons, which was excessive, are implausible and reflect suppression of takings and not the use to which the appellant submits they were used. The appellant could have provided the logbook setting out the actual use to which the buttons had been put, but did not do so. If they were not making a sale, then pressing the 1p button was inaccurate in any event. The length of time that the 1p sales were high shows either lax control or that Mrs Ahmed was aware of what was going on and did not take steps to stop it as she was happy with the position, namely that money was being taken into the till but not being recorded as such. She is clearly an intelligent lady and had till information available to her on a daily basis. In his submission, by failing to consider this information and turn, effectively, a blind eye to the actions of the staff in using the no sale and 1p buttons in the way that they did, she was sanctioning the use of those buttons to disguise sales. Initially the underreporting was effected through use of the no sale button, and latterly the use of the 1p sales button.

34. In simple terms, HMRC do not believe the story told by the appellant. They believe it implausible, and the more likely explanation is that the appellant has suppressed takings. They do not believe that the no sale button and the 1p sale button were used to provide change, resolve cash issues on changes of shift, cash up at the end of the day, and to pay tradesmen.

35. To the contrary, we think that on the balance of probabilities, the appellant's story is more likely to be correct. Both Mrs Ahmed and Mr Iqbal struck us as honest and credible witnesses. Whilst we think that Mrs Ahmed had a lax if not cavalier attitude towards stock and other operational controls, and towards management accounts, this does not mean that she suppressed takings, or sanctioned the suppression of takings by the use of the no sale or 1p buttons.

36. It is clear from the facts, and as we have found, that the shop was in an area surrounded by bus stops, and that the appellant's unchallenged evidence was that it provided change for those using the buses. The appellant has been unable to provide a log of precisely the numbers of individuals who attended the shop and asked for change. Mrs Ahmed has explained that one of the reasons they gave change was because they thought their customer base might resent being asked to pay for an item and the goodwill of the business would thus suffer. It seems that this was a misplaced anxiety given that turnover does not seem to have been affected since the change of policy following HMRC's criticism of the use of the no sale button. But in our view, it was a reasonable and sincerely held anxiety. HMRC's estimated usage allowance of 15 or 16 per day rather than the average of approximately 61 uses per day, of the no sale button, is totally arbitrary and Officer Doherty was unable to explain where it had come from. If he is correct, then this would mean a very small number of people asking for change, in light of the other uses to which the no sale button was put. We think in light of the appellant's evidence, that the figure is far more likely to be approximately 61 uses per day to provide the change, pay tradesmen, add change to the till, and to count the cash on shift changes, as submitted by the appellant.

37. Mrs Ahmed clearly responded to HMRC's criticism that the no sale button should not be used, and the statistics show this. What they also show is that the reduced use of the no sale button was, initially, compensated for by the increased use of the 1p sale button. We find this unsurprising. The behaviour of the staff would not have changed overnight and having been told they could not use the no sale button for the purposes mentioned above, they would in their view still have needed to use some button for those purposes. We think this is a far more likely explanation for the significant increased use of the 1p sale button than the explanation provided in respect of the breakdown of sweet packets reaching their expiry date into smaller one penny items. We accept that this might have happened, but do not believe that this would have been a significant factor for the increased use of that button.

38. Whilst, as mentioned above, we have misgivings regarding Mrs Ahmed's ongoing operational controls of the business, her response to HMRC's criticisms of the use of the no sale and 1p buttons demonstrates that she was anxious to ensure that she complied with HMRC's observations, which in turn demonstrates, to us, that she was keen to ensure that she complied with her tax obligations, something which is inconsistent with HMRC's view that she was deliberately suppressing takings. The turnover of the business has not changed materially following the reduction in use of the no sale and 1p sales buttons. There is no evidence of suppressed purchases.

39. Furthermore, when assessing to best judgment, we accept that it was open to Officer Doherty to rely on the industry standard statistics available to him and that he did not consider the specific trading position of the appellant. However, when it comes to quantum, these specific matters are very relevant. The appellant has demonstrated that the high proportion of tobacco/cigarette sales, which have a low profit margin, may on the balance of probabilities have had a significant impact on the figures assessed by Officer Doherty. Whilst we appreciate that the burden of establishing, on the balance of probabilities, that the assessments are incorrect, we have heard nothing from HMRC in response to the evidence provided by the appellant of the impact of the tobacco/cigarette sales on the accuracy of the assessments. Nor have we heard any evidence concerning other specific aspects of the appellants business (for example the amount of change given to those bus users in light of the number of bus stops in the vicinity of the shop). Having raised these issues in evidence, which evidence has not been seriously dented by HMRC's cross examination, we are entitled to rely on it when considering quantum in light of the fact that HMRC have provided little alternative evidence to challenge the appellant's assertions. We do not believe that the appellant has suppressed its takings.

40. In light of the foregoing it is our judgment that the VAT assessments (and consequently the Corporation Tax assessments) overstate the VAT and Corporation Tax which HMRC allege is due from the appellant. In our view the VAT returns and Corporation Tax returns correctly stated the amount of VAT and Corporation Tax due for the relevant periods.

Penalties

41. Since we have decided that no additional VAT or Corporation Tax is due, there is nothing on which Schedule 24 can bite. There is no potential lost revenue. Accordingly, the appellant is not liable to any penalties.

DECISION

42. It is our decision that although the assessments were valid, the appellant has not suppressed its takings, and that the amounts originally declared to HMRC in the appellant's

VAT returns and its Corporation Tax returns accurately reflect its sales. We allow the appeal against the assessments and the penalty assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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: 30 JUNE 2022