Neutral Citation: [2022] UKFTT 00455 (TC)

Case Number: TC08660

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/04826
TC/2019/05014
TC/2019/05340

VAT-CORPORATION TAX-"best judgement" assessments-penalties-whether "deliberate" behaviour-whether reductions appropriate-VAT Personal Liability Notice-relevant period-whether behaviour "deliberate"-loans to participators-whether there was a loan-quantum

Heard on: 14 and 15 March 2022 and paper sitting on 10 and 11 August
Judgment date: 05 December 2022

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MS SUSAN STOTT

Between

CHRISOVALANDIS GEORGIOU (1)
NINOS KOUMETTOU (LIQUIDATOR) OF GEORGIOU & CO LTD (2)
Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Alan Arenstein of WLH Taxation Limited, accountant

For the Respondents: Ms Jessica Parlour, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely and the hearing was held on the Tribunal's VHS platform. A face to face hearing was not held because of the ongoing impact of the Covid-19 Pandemic. The documents to which we were referred are a hearing bundle in three parts, the first with 670 pages, the second with 200 pages and the third with 235 pages, an authorities bundle of 452 pages together with additional authorities, additional correspondence between the parties and the skeleton arguments of both parties.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The hearing was not completed by the end of the two days allotted and a resumed hearing was listed for 20 and 21 June 2022. Owing to a train strike, that hearing was postposed and it was agreed between the parties that the hearing should be completed by way of written submissions. A paper sitting was listed for 10 and 11 August at which we considered, the Appellants' written submissions, the Respondent's closing statement and the Appellant's response to HMRC's closing case.

4. At the March hearing, we heard oral evidence from Mr Chrisovalandis Georgiou, the Appellant, Mr Jonathan Beard, the VAT officer who took over the VAT enquiry and issued the VAT assessments, penalties and Personal Liability Notice (PLN) and Ms Sue O'Connor, the HMRC officer who dealt with the Corporation Tax matters and issued various assessments and penalties.

5. In the interests of keeping this decision as concise as possible, we have not mentioned in detail all the evidence, arguments and cases which were put before us, but we confirm that we have taken all of these things into account in arriving at our decision.

6. The relevant statutory provisions are set out in the schedule to this decision.

THE BACKGROUND AND THE MATTERS UNDER APPEAL

7. Georgiou & Co Limited (the Company) operated cash only fish and chip shops from 2013 until the closure of the business in November 2017. Initially, there were four shops, but two of them were closed in the course of the 2014/15 tax year, leaving two shops: Dove House and Harvey's. The premises of the closed businesses were retained and the Company received rental income from them.

8. Mr Georgiou was initially a 25% shareholder in the company, and a director, along with his wife, father and mother. His father passed away on 14 November 2014 and from then on, Mr Georgiou became responsible for the business, although for the reasons set out below, he did not properly assume control of it until around April 2015. On his father's death, Mr Georgiou's shareholding increase to 50%. His wife and mother remained directors, although they had little involvement with the business.

9. The essential question is whether, as Mr Georgiou contends, he inherited a failing and loss making business, tried very hard to turn it round, but was ultimately unable to do so. Alternatively, as HMRC contends, did he systematically and deliberately supress sales of the Company, to the tune of nearly £1 million over a four year period, to evade VAT and Corporation Tax, and appropriate the undeclared profits for his own use?

10. The fish and chip business ceased trading on 18 November 2017. The premises were rented. The business of Dove House was transferred to an unconnected company. The business

of Harvey's was transferred to a different unconnected company. Mr Georgiou continued working at Dove House as an employee of the new owner.

11. The insolvent Company went into a Creditor's Voluntary Liquidation on 23 March 2018.

12. The Company, through its liquidator, Mr Koumettou, appeals against the following assessments:

(1) A VAT assessment, issued on 4 December 2017 for undeclared output tax for VAT periods 03/14 to 03/16 in the sum of £141,238 (the VAT assessment).

(2) A VAT penalty, issued on 5 April 2018, resulting from deliberate behaviour in the sum of £84,037 (the VAT penalty)

(3) Discovery assessments relating to undeclared profits for Corporation Tax purposes, issued on 24 April 2018 for the accounting periods ending 31 March, 2014, 2015 and 2016 for a total amount of £230,647.40 (the Corporation Tax assessments)

(4) A Notice of Determination, issued on 24 April 2018, for Corporation Tax on undeclared profits of the period of account ending 31 March 2017, in the sum of £68,833 (the Notice of Determination).

(5) Corporation Tax penalties issued on 24 April 2018 in relation to the periods of account ending 31 March 2014, 2015 and 2016 in the total sum of £137,235.55 (the Corporation Tax penalty).

(6) The Corporation Tax assessments and penalties included amounts attributable to a charge under the "loans to participators" provisions of section 455 Corporation Tax Act 2010.

13. Mr Georgiou appeals against a Personal Liability Notice issued to him on 5 April 2018 and amended on 10 July 2019 in relation to the VAT penalty, in the sum of £64,885.32 (the PLN).

14. Following the hearing and in the course of the written submissions, HMRC agreed to amend the Corporation Tax penalties to reflect a greater degree of cooperation by Mr Georgiou that had originally been applied. This reduces the penalty to £121,090.

15. It was also agreed to reduce the PLN to reflect the fact that Mr Georgiou had not assumed control of the business until April 2015. This reduces the penalty to £47,857.76 although it appears that this figure still includes the proportion of the PLN applicable to the period between Mr Georgiou senior's death until 31 March 2015.

16. Mr Koumettou did not participate in the hearing and the Company is in any event insolvent and unable to pay any liabilities which may be found to be due. Mr Georgiou wishes to challenge the assessments against the company in order to restore the reputation of himself and his family.

17. The only assessment for which Mr Georgiou is personally liable is the PLN.

THE FACTS

History of the Company

18. The Company carried on a fish and chip business. Georgiou & Co Ltd was formed in March 2011 when Dove House Fish Bar (Dove House) became available to rent. Dove House was in an affluent area and in a good position on a main road. In December 2012, the business also took on Harvey's Fish Bar (Harvey's). The catchment area for Harvey's contained a poorer clientele and was not so well sited.

19. Between August 2013 and December 2014, the business operated four fish and chip shops. From December 2014 to March 2015 there were three shops. When the fish and chip businesses ceased at those shops, the new occupiers paid rent to the Company. From March 2015, the Company operated only Dove House and Harvey's.

20. As noted the Appellant and his father, mother and wife were initially equal shareholders in the company and all were directors of it. The driving force behind the business was the Appellant's father who participated in all elements of the business but, right up until his death, was the only person who dealt with the books and records and cashing up the day's takings. Mr Georgiou dealt with suppliers and service providers as his English was better than his father's and he also did the actual cooking. The Appellant's wife and mother assisted with the cooking and cleaning. There were no external staff at this stage.

21. In November 2013, Mr Georgiou senior was diagnosed with advanced pancreatic cancer. He was unable to deal with the day to day running of the business, but wanted to continue to work as far as possible and he continued to keep the books and records and to do all the cashing up at both shops. Whilst Mr Georgiou and has wife and mother, tried to run the business, the pressures of the father's illness and the need for family members to help with his treatment and transport had an impact on the service levels and quality of food in the business and takings began to decline.

22. Sadly, Mr Georgiou's father died on 17 November 2014 and Mr Georgiou inherited his shares and full responsibility for the business.

23. There followed a very difficult period for the family and business. Mr Georgiou senior's funeral took place in his home country of Cyprus and the family spent an extended mourning period there. Mr Georgiou and his wife returned towards the end of December 2014. His mother remained until February 2015 and shortly after her return fell and broke her wrist requiring the Appellant and his wife to care for her on an almost full time basis. His mother then returned to Cyprus and essentially retired and his wife's role in the business diminished.

24. Mr Georgiou stated, and we find as fact that the busiest period for the business was between the end of October and Christmas: when the weather is cold, customers want hot food. January and February tend to be poor trading months as money is short after Christmas and many people avoid takeaways, having made resolutions to "eat healthily". This is borne out by the figures and accords with common sense.

25. So during the best trading period of the year, the family were absent, other than occasional visits by Mr Georgiou to pick up post and see what was happening. He relied on friends and acquaintances to run the shops for him. There were regular changes in staff and unsurprisingly, the quality of the food and service was inconsistent and had deteriorated. Although Mr Georgiou had asked those stepping in to manage the shops to record all payments and receipts, the managers and staff were paid in cash and this was not all recorded.

26. Mr Georgiou eventually took control of the business in April 2015 and attempted to reverse the damage which had been done to the trade since his father's death.

27. Mr and Mrs Georgiou worked in the shops and staff were also employed.

28. Mr Georgiou improved the cleanliness of the shops and ensured that portion sizes were standardised and consistent. Costs had risen and he then implemented actions to try and reduce costs and improve profitability. This had to be done gradually to gain customer acceptance. He sought to reduce the high level of waste by cooking to order and adjusting the amount of food prepared according to the time of year (less in the summer months) the weather (less if snowy or icy or heavy rain when people wouldn't want to go out) and his knowledge of the market

(less when the nearby Jaguar Land Rover factory had its seasonal closures). More rigorous stock control reduced expenses.

29. Prices were increased, gradually, in stages.

30. Portion size was reduced, also in stages.

31. Mr Georgiou banded together with other fish and chip shop owners to have better bargaining power with suppliers so that they could cut costs by volume buying as a group and by buying lower qualities of oil.

32. Mr Georgiou did not himself tell HMRC about these efficiencies as he was not asked about it and did not know he needed to tell them. Mr Arenstein did, however, tell HMRC about the seasonal variations and efficiencies in the course of the enquiry; for example in his letter of 26 February 2020. He also mentioned price rises and the difference in prices and clientele of Dove House and Harvey's. These matters had also been put to HMRC by Mr Georgiou's previous agent, Mr Jourdanou.

33. These actions stabilised the business, but the Company's cash flow was still precarious because of the earlier loss of profits and VAT debts.

34. Builders who had been working on the property next to Harvey's had damaged the roof of Harvey's and from October 2015, the shop flooded when it rained. In November the roof collapsed and more trade was lost at the busiest time of the year while insurance issues were sorted out and building works done.

35. There was very little money available. Mr Georgiou said his overdraft limit was £35,000. The Company's bank statements between 1 October 2015 to 30 December 2015 were consistently overdrawn. The overdrawn balances were never less than £21,000 and regularly exceeded £30,000. The hearing bundle also included Company bank statements from 23 June 2016 to 10 October 2016 and these told a similar story with the average overdraft, if anything, being higher in this period.

36. Mr Georgiou tried to increase profits by selling cold food such as salads and pies in the summer and he also sold wet fish.

37. The directors took minimum salaries in order to leave money in the Company as far as possible and his mother waived her directors fees.

38. The businesses continued to decline and were unable to pay the rent on the shops and had mounting debts.

39. In mid-November 2017 Mr Georgiou asked his landlord if he could help find someone to take over Harvey's. Both Dove House and Harvey's ceased trading on Saturday 18 November 2017. New owners took on both businesses which reopened on Tuesday 21 November 2017. Mr Georgiou and his staff stayed on at Dove House as employees of the new owners.

40. We accept Mr Georgiou's evidence that the businesses were handed over for no consideration.

41. The Company went into liquidation in March 2018.

The VAT enquiry

The cash reconciliation exercise

42. HMRC's VAT enquiry began in January 2016. HMRC wrote to the Company on 26 January to arrange a visit by Officer Tromans on 1 February 2016. The date of the visit was subsequently changed to 29 February 2016. At the visit, Mr Tromans carried out a cash

reconciliation using bank statements and cash sheets in order to check the credibility of the Company's annual VAT return to 03/15. This covered the period from 1 April 2014 to 31 March 2015. The cash sheets showed sales and cash purchases. Twelve cash sheets with details of cash purchases were missing. Mr Tromans assumed that purchases were at the same level as shown on the other sheets.

43. It was very difficult to read Mr Tromans' notes, but Mr Beard explained that Mr Tromans' methodology was to add together the cash banked, the supplies for the two fish bars paid in cash and the wages, which were also paid in cash. He then compared this total, which was treated as the minimum cash needed by the business for the period, with the gross sales declared in VAT returns for the period. All sales were cash.

44. The cash total was £490,687, to which Mr Tromans added the presumed cash purchases from the missing cash sheets which brought the total to £552,450. The gross sales declared were £507,562. Since the declared sales were less than the expenses and cash banked, Mr Tromans concluded this was evidence that sales had been suppressed.

45. Mr Tromans carried out a similar exercise to check the 12/15 period which was completed when Mr Georgiou's then agent provided requested information. In addition, he compared the purchases made (cash purchases plus business related payments from the business bank account) with the gross purchases entered in the VAT return. These calculations and the 2017 calculations mentioned below were set out in an attachment to a letter to WLH Taxation Limited (WLH) dated 3 September 2020.

46. Mr Beard became responsible for the enquiry from January 2017. On 10 August 2017, he carried out a further cash reconciliation exercise on the same basis as Mr Tromans for the 09/16 period covering both sales and purchases.

47. The 12/15 exercise showed total cash of £117,030 compared with gross sales in the VAT return of £88,025. The deficit of £29,005 was taken by Mr Tromans to be evidence of supressed sales on the basis that more cash was needed to pay for the business expenses than was declared by way of sales. I.e., there must have been more sales than were declared to enable the business to meet its liabilities.

48. The purchase exercise for the same period showed total purchases of £79,450 compared with £45,720 declared in the VAT return. This appeared to show underdeclared purchases of £33,730. Mr Beard said the discrepancy could have been because purchases may be recorded in a period other than that in which they were incurred, but the conclusion of Mr Tromans (and Mr Beard) was that purchases were being supressed as well as sales.

49. The equivalent computations for the 09/16 period appeared to show underdeclared sales of £3,217 and underdeclared purchases of £17,086.

50. Whilst the cash reconciliations were initially regarded as a credibility check, by the time of the hearing and HMRC's closing statement, they were regarded as proof of the suppression of sales and purchases and were one of the reasons cited for regarding Mr Georgiou's actions to have been "deliberate" in connection with the penalties.

The problems with the tills and lack of sales data

51. Mr Tromans' other main concern was that the Z readings taken from the till did not show the date and time they were taken or the sequence number as the till appeared to be reset daily. The Z readings are print outs from a till which show the total of the daily sales. Mr Tromans was satisfied that Z readings were taken and attached to the weekly takings sheet. Mr Tromans raised the lack of sequencing in a letter to the then agent of 11 March 2016 when he asked for details about the till and also about records of zero rated sales.

52. The agent provided the information requested in emails of 16 May and 2 June 2016, including the "till roll tails" showing the daily takings including zero rated items. He explained that zero rated items were recorded as a separate "department" on the till and so could be separately identified. He also explained that the till was an old Casio model which had been used for 10 years and that Mr Georgiou intended to install EPOS (Electronic Point of Sale) tills in both Dove House and Harvey's.

53. The reason why the till was resetting (and so the Z readings did not show the date etc) was because the electricity was switched off each night for safety reasons. The electricity controlled the gas flow to the frying range and leaving the electricity on would be a fire risk.

54. We note that on 10 May 2016 the agent had asked for more time to provide the information requested as Mr Georgiou was having staff issues and his priority was to serve customers "in view of the business cash flow problems and the need to fulfil [Mr Georgiou's] banking requirements".

55. In a letter dated 1 July 2016 sent to the Company and addressed to Mr Georgiou, Mr Tromans informed him that it was a legal requirement to keep till rolls and included an extract from VAT Notice 727 stating what needed to be kept as evidence of the Daily Gross Takings. This stated that a business must record all payments as they are received from cash customers and the record would normally be a till roll. In an email of 25 August 2015, the then agent, Jordanou & Co, said that till rolls were being retained. The agent had also informed HMRC that Mr Georgiou was looking to install EPOS tills. These tills should have provided the information HMRC required.

56. Mr Georgiou explained that the till rolls were not kept because a fault in the till meant that it did not record individual sales, but only the Z readings.

57. We acknowledge that Mr Georgiou was required to keep a record of individual sales, but we also note that the Z readings, which were available, recorded the total of those individual sales and formed the basis of the information sent to the accountant to prepare the VAT returns.

58. Mr Tromans arranged a visit to inspect the till at Dove House on 12 December 2016. Mr Beard also attended this visit in his role as an accredited till officer and following Mr Tromans' transfer to other duties took over the management of the case in January 2017. At the meeting, Mr Beard examined the old Casio till and found that there was no back up battery, so that the till reset when the electricity was turned off at night. He explained the requirement to retain evidence of sales.

59. Mr Georgiou informed Mr Beard that he had bought a new EPOS till for Harvey's which had now been installed and that he was intending to buy an EPOS till for Dove House. The new till at Harvey's was not inspected.

60. Mr Jordanou emailed Mr Beard on 20 January 2017 saying:

> "As mentioned at our last meeting the till used by Dovehouse Fish Bar (and inspected by your office) was old, on its last legs and proving to be unreliable. Mr Georgiou was looking to replace this till and has now done so. The new till is an electronic point of sale model and, I understand, HMRC compliant."

61. Mr Georgiou's evidence, which we accept, was that he had bought the new tills to try and remedy the fault with the old one. However as cash was short, he had bought bottom of the market tills which were cheaper than average. He had asked, and been told that the tills were "HMRC compliant". In addition to the hardware, he paid a fee for the software to be provided under a licensing and servicing agreement.

62. On 25 January 2017, Mr Beard wrote to the company stating that he was going to carry out a number of credibility checks on the VAT returns in the absence of the till rolls. He also requested the company to print the Electronic Journal from the till each night and attach it to the Z reading for the next month.

63. Mr Jordanou emailed Mr Beard on 24 March 2017 to say he was sending the further information requested including purchase invoices, Z readings and bank statements in the post. He also said:

> "We enclose the Z readings/electronic journal for each day in the period 30/01/2017 to 05/03/2017 inclusive for both Dovehouse and Harveys units. The cold food/refunds totals shown on each slip are included in the daily takings figures."

64. He further stated "the daily electronic journal is retained for each shop"

65. Mr Beard requested that the agent send him further information (which was provided) and the Electronic Journals for both shops for February to April. The information sent did not, however, include the individual sales, but only the Z readings and weekly sales summaries.

66. Mr Beard and a till colleague made an unannounced visit to both shops on 6 July 2017 but Mrs Georgiou refused them entry (as she was entitled to do) as Mr Georgiou was not there.

67. Following the unannounced visit and a telephone conversation, Mr Jordanou wrote to Mr Beard on 11 July enclosing cash sheets and stating:

> "We understand that the electronic journal is the same as the Z reading and we enclose Z readings, on a daily basis, for each shop for the period 30/01/2017 to 30/04/2017 inclusive."

68. If Mr Georgiou's accountant thought he was providing HMRC with the information that they had requested, it is unlikely that Mr Georgiou would have been aware that they were not. We accept Mr Georgiou's statements that he thought he was providing HMRC with everything they wanted and had purchased the new tills, which he had been assured were "HRMC compliant" in order to remedy the problems with his old tills and satisfy his obligations.

69. In a letter of 16 August 2017 Mr Jordanou told Mr Beard that he had received legal advice as to the records required, they had kept and provided all such records and the advice had been passed to the supplier of the hardware and software for the tills.

70. He also offered to make the tills available for any inspection that HMRC wished to carry out. As it would be a breach of the software licence for anyone other than the software supplier to interrogate the till or otherwise interfere with the software, Mr Jordanou offered an inspection visit to be made by appointment when a software engineer from the supply company would be able to provide whatever information HMRC wanted.

71. On 23 August 2017, Mr Beard agreed to the visit in the presence of the till provider and reiterated that the law required the business to keep a record of individual sales, and not just the daily total on the Z readings.

72. On 2 October 2017, Mr Beard, together with two HMRC EPOS till specialists visited both Harvey's and Dove House. Mr Georgiou, Mr Jordanou and the engineer from the till provider were also present. At each shop, the EPOS officers told the till engineer what information they wanted (the sales information) and the till engineer saved the relevant files to a new UBS memory stick. The supplier had concerns about viruses on third party USB sticks and it was agreed the data would be downloaded onto a new USB stick and the package would be opened in front of Mr Gergiou and the till engineer to prove this. The contents of the memory

stick were saved to a secure HMRC laptop. The memory stick was left with Mr Georgiou so he had a copy.

73. HMRC's own report of the visit states that HMRC asked for a copy of the underlying sales details, the till engineer copied the files they had requested and the till engineer stated "this folder contains individual sales details" and "The till engineer confirmed transactions at line level could be identified within data provided". Mr Beard confirmed in cross examination that the till engineer from the till supplier told him that the file contained the Electronic Journal. However, the folder which should have contained the individual sales records was blank. HMRC assumed either that the records had been deleted beforehand or the EPOS was not retaining the sales data.

74. Mr Georgiou denied that he had deleted any information and said that he would not have known how to adjust the till in any event. He believed that the tills were "HMRC compliant" and all the information needed was being recorded. HMRC informed him, in a letter of 17 October 2017 that the relevant files were empty and said "As such, I still do not have the information I require (and which you are required by law to keep) to check whether the Returns are credible." Mr Beard requested that the sales information be provided for the period 1-30 November 2017 and suggested that if he needed help he should ask the till engineer.

75. Mr Georgiou said that he then informed the till engineer of what HMRC had said and was told that if the tills had recorded the sales they would be on the total i.e. the Z readings. It appeared the tills had a fault or had not been programmed properly. The engineer said that the only option was to purchase new tills, which the Company could not afford.

76. Having considered Mr Georgiou's evidence and the written records of the till engineer's statements, we find, on the balance of probabilities that the tills were faulty or were not programmed correctly and were not recording the sales information. We accept that Mr Georgiou had not interfered with the tills or deleted the information.

77. We also note that Mr Beard had said the individual sales records were required to check the credibility of the VAT returns, not just that the information had to be kept by law. However, the total of the individual sales would appear on the Z readings, which were retained and were available, and used for, the credibility check.

78. It was suggested to Mr Beard that the Electronic Journal would not add anything to the Z readings as the total of individual sales would be the same as the Z reading. Mr Beard did not accept this, saying the till could be programmed to omit sales. In relation to the absence of the Electronic Journal from the file, this could be because the programme was removed or the contents of the programme were deleted. This could only be done by someone who knew how to manipulate the software and this was more difficult on the new tills that the old ones. We do not consider that Mr Georgiou would have known how to alter the till programmes and he was clearly concerned that no-one other than the till supplier's personnel should interfere with the tills for fear of invalidating his guarantee or software licence. In short, we do not find it credible that Mr Georgiou reprogrammed the till so that the Electronic Journal was not available or so as to omit sales information.

79. We find that Mr Georgiou believed he was providing to HMRC all the information they had asked for and that the tills were recording the information they were supposed to record.

80. Mr Beard said that there were two reasons for requiring the individual sales. First, Mr Beard said they would evidence any refunds. However, the Z readings also show total refunds. The second reason was that the Electronic Journal would show the time of sales so that if there were gaps in the times of sales it would be evidence of trading with the till open i.e. taking cash but not putting the sales through the till.

81. Mr Beard also said in cross-examination that if the Electronic Journal/till rolls had been provided and tallied with the Z readings, they would not have relied on the cash reconciliations and would have closed the enquiry.

The covert invigilations

82. Having instructed Mr Georgiou to retain the individual sales information, HMRC carried out a covert invigilations on Friday 17 November 2017 and Wednesday 22 November 2017 at both Harvey's and Dove House between 5pm and when the shops closed at around 10pm.We note that at the time of the second invigilation, the Company no longer owned the businesses having transferred them to new operators on the previous weekend.

83. The invigilators were requested to record "parties" entering each shop in each half hour period. They parked outside the shops and observed the number of customers entering and the number of packages they had on leaving. They were told not to count people/groups who entered the shop and left shortly after e.g. to get some cash before returning. I.e. those people were not double counted. It was not entirely clear whether "parties" meant groups of people or individuals. In some the invigilation reports there were references to "groups" and in others to "persons" or "customers". Some of the invigilators recorded the number of "packages" which left the shop in the half hour period. Others did not.

84. On 22 November, HMRC officers made test purchases at both Dove House and Harvey's to check that the sales were recorded on the till and included in the Z readings. The officers bought different items at each shop.

85. The invigilators also observed whether the staff traded with the till open and whether other sales were put through the till. The test purchases were put through the till, as were the orders of other customers whilst they were in the shops. The till was not left open. The only exception was when a customer entered to pick up a large order (£56.60) which had been pre-ordered and was waiting for him. The till drawer was open when he paid as another customer was paying at the same time and the large order was not put through the till at that point. Mr Georgiou explained that if a customer put in a large order over the telephone it was entered in the till at that point, so the customer could be informed of the total cost and would not, of course, be recorded again when the customer picked up the food and paid. One observer also noted that the till was open on one occasion as three members of staff were serving different customers at the same time, but all purchases were put through the till. There were no other observations of trading with the till open.

86. The various officers who made test purchases observed two to four staff at Harvey's, some helping with preparation, and five to six staff at Dove House with three to five serving and others dealing with preparation and cooking. Mr Georgiou did not deal with customers, but only with cooking the food.

The VAT assessment

87. Mr Jordanou had informed Mr Beard on 1 December 2017 that the Company had ceased trading on 20 November 2017. Mr Beard considered it unlikely that he would obtain any further information and so calculated the assessment to "best judgement" based on the results of the invigilation, the Z readings for Dove House for 09/16, the cash sheets showing sales and purchases for both shops for 09/16 and the sales reports from the new tills at both shops for the period February to April 2017. His methodology is set out below.

88. The Z readings for Dove House for 09/16 show the number of transactions for each day in that period. Using the sales figures for the period and the number of transactions, he calculated the average transaction value, which was £7.31.

89. He then calculated the "weighted average" number of transactions and sales for Wednesdays and Fridays during the period ending 30 September 2016. It is not clear what is meant by "weighted" in this context.

90. As no Z readings were available for Harvey's, Mr Beard used the sales totals information for Wednesdays and Fridays and using the average spend from the Dove House calculations (£7.31) worked out the average number of transactions for the Wednesdays and Fridays.

91. The average transaction numbers for each of Wednesday and Friday for 09/16 were then compared with the numbers of transactions observed during the invigilations. The average number of transactions for 09/16, for each day and each shop, was less than the transactions observed. It was assumed that the difference represented unrecorded sales and this figure was used to calculate the percentage of supressed sales. So, for example, on the Wednesday 22 November 2017 invigilation at Dove House, 163 groups were observed. The average number of transactions for Wednesdays in 09/16 was 104, the difference being 59. The number of actual sales was assumed to be 104 + 59 = 163 and the suppression percentage was 59/163 x 100= 36% so declared sales would be 64% of the actual sales. Dove House was also open at lunchtimes but those sales were ignored which was in the Company's favour. Using the same method:

(1) The suppression rate for Fridays at Dove House was calculated as 49%, so the declared sales were 51% of the actual sales.

(2) The suppression rate for Wednesday's at Harvey's was 19% so the declared sales were 81% of actual sales

(3) The suppression rate for Fridays at Harvey's was 26%, so the declared sales were 74% of actual sales.

92. Mr Beard then used the declared sales for 09/16 and for the period February to April 2017 to calculate how the total sales were split between Dove House and Harvey's. On a "weighted average" basis, the split was 69.12% Dove House and 30.88% for Harvey's.

93. The Friday figures were assumed to be applicable to Saturdays also and the Wednesday figures were assumed to apply to the other weekdays (the shops were closed on Sundays). On this basis, 42% of total sales were assumed to be made on Fridays and Saturdays and the remaining 58% from Monday to Thursday.

94. In making these calculations it was assumed that there were no seasonal variations in sales, that there were no price rises throughout the period of trading, that the menu and prices in Dove House and Harvey's were the same and that the average spend in Dove House and Harvey's was the same.

95. These figures were then used to calculate the underdeclared VAT, from the start of trading (03/14 to 09/16). For the periods from 12/16 to 06/17 it was noted that, whilst zero rated purchases of food had not increased, gross sales had increased significantly. This was assumed to be the result of more sales being declared during the enquiry i.e. a lower suppression rate. Mr Beard calculated the supposed number of additional transactions from the increased sales, which reduced the difference between the assumed number of transactions and the number of transactions based on the invigilations. The suppression rate calculated on this basis was 23% so for the later periods, the declared sales represented 77% of sales.

96. The alleged underdeclared VAT was then calculated in the following manner. The figures below refer to the periods up to 06/17. As noted, the suppression rate was assumed to be less for the later periods.

(1) The starting point was the gross sales declared in the VAT returns

(2) The gross sales were divided between Dove House and Harvey's 69%:31%

(3) For Dove House, 42% of the sales declared (representing Fridays and Saturdays) were increased by treating the gross sales declared as 51% of the actual sales to produce a figure for the actual sales.

(4) The remaining 58% of Dove House sales (representing Monday to Thursday) were increased to "actual sales" by treating sales declared as 64% of the real total.

(5) The same exercise was carried out for Harvey's using the same weekend/weekday split and the suppression rates calculated from the invigilations.

(6) The "actual" gross sales so calculated were added together for each VAT period.

(7) The percentage of zero rated sales declared in each period was used to calculate the amount of zero rated sales included in the revised gross sales on the basis that zero rated sales had also been supressed.

(8) The recalculated zero rated sales were deducted from the recalculated gross sales for each VAT period in order to give the total of standard rated sales.

(9) The output tax due for each period was calculated for the revised standard rated sales. The difference between this figure and the declared output tax for each period was the amount of additional VAT due.

97. A formal notice of assessment for the total underdeclared VAT in the sum of £141,238 was issued to the Company on 4 December 2017.

The VAT penalties

98. Mr Beard sent a "penalty explanation letter" to the Company on 2 March 2018 stating that HMRC intended to issue penalties totalling £84,036.58. This was followed by a formal notice of penalty assessment on 5 April 2018. The penalties were calculated on the basis that the behaviour which led to the underdeclaration of VAT was "deliberate". The explanation for this conclusion was as follows:

> "We consider that the behaviour was 'deliberate'. This is explained below. Throughout the enquiry, I have requested copies of your Electronic Journals in order to check the credibility of your declared sales. Despite there being a legal requirement to retain a written record of each and every sale made, you have not provided these records. Following a Covert Invigilation it is clear that the records provided do not reflect the number of customers seen. I understand that you are responsible for cashing up both Fish and Chip shops, and that you are also responsible for recording the sales totals, which are subsequently reported in the VAT Returns. Accordingly, it is clear that you would have known the true level of sales, and that the sales being recorded and declared in the VAT Return were incorrect. I consider the behaviour shown to be Deliberate."

99. Mr Beard, in his witness evidence, said that in arriving at this conclusion he had taken account of the fact that Mr Georgiou was solely responsible for cashing up at both shops, at least after the death of his father. The cash reconciliations for 12/15 and 09/16 "showed the Company spent more money than it received from declared sales with no other income stream identified to make up the shortfall…". Mr Georgiou would have known that there was more money in the till than he was recording on the cash sheets for the accountant, so he would know that he was providing inaccurate information to the accountant which would result in inaccurate VAT returns as not all the sales were recorded. Returns other than these showed similar levels of sales which Mr Beard considered suggested that sales were underdeclared for other periods also.

100. The cash reconciliation exercises and the results of the covert invigilation suggested a continuous and almost daily recording of under declared sales.

101. Further Mr Georgiou had failed to record individual sales despite several requests to do so and had deliberately failed to provide the sales information. Mrs Georgiou had refused entry to officers at an unannounced visit. At the agreed till inspection visit, the individual sales information was still not provided "with the information appearing to have been removed prior to the visit".

102. Ms Parlour submitted that the suppression of sales led to a deliberate submission of incorrect VAT returns and that "the scale of suppression would require a widespread and organised process. It is not plausible that those responsible for submitting VAT returns would not have realised that some sales, by number and value, had been purposefully omitted."

103. HMRC may reduce a penalty to reflect the degree of co-operation with the enquiry. On the basis that the disclosure of underpaid VAT was "prompted", and the inaccuracy was "deliberate" the penalty range was between 35% and 70% of the Potential Lost Revenue. Mr Beard gave a 5% reduction for "telling" stating that there had been minimal disclosure of the errors in the returns and no explanation of the errors. A reduction of 10% was given for "helping" because of a lack of co-operations in helping to quantify the undeclared sales and the failure to provide details of individual sales. The reduction for "giving" was 15% as the business had provided some information but only after delays and reminders. This gives a total reduction of 30% which results in a penalty percentage of 59.50% of the Potential Lost Revenue, which, applied to the VAT assessed results in the penalty of £84,036.58.

The Personal Liability Notice

104. Paragraph 19 of Schedule 24 Finance Act 2007 provides that where a VAT penalty is charged on the basis of a deliberate inaccuracy in the return and that inaccuracy is attributable to an officer of the company, the officer is personally liable to pay such proportion of the company's penalty (up to 100%) as HMRC may notify to the officer.

105. On 5 April 2018, HMRC wrote to the Company and to Mr Georgiou, requiring Mr Georgiou, as a director of the company to pay the whole of the penalty charged to the company. It was subsequently accepted that Mr Georgiou's father had been responsible for cashing up until his death in November 2014 and Mr Georgiou's PLN was reduced to 77.21% of the penalty to reflect this. At the hearing HMRC accepted that Mr Georgiou did not become fully responsible for running the business until some time after his father's death and he would only be liable for the VAT period 03/15 onwards. HMRC state that that results in Mr Georgiou being liable for 59.5% of the penalty or £50,000 whereas Mr Arenstein submits the correct figure is £35,695.22. We find that Mr Arenstein's calculation is the correct one.

106. The reasons for attributing the deliberate inaccuracy solely to Mr Georgiou are similar to the reasons for determining that the behaviour was deliberate in the first place. In particular, Mr Georgiou was the only person who, following his father's death, was responsible for cashing up at both Dove House and Harvey's and he was the person responsible for recording the sales on the cash sheets and sending them to the accountant for him to prepare the VAT returns. On the basis that he would be aware of the actual cash sales he would know that the sales recorded on the cash sheets had been understated. Mr Georgiou was a director of the Company throughout its period of operation.

The corporation tax review

The corporation tax assessments and determination

107. Following the VAT assessment, the case was referred to Officer Sue O'Connor, an experienced officer who carried out the Corporation Tax review and issued the Corporation

Tax discovery assessments, determination, penalties and charges on the Company under the "loans to participators" provisions in section 455 Corporation Tax Act 2010. A corporation tax PLN was issued to Mr Georgiou but subsequently cancelled because of a procedural irregularity.

108. Ms O'Connor had no involvement with the VAT enquiry.

109. The case was referred to Ms O'Connor in March 2018 to consider whether the revised VAT sales figures had any impact on the Company's Corporation Tax returns and whether these needed to be amended.

110. The only documents which Ms O'Connor considered at the time were the VAT assessment and penalty notice and the Company's Corporation Tax return. She may subsequently have seen some other documents relating to the VAT enquiry but she was unable to recall what she had seen or when. Ms O'Connor only mentioned the VAT assessment, but we infer that she also considered the VAT penalty assessment as she referred to this in her own assessments.

111. Ms O'Connor reviewed the case on 4 April 2018, solely on the basis of the above documents.

112. Corporation Tax returns had been submitted for the accounting periods ending 31 March 2014, 2015 and 2016. No return had been submitted for the period ended 31 March 2017. That return was not yet due at the time the Company went into liquidation and it is understandable that the liquidator of an insolvent company would not want to incur costs preparing the accounts. All the accounts which had been submitted, from the start of trading on 18 August 2013 showed substantial losses.

113. Ms O'Connor calculated the assessments as follows:

(1) She took the additional VAT from the VAT assessment for each quarter and multiplied it by five to give the undeclared sales. The sales for each VAT quarter were then allocated to accounting periods.

(2) The additional sales so calculated were added to the turnover shown in the company accounts and the revised figures converted the declared losses into substantial profits.

(3) The revised profits were charged to tax at the corporation tax rate of 20%.

114. On this basis, Ms O'Connor considered that she had "discovered" that tax which ought to have been paid had not been paid and she raised discovery assessments for the years ended 31 March 2014, 2015 and 2016 on this basis.

115. As no return had been submitted for 2017, Ms O'Connor made a "best judgement" determination of the profits for that year, based on the revised profits of the previous three years.

116. Ms O'Connor wrote to Mr Georgiou at the Company on 11 April stating that she proposed to issue the corporation tax assessments and determination. She also requested copies of the Director's Loan Account for the four accounting periods concerned. She further indicated that she also proposed to issue penalty assessments based on deliberate behaviour and would give the same reductions for co-operation as had been given in the VAT penalty assessments. Ms O'Connor said in her witness statement that she also wrote to the liquidator on this date but the letter was not in the bundles. Ms O'Connor received no reply to this letter. This is not surprising as it was addressed to Mr Georgiou at the Company and as it was in liquidation he had no right or ability to respond on the Company's behalf.

117. Ms O'Connor sent the formal assessments, determination and penalty notices to Mr Georgiou on 24 April 2018.

118. Mr Beard wrote to the liquidator, also on 24 April 2018 stating the amounts of the VAT and corporation tax assessments and asking various questions about the rental income received by the Company and the "sale" of Dove House and Harvey's.

119. On 30 April 2018 Mr Georgiou wrote to Mr Beard stating that all matters were now being dealt with by the liquidators and all correspondence should be addressed to them. It seems that no further information was provided by the liquidators. We infer this was because the Company was insolvent and the liquidators did not want to incur additional costs in investigating matters which would not affect the insolvency.

120. In her witness statement, Ms O'Connor expressly said that, in relation to the corporation tax review, she did not ask any questions or request any information or documents, yet she made a number of statements about the VAT enquiry of which, at the time, she had no knowledge. For example, she said that the Company had supressed sales. She also said that the business was not able to provide evidence of sales as required under section 73 VATA. She was unaware that the Company had provided the daily sales totals i.e. the Z readings and in fact, these were adequate records for corporation tax purposes. She also referred to the test purchases and the invigilation exercises. She said that the business traded with an open till, when the invigilation evidence contradicted that.

The corporation tax penalties

121. Ms O'Connor issued penalty assessments to Mr Georgiou (rather than the liquidator) on 24 April 2018 on the basis of deliberate behaviour.

122. The explanation for considering the behaviour "deliberate" simply repeated the assertions in the VAT penalty notices, despite Ms O'Connor having no knowledge of the VAT enquiry. In her witness statement, she said that she agreed with Officer Beard's assessment of the behaviour for the following reasons:

> "a. Officer Beard established that the Business deliberately failed to retain a record of daily takings, despite reminders, and that the VAT returns contained deliberate inaccuracies, and therefore it is reasonable to infer that the company accounts and hence the company returns also contained deliberate inaccuracies.
>
> b. Evidence obtained by Officer Beard showed that cash takings were deliberately suppressed, and that the records showed that the cash takings that were reported were insufficient to cover the cash purchases and expenses.
>
> c. The appellant was responsible for recording the daily takings which were used by the accountant to prepare the VAT returns and company tax returns, therefore he knew that the returns did not reflect the correct figure of sales, as he had deliberately failed to record the full amount of cash sales.
>
> d. The daily takings records were requested by Officer Beard, but the Business failed to provide these, and also failed to provide explanations for the errors and inaccuracies identified during the VAT check."

123. At the time of the assessments, Ms O'Connor had no knowledge of these matters.

124. She also states:

> "The VAT Assessment was based on observations of groups entering and leaving both Dove House Fish Bar and Harvey's Fish Bar with meals compared to records showing transactions provided by the Business.

> Observations from the test purchases included payments being placed in an open cash drawer, meaning the transactions had not been recorded in the till."

125. Apart from the fact that she was unaware of the invigilation at the time, the evidence in relation to the invigilation in the VAT enquiry showed that the business did not trade with an open drawer and that there was no evidence of transactions not being recorded in the till.

126. We find that Ms O'Connor based the corporation tax penalties solely on what was contained in the VAT penalty assessments and made no attempt to consider the appropriate behaviour herself. Nor did she have, or seek, any information which would have enabled her to conduct a review herself.

127. In relation to the reductions for co-operation, Ms O'Connor again used the figures from the VAT enquiry without applying any independent assessment of the position.

128. Following the hearing Ms O'Connor reconsidered the penalty and offered to increase the reduction for "telling" from 5% to 25%. Although she had asked for copies of the Director's Loan Account and this had not been provided, she did not ask for any other documents or information and she therefore considered it appropriate to make this adjustment.

The Director's Loan Account and the section 455 "loans to participators" charge

129. The Company is a "close company" for the purposes of CTA 2010 on the basis that it is controlled by five or fewer participators (not on the basis that it merely had five or fewer participators as stated by both Mr Beard and Ms O'Connor). Where a close company makes a loan to a participator or a participator incurs any other indebtedness to a company, the company is treated as making a distribution and tax is charged on the outstanding loan under section 455 CTA 2010 on the company at a rate of 25% up to 5 April 2016 and from 6 April 2016 at the rate of 32.5%. A "participator" includes a shareholder.

130. Ms O'Connor had requested information about Mr Georgiou's director's loan account from the liquidator, but had received no information. She then assumed a nil balance at the time the Company started trading and assumed that the additional profits which she had calculated on the basis of the VAT assessment "were appropriated by the director [Mr Georgiou] in the absence of any evidence to the contrary". We note that part of this period was before the late Mr Georgiou's death, when the Appellant was not involved with the financial side of the business.

131. Based on this assumption, the director's loan account was rewritten to treat the omitted sales as loans which resulted in an overdrawn balance for each year of trading. Ms O'Connor then raised assessments on these amounts for each year under section 455 CTA 2010. The total corporation tax on these amounts was £178,660. This formed part of the corporation tax assessments and was also included in computing the corporation tax penalties.

132. It was put to Ms O'Connor in cross-examination that her revised figures would mean that Mr Georgiou had taken £850,000 from the business over the four year period and she was asked whether she had looked at Mr Georgiou's lifestyle. Ms O'Connor responded that she had not carried out any credibility check or looked to see whether he enjoyed a lifestyle commensurate with an untaxed income of over £200,000 a year. She had simply taken the view that if there were profits which had not been included in the accounts, they must have gone somewhere and the default assumption is that the director took them for his own use.

133. Ms Connor stated in evidence that it is not usual in cross tax investigations to ask for additional information in these circumstances. It is "standard procedure" to review the corporation tax position based purely on the VAT figures.

THE BURDEN OF PROOF

134. In relation to the VAT assessment, the burden is on HMRC to show the assessment has been made to "best judgement". If they do so, the burden passed to the Appellant to show that the assessment is incorrect.

135. In relation to the corporation tax assessment, the burden is on the Respondents to show that they have made a "discovery" within paragraph 41 of schedule 18 to the Finance Act 1998 ("schedule 18") and that the conditions set out in paragraphs 43 or 44 of schedule 18 are satisfied. Once this has been shown, the burden passes to the Appellant to show the amount of the assessment is incorrect.

136. Where a corporation tax determination has been properly made under paragraph 36 of schedule 18, the burden of proof passes to the Appellant to show the assessment is excessive.

137. In order to levy a "loans to participators" charge, the Respondents must show that a loan was taken from the Company by Mr Georgiou. The Respondents, in their Statement of Case, and elsewhere, added "as the main participator". So far as we are aware, there is no concept in the Corporation Tax Acts of a "main participator" but it is acknowledged that Mr Georgiou was a participator in the company.

138. The burden is on HMRC to show that penalties have been properly charged and that the behaviour leading to the inaccuracy be reference to which the penalties have been charges was "deliberate".

139. In relation to the Personal Liability Notice, HMRC must show that that there was a "deliberate" inaccuracy in the returns of the business and that this was attributable to Mr Georgiou.

140. In all cases, the standard of proof is the balance of probabilities. That is, the relevant party must show that it is more likely than not that their case is correct.

DISCUSSION

Preliminary points

141. We will first deal briefly with a point raised by Mr Arenstein.

142. He submitted that HMRC were out of time to assess in relation to VAT periods before 4 December 2017.

143. The time limit for VAT assessments is set out in section 73(6) VATA as follows:

> "(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

144. Mr Arenstein submits that HMRC were in a position to "justify the making of" the assessments following the visit by officer Tromans on 29 February 2016 on the basis that HMRC considered the cash reconciliation exercise showed cash deficiencies. He contends that

the one year time limit for making assessments was not met as the assessments were all raised on 4 December 2017. HMRC therefore have to rely on the two year limit which excludes the earlier periods.

145. We do not agree. Although the status of the cash reconciliations were elevated in the course of the enquiry from "suggesting" the suppression of profits, to "showing" the suppression of profits, we consider that HMRC were only in a position to justify the making of an assessment when they had quantified the alleged underpaid tax following the covert invigilation.

146. We therefore find that the VAT assessment was in time.

The VAT assessment

147. The VAT assessment is the starting point for all of the assessments, the determination, the penalties and the PLN.

148. HMRC submit that the cash reconciliation exercise showed that the Company was suppressing both sales and purchases (or "suggested" such suppression) which triggered the original enquiry. Insufficient information was provided to explain the results of the cash reconciliation and so the Respondents carried out the covert invigilation in order to give them a basis to compute the underdeclared VAT on a "best judgement" basis in accordance with section 73(1), which provides so far as material:

> "(1) Where … it appears to the Commissioners that [VAT] returns are incomplete or incorrect, they may assess the amount of VAT due from [the taxpayer] to the best of their judgment and notify it to [the taxpayer]"

149. Mr Arenstein, having analysed HMRC's computations, submits that they are riddled with errors which undermines their credibility.

150. Mr Georgiou's evidence was that the business was disrupted by his father's illness and death and that sales fell in the period following the diagnosis and for some months after his father's passing. HMRC produced a table showing quarterly sales which appeared to show that "sales increased quite significantly in the 03/15 VAT period". The sales figures in the table show £83,217 for 03/14, £126,890 for 03/15 and £81,369 for 06/15. Sales between 09/15 and 09/16 vary between £79,269 and £88,025 before starting to increase to a maximum of £116,565 in 06/17. The 03/15 figure clearly looks anomalous and Mr Arenstein points out two flaws.

151. The 03/14 period ran from the commencement of business in August 2013 to 31 March 2014, a period of approximately 7.5 months and the 03/15 return covered a 12 month period. HMRC seem to have assumed that the 03/14 period was a full 12 months and calculated the quarterly sales on that basis, which would clearly give a low figure. Mr Arenstein recalculated the quarterly sales using the figures in the corporation tax accounts and a 7.5 month accounting period. This produced an average quarterly figure for 03/14 of £128,515.

152. Secondly, the figures in the table fail to take account of the fact that at the beginning of the period, the business was running four fish and chip shops and at the end of it, they were only running two; Dove House and Harvey's. Mr Arenstein carried out computations to calculate the average takings per month per shop. He acknowledges that this was an approximate exercise, but it indicates that there was an increase of 1.66% in the monthly takings per shop between the 03/14 period and the 03/15 period but an increase of 24% in the takings per month per shop in the period to 03/16 compared with the previous year. Accepting that the figures are not accurate, they indicate a trend which is consistent with Mr Georgiou's evidence that sales dropped following his father's diagnosis and death and then started to rise again, once Mr Georgiou was fully in charge and implemented the efficiencies explained in his witness evidence.

153. We accordingly find that the figures are more consistent with the contention that Mr Georgiou senior's illness and subsequent passing caused problems with the business and falling sales. HMRC have certainly not shown that sales increased in the 03/15 period.

154. We now turn to the cash reconciliation exercise which Mr Arenstein submits is also flawed.

155. Officer Beard conducted a review of the Company's bank statements and analysed deposits received and purchases made. We did not have all the relevant bank accounts in the bundles, but we did have those for the 09/16 quarter which was one of those reviewed.

156. Mr Beard had added up all the deposits made in the quarter and treated those deposits as "potential sales" (£51,917.20) except for two deposits, one of £6,300 and the other of £100. Mr Arenstein said there was no indication as to why they were excluded, but an examination of the bank accounts showed that whilst most deposits simply had a number to identify it, the bank statement recorded that the £6,300 deposit was a transfer from "Doulton Underwriting payment" and the £100 is identified as "Monarch Airlines".

157. There is no indication what the other deposits, except one, related to or that they represented sales. The only other deposit which was identified was a payment of £2,000 on 8 August 2016 which was a deposit labelled "Poplar Rd Solihull". Both Mr Tromans and Mr Beard were aware that the Company received rent from the shops they had ceased to operate. "Other operating income" of £74,850 is declared in the relevant company accounts. The rental income was received in cash from the tenants and paid into the business bank account along with the takings from Dove House and Harvey's. It does not appear that HMRC took account of the fact that some of the deposits would have been rental income not sales. The entry for Poplar Road Solihull, which we infer was payment of rent was included in the "potential sales" for the quarter.

158. We did not have the bank accounts for the 12/15 quarter, but a similar exercise was carried out with only one deposit for £650 being excluded from the potential sales of £67,059.88.

159. Mr Beard then reviewed the purchases as shown in the bank accounts. The review included columns for the date, description and amount of the payment with the fourth column listing items "related to business and normally included in returns." Whilst the fourth column excludes obvious personal payments such as Sky subscriptions and payments to Mr Georgiou, it includes a number of payments, some for several thousand pounds, which are described merely as "payment", "cheque" or "transfer". Transfers are not payments related to the business and the "payments" and "cheques" may or may not be. The analysis was only provided to the Appellant in June 2021 so he has not had an opportunity to challenge the figures in the course of the enquiry.

160. Mr Arenstein pointed out that using the initial computation produced an excess of gross sales over cash banked and expenses. It was only when Mr Tromans added in the assumed expenditure from the "missing" cash sheets that there was a cash shortfall. There were also arithmetical errors and no account was taken of the rental income received during the period. When Mr Arenstein reworked the figures, the alleged cash shortfall was very much reduced.

161. Mr Arenstein does not argue that his figures are necessarily accurate and he acknowledges that HMRC did not use these figures, but the results of the invigilation to compute the amounts of the VAT and corporation tax underpaid. However, he submits that the cash reconciliations, which were used as the basis for HMRC's view that sales and purchases were suppressed and taken into account in making their "best judgement" assessment, were flawed.

162. At some points in his evidence Mr Beard described the cash reconciliation exercise as a "credibility check" which "suggested" that sales (and purchases) had been supressed. However, it was clear that the cash reconciliation was taken into account, together with the results of the invigilation exercise in arriving at the "best judgement" assessment and in concluding that Mr Georgiou's behaviour was "deliberate". It is also clear that what began as a "suggestion" of suppressed sales and purchases became, in HMRC's eyes as the enquiry progressed, "proof" or "evidence" of such suppression. For example, in his letter of 3 September 2020 to Mr Arenstein, he says:

> "The evidence of the under declared sales referred to are from the initial cash calculations which showed the company under declaring the sales and purchases, and the result of the covert count."

163. There are also statements in HMRC's skeleton argument that the cash reconciliation "shows" that sales and purchases have been supressed.

164. The cash reconciliations do not *prove* anything. However, we accept that, together with the lack of dates and sequence numbers on the Z readings, they justified HMRC in continuing the enquiry.

165. The quantum of the assessment was based on the covert invigilation and the calculations which Mr Beard carried out as described above. The question then is whether the assessment was to "best judgement". The standard of best judgement has been considered in a series of cases.

166. The classic statement of what constitutes "best judgement" is set out in the High Court case of *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, where Woolf J. said at page 292:

> "Therefore it is important to come to a conclusion as to what are the obligations placed on the commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.
>
> Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due."

167. HMRC referred to Rahman t/a Khayam Restaurant v Customs and Excise Commissioners [1998] STC 826, where Carnwath J. considered the above passage and commented:

> "I have referred to the judgment in some detail, because there are dangers in taking Woolf J's analysis of the concept of 'best judgment' out of context. The passages I have italicised show that the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'. In substance those tests are indistinguishable from the familiar Wednesbury principles (see *Associated Provincial Picture*

Houses Ltd v Wednesbury Corp [1948] 1 KB 223). Short of such a finding, there is no justification for setting aside the assessment."

168. The Courts have further considered the concept of "best judgement" in other cases including *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 and *Queenspice Ltd v Revenue and Customs Commissioners* [2010] UKUT 111 (TCC) and *CA McCourtie* LON/92/191.

169. It is in the nature of a best judgement assessment that the figures are unlikely to be accurate and HMRC is given a fairly wide margin for error. Based on the case law, HMRC summarised the requirements for best judgement as follows. HRMC must have some information available to them and must base their judgement on all the information they have. They must act in an honest and above board way. The facts must be objectively gathered and interpreted intelligently. Clearly the calculations should be arithmetically sound and any sampling technique should be representative. A decision must not be arbitrary. The officer must stand back and consider whether the result he has arrived at is reasonable.

170. If an assessment is not to best judgement, it cannot stand. If an assessment is to best judgement, the burden shifts to the taxpayer to show what the correct liability is.

171. HMRC submit that Mr Beard's assessment met the best judgement criteria for the following reasons.

(1) The only accurate records that could be used to establish the Company's true VAT position were the results of the covert invigilation, the Z readings and cash sheets from the 09/16 period and the sales figures provided for the period from February to April 2017 from the new tills.

(2) Mr Beard considered whether the results of the invigilation, carried out in November, could be compared with the Z readings from 09/16 and concluded they could as there was no clear evidence of seasonal variations in sales.

(3) He had taken account of all the information provided by the Company and its accountant.

(4) The invigilations were carried out in the evening and did not take account of lunchtime sales which benefitted the Appellant, as did the fact that the calculated average transaction value was lower than the average during the test eat exercises.

(5) The calculation takes account of the fact that sales increased after the till visit. Mr Beard considered that this was because Mr Georgiou was declaring more sales as a result of the enquiry. We comment at this point that one would expect the suppression of sales to cease altogether when the business is the subject of an enquiry by HMRC. Mr Beard rejected the possibility that the additional sales could be due to more customers visiting the shop as purchases increased only slightly during the period, but VAT and net sales declared increased by a larger amount.

(6) Mr Beard considered whether the level of gross sales assessed were reasonable and not excessive or arbitrary and concluded that they were reasonable.

(7) Mr Beard also considered that the revised figures for the periods covered by the cash reconciliations produced a reasonable Gross Profit Ratio (GPR). Mr Arenstein had suggested that a range of 54% to 60% was reasonable for a fish and chip shop and stated that the business generally achieved 58%. The GPRs produced by the calculations from the cash reconciliations were 46.23% and 51.16%. It is not clear whether the two figures relate to the two VAT periods or the two shops.

172. Accordingly, HMRC submit that the assessment is reasonable and not arbitrary.

173. Mr Arenstein contends that the assessments are not to best judgement. He referred to a number of authorities which we have considered: *Kong's restaurant Ltd v Revenue and Customs Commissioners* [2021] UKFTT 220 (TC), *Golden Cube Ltd* [2018] UKFTT 488 (TC), *Ernest O Bustard* [2015] UKFTT 546 (TC), *Brough East Yorkshire Limited v Revenue and Customs Commissioners* [2021] UKFTT 0268 (TC), *Wei Xian Peng and Qian Hong Peng t/a Zhu Guang Restaurant* [2020] UKFTT 17 (TC), *FW Services Ltd* [2020] UKFTT 143 (TC) and *Darren Cresswell v Revenue and Customs Commissioners* [2017] UKFTT 0879 (TC).

174. Mr Beard agreed in cross-examination that the assessment was based solely on the covert invigilations and that the figures produced were then extrapolated over the four year period of trading. Mr Arenstein pointed out that the invigilations were carried out on two nights in November, only five days apart (and the Company no longer owned the business on the second night) and that the figures produced were then compared with the sales in the summer quarter in the previous year. Mr Beard admitted that this was not ideal, but he had to use the figures he had as the Company had ceased trading and no further information was forthcoming.

175. He considered that it was reasonable to extrapolate in this way given that most purchases were zero rated and the two days were a Wednesday, which represented week nights and a Friday, which represented the weekend trading.

176. The bundles contained a schedule of transactions, sales and average transactions headed (presumably by HMRC) "Dovehouse (sic)-Old Till. Till readings not credible re sales but credible re transactions". This covered the period from 27 June 2016 to 1 October 2016 plus three dates in December 2016. These are the figures which were used to calculate the average number of transactions referred to at [91] above. These figures, which HMRC accept are accurate as regards the number of transactions, show significant fluctuations in the number of transactions during the week and at the weekend. The general pattern is that there are more transactions on Wednesdays than on Mondays and Tuesdays but fewer than on Thursdays. Transactions on Fridays were usually significantly higher than those on Saturdays. Wednesdays do not therefore seem to be representative of weekdays as a whole, nor are Fridays representative of the weekend.

177. Mr Arenstein points out, in his letter to Mr Beard of 26 February 2020 that the calculation of average transactions is also arithmetically flawed in relation to both Dove House and Harvey's. HMRC have arrived at the average number for Wednesday transactions by dividing the total transactions by 15 and 14 respectively. There were, however, only 13 Wednesdays in the quarter, so the average transactions have been understated. If the correct averages are taken, the alleged suppression rate at Dove House reduces from 36.20% to 26.38%, a 37% overstatement and for Harvey's, the overstatement would be 42%, a reduction from 19.23% to 13.46%.

178. Mr Arenstein submitted that the invigilation exercise itself was flawed. There were a number of uncertainties over the observations and as none of the officers involved had been called as a witness, they could not be resolved. There were the discrepancies noted above as to whether some officers were recording individuals or groups and there were discrepancies between groups entering and the number of packages leaving. On 17 November, one officer recorded 56 "customers" at Dove House between 17.00 and 17.30. We were shown photographs of Dove House and it is unlikely that that number of customers/groups could have entered the shop in that half hour period. The photograph shows that Dove House is full with about 20 people in it. That number is out of line with the remaining observations. These points do raise, at least a question, about the reliability of the figures on which the assessment was based.

179. Mr Arenstein submitted that the figures computed using the observations made in November could not properly be compared against the recorded figures from the summer quarter the previous year.

180. Mr Beard denied that there were seasonal variations in business. He said the VAT returns showed only small differences in sales. Mr Arenstein pointed out that the variations were significant in percentage terms. Sales increased by 12% between the 06/15 quarter and the 12/15 quarter, before falling. The increase between 06/16 and 12/16 was 22%. In addition, the Land Rover plant which is located close to both shops and provides them with custom closes for two weeks in the summer. The shops also sold salads and cold food (which is zero rated) and more people bought those in the summer, rather than fish and chips. More people would be on holiday.

181. Mr Beard made an unannounced visit to Dove House (not in connection with this enquiry) on 7 June 2018, when Mr Georgiou was working there. Mr Beard said the shop was "almost empty" at 17.50 whereas HMRC recorded 56 customers between 17.00 and 17.30 and 31 customers between 17.30 and 18.00 in the November invigilation; a stark contrast.

182. We prefer Mr Arenstein's arguments. It is common sense that a fish and chip shop is likely to be busier in the winter than in the summer and the figures bear this out. Although we understand why Mr Beard used the 06/15 quarter for comparison, that does not mean that it is a reasonable comparison to make to compute the extent of the alleged suppression of sales, especially as it was a quarter from the previous year, when Mr Georgiou had only just taken over the running of the business.

183. Mr Beard asserted that there were no price rises in the period. When challenged, he said there were none disclosed. This is not correct. The original accountant, Mr Jordanou stated in his email of 3 January that selling prices increased. Mr Arenstein also raised the point in his letter of 26 February 2020. Mr Georgiou, in his witness statement, explained that prices had been increased gradually over the period.

184. As was pointed out in the communications from both agents, and as explained by Mr Gerogiou in his witness statement and in cross-examination, the increase in prices was only part of the efficiencies Mr Georgiou implemented once he got to grips with the business following his father's death. Other actions included greater advertising, special offers and loyalty cards, greater efficiency in preparing and cooking the food leading to less wastage, better portion control and joining with others in the industry to negotiate price discounts with suppliers. All this provides a cogent and credible explanation as to why purchases only increased slightly during the period, but sales increased significantly as these changes attracted back customers lost following the death and made the sales more profitable.

185. Mr Beard rejected this explanation and suggested it was a result of a reduction in the suppression of sales during the enquiry. We find this explanation neither cogent nor credible. It would be surprising if a business under investigation by HMRC which had been suppressing sales would continue to do so at all during an enquiry and it is not credible that there would have been no price rises at all over a four year period of trading.

186. Mr Beard also denied that there were any differences in the spending patterns of the customers of Dove House and Harvey's and he asserted that the menus, prices and average spend were the same in both shops. This was challenged by both agents in the email/letter referred to and by Mr Arenstein at the hearing.

187. Dove House is in an affluent area, on a main road with parking available. Harvey's is located in a much less affluent area with the clientele including those from surrounding council estates. Mr Beard used the same average spend for Dove House and Harvey's (£7.31) in the

assessment computation. See [90] above. In cross-examination, Mr Beard acknowledged that Harvey's was in a run-down area.

188. In his witness statement he said that he used the average spend per transaction for Dove House in the Harvey's computation because "it was clear from the test purchases that food items for sale were the same price". However, the test purchases made at each shop were entirely different. There were no common items at all, so it could not be "clear" that the prices were the same in each shop.

189. We accept the Appellant's evidence that prices were lower in Harvey's than Dove House and we also accept that the spend would, on the balance of probabilities, be lower in any event as the customers at Harvey's were likely to buy the cheaper items like sausages and pies, were likely to buy less overall and less likely to buy extras. Mr Georgiou gave as an example that a customer in Dove House might buy three fish and three chips, whereas customers in Harvey's might buy three fish and two chips.

190. It was not in our view reasonable to use the same average spend in the calculations.

191. Mr Beard considered it reasonable to extrapolate the results from the two nights in November 2017 back over the four years of trading. We do not agree. It could not be assumed that Mr Georgiou's father ran the business in the same way as the Appellant, who only took over part way through the period. No account was taken of the severe disruption to the business caused by Mr Georgiou senior's death. For several months, including at the busiest time of the year, Mr Georgiou was relying on a succession of friends and paid helpers to do what they could, just to keep the business going. From April 2015, when he was able to focus on the business, he found that the chaos of the previous few months had driven customers away and he had to start building the business up again and tempting the customers back. He also implemented the efficiencies discussed above in an attempt to make the business more profitable. This was a slow process, but his success was reflected in the sales and VAT figures.

192. It cannot be said that the two nights in November were representative of the whole period of trading. Apart from the disruption to the business caused by the death, the shedding of two shops, the seasonal variations, the differences between Dove House and Harvey's, the differences between transaction numbers on different days during the week and at the weekend and the efficiencies implemented, sales can vary for many random reasons. The weather, holidays, a big football match on the television and many other contingencies can affect the sales on a particular day. To say that the observed sales on two nights, five nights apart is representative of the whole period is unrealistic.

193. Nor does Mr Beard appear to have stood back and considered overall if his conclusions were credible. We expect a general "reality check" to be part of exercising best judgement and this is indeed part of HMRC's instructions to its officers. At VAEC 1510, which is headed "Best Judgement: Determine the overall credibility of your assessment", it states:

> "Once you have calculated the arrears to best judgement, you should ask yourself is this figure credible? Could the business have actually under-declared this amount of tax.
>
> The tribunal will consider the above questions. If the amount you calculate does not pass the credibility test then your assessment may not be to best judgement. Ensure you have given enough consideration to all the facts and evidence."

194. First, as we have found, Mr Georgiou did not work front of house. He did the cooking and did not take the cash. Nor could he be in both shops at once. He cashed up at the end of the day. If additional cash was being taken and not put through the till, all the staff in both shops

would have had to be complicit. This is not credible and no evidence was produced to suggest it was the case. Mr Beard asserted that Mr Georgiou would know that there was more cash than was being declared and he could have falsified the figures. But there would have to have been more cash taken. The observations during the covert invigilation and the test eats indicated that all the test eats went through the till and the staff were not trading with an open till. The actual sales as shown by the Z readings were, on 17 November, significantly more than HMRC's estimated sales-more than would be accounted for by lunchtime trade.

195. Mr Beard considered that if the electronic journal had been available to show the times of sales, it would have indicated gaps, showing when transactions were not recorded. This may or may not be the case, but the suppression rate calculated would have meant up to half the sales were not being declared and if this were the case, one would have expected it to be observed during the invigilation. In addition, the extra cash would have had to go somewhere and there were no observations of cash being put anywhere other than in the till.

196. Whilst a dishonest trader in a cash takeaway business might want to supress sales as that would reduce their VAT and income tax/corporation tax liability it is more difficult to understand why such a trader would wish to suppress purchases. In a food business, most purchases would be zero rated for VAT and so would not affect the VAT due. Purchases are relevant in calculating profits for corporation tax purposes but the profits and tax would be increased by supressing purchases.

197. HMRC allege that Mr Georgiou was engaged in a "systematic" suppression of sales (and purchases). The suppression rates calculated by HMRC were:

(1) Harvey's: 19% on Wednesdays and 26% on Fridays

(2) Dove House: 36% on Wednesdays and 49% on Fridays.

198. HMRC submitted that the scale of suppression would require a "widespread and organised" process. There is no evidence of any such process and it is not credible that an organised and systematic underdeclaration of sales would produce such widely differing suppression rates by day and shop.

199. Mr Beard did not take account of the fact that the bank statements for the relevant periods (at least, the ones in our bundles) consistently showed that the Company's account was in debit and close to its overdraft limit. One would not expect this of a profitable business.

200. Similarly, if the business was so profitable, why would Mr Georgiou have ceased trading?

201. On Mr Beard's figures, Mr Georgiou (and/or his father) had taken £850,000 out of the business over a period of four years. We do not find it credible that that amount could just disappear. When this was put to Mr Beard he asserted it was possible, but he had not looked to see whether it had affected Mr Georgiou's lifestyle as "VAT officers don't look at [personal] bank accounts".

202. HMRC did not carry out any cash up at either of the shops (as was the case in *Kong's Restaurant Ltd*) and were not present when Mr Georgiou cashed up. There was in fact no evidence of suppressed sales other than the flawed cash reconciliation exercises. HMRC's own evidence from the invigilations did not show any trading with an open till or other suspicious activity and did show that the test transactions and other purchases in the shop at the time were recorded in the till. As Mr Georgiou did not take the money from customers it is difficult to see how extra cash could have been hidden without the active assistance of all the staff which we have found to be inherently not credible. Nor did HMRC have any curiosity as to what had happened to nearly £1million which was allegedly removed from the business.

203. When we asked Mr Beard whether he had considered whether the business was in fact a loss making enterprise as the Appellant said, he was evasive in his reply. Taking into account his evidence and attitude it seems that, following the cash reconciliations which "suggested" the suppression of sales and purchases, he concluded that was the case and interpreted all the information provided and other evidence in a way which supported that conclusion.

204. We do not consider that the criteria for best judgement have been met. In particular, we do not consider that all the information provided was properly considered, there were flaws in the arithmetic and importantly, the sampling technique was far from representative. Having calculated the figures for the assessment, Mr Beard then failed to consider whether they were credible and whether the business could actually have underdeclared that amount of tax.

205. Having taken all the above into account, we conclude that the VAT assessment was not to best judgement and the assessment is accordingly invalid and cannot stand.

206. The penalties and the PLN must fall with the assessment, but as these points were fully argued, we will consider them below.

The VAT penalties

207. Ms Parlour submits that a penalty is due as the Company submitted VAT returns which contained inaccuracies leading to an understatement of tax.

208. She further submits that the degree of culpability is "deliberate".

209. Ms Parlour submits that he correct approach in considering what constitutes deliberate behaviour is that set out in *Jason Andrew v HMRC* [2016] UKFTT 0295 (TC). She stated that the Tribunal said at [48] that a deliberate penalty was "appropriate in cases were the inaccuracy was made knowingly, or without belief in its truth or recklessly". That is not in fact what the case held. At [47]-[48] the Tribunal said:

> "We must decide two issues. First, whether the deliberate inaccuracy in the Company's 04/14 VAT return "was attributable to" Mr Andrew. Secondly, if so, whether the portion of the Company Penalty specified by HMRC to be payable by Mr Andrew (namely 100%) is appropriate.
>
> 48. Page On the first issue, Mr Andrew completed and signed the VAT return. … There is no evidence that he took any meaningful steps to satisfy himself on the accuracy of the information before completing and signing the return, and in our view that constitutes recklessness, which it is well-established is sufficient for these purposes: per Lord Herschell in *Derry v Peek* [1886-90] All ER Rep 1 at 22:
>
> > "…fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."

210. The Tribunal was not setting out the test for deliberate behaviour, but considering whether a deliberate inaccuracy was "attributable to" Mr Andrew.

211. The correct test for deliberate behaviour is set out at [62]-[63] of *Auxulium Project Management Limited* [2016] UKFTT 249 (TC):

> "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 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."

212. This test requires actual knowledge of the inaccuracy and an intention that HMRC should take the inaccurate document to be accurate. We note that the test is based on HRMC's Compliance Handbook-its instructions to its officers. We adopt the Auxilium test.

213. HMRC's reasons for contending that the behaviour was deliberate are:

(1) The cash reconciliations "showed that the accountant was provided with information for the VAT return that did not include all the sales in 12/15 and 09/16."

(2) Mr Georgiou and his father were the people who did the cashing up. As Mr Georgiou would know that the amount of cash in the till was more than that recorded in the till report and subsequently transferred to the cash sheets, he would know that the information provided to the accountant for the VAT returns was incorrect.

(3) The scale of the underdeclared sales calculated for 12/15 and 09/16 and based on the invigilations suggest a continuous and daily recording of underdeclared sales. This "widespread and organised" process and "routine and systematic" practice meant that those responsible, i.e. Mr Georgiou, must have known that sales were deliberately omitted from the VAT returns.

(4) Mr Georgiou had failed to retain and provide copies of the Electronic Journal despite a number of requests.

(5) "…it is clear that you [Mr Georgiou] would have known the true level of sales and that the sales being recorded and declared in the VAT return were incorrect."

214. HMRC accept that the burden is on them to prove that the behaviour was deliberate. We do not consider they have discharged that burden. The cash reconciliations do not "prove" that any sales were underdeclared. Mr Beard asserted that "Following a Covert Invigilation it is clear that the records provided do not reflect the number of customers seen". It is not clear at all that that is the case for all the reasons set out above. If sales had been systematically supressed then no doubt Mr Georgiou would know about it, but we have concluded that the cash reconciliation and invigilations do not prove that that there was any suppression.

215. We are also satisfied that Mr Georgiou did not deliberately fail to provide the sales information or the Electronic Journal. As set out above, he thought, and indeed his agent at the time thought, that they were providing HMRC will all the information they needed. We do not accept that Mr Georgiou tampered with the till to remove the Electronic Journal. We found that the absence of the information was owing to an error in the machine or its programming. Indeed, the fact that Mr Georgiou had used scarce funds to buy new tills which he was assured were "HMRC compliant" in order to be able to provide the information requested is not the action of a person intent on underdeclaring VAT.

216. HMRC have not shown, on the balance of probabilities that Mr Georgiou knowingly, that is, deliberately provided HMRC with an inaccurate document.

217. HMRC argued that if the behaviour was not deliberate, it was at least "careless" but they did not make any specific submissions as to why that was the case. We infer that they assumed that as the returns were inaccurate, they must have been completed without reasonable care.

However, we are not satisfied that HMRC have demonstrated that the returns were in fact incorrect.

218. As regards the reductions in the penalties for "telling", "helping" and "giving", we consider that HMRC failed to take account of the high level of co-operation and provision of information by Mr Georgiou and his accountant during the enquiry. Once the Company ceased to trade, we would not expect any further information to be provided as the Company was insolvent, Mr Georgiou could take no further part in its affairs, and the liquidator would not provide further information as this would incur costs. If it were relevant, we would have given a greater reduction.

The PLN

219. Given our finding that the Mr Georgiou's behaviour was not deliberate, the PLN must fall away.

220. There is also a question as to the basis on which the whole of the PLN was assessed on Mr Georgiou. This can only be done if Mr Georgiou personally gained from the deliberate inaccuracies. There is no evidence that this is the case.

221. Alternatively, if the PLN was issued because the Company became insolvent, it should have been allocated between all the directors and HMRC are now out of time to assess the other directors.

The Corporation Tax assessment

222. The corporation tax assessment was issued by HMRC Officer Sue O'Connor, who gave evidence at the hearing. We found her a candid witness. Ms O'Connor raised discovery assessments in relation to accounting periods ended 31 March 2014, 2015 and 2016 and issued a Notice of determination for the period ended 31 March 2017.

223. We have set out above, at [107] to [133], how the corporation tax review was conducted.

224. Mr Arenson submitted that as Officer O'Connor had relied entirely on Officer Beard's VAT calculations as the basis for her corporation tax assessments she was not in a position to make a "discovery" that tax had been underpaid.

225. Paragraph 41 of Schedule 18 provides:

> "(1) If [an officer of Revenue and Customs][discovers] as regards an accounting period of a 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,
>
> [he] may make an assessment (a "discovery assessment") in the amount or further amount which ought in [his] opinion to be charged in order to make good to the Crown the loss of tax."

226. Mr Arenstein argues that Ms O'Connor had insufficient information to reach a conclusion that tax had been underpaid as she was told by Mr Beard only of an alleged suppression of turnover and not about the alleged suppression of purchases which would have been relevant to a corporation tax assessment.

227. Ms Parlour submits that Ms O'Connor did discover a loss of tax when she reviewed the VAT assessment which assessed undeclared cash sales, not reflected in the business's accounting records and not included in the corporation tax returns.

228. HMRC's statements about whether there were additional purchases, or only might be additional purchases, were inconsistent, but Ms Parlour submits that the cash reconciliations only suggested there might be undeclared purchases and Mr Georgiou had said there were no additional purchases. She concluded that Ms O'Connor was properly able to assess additional amounts to make good the loss of tax.

229. The threshold for making a "discovery" is a low one.

230. On the face of it, the conclusions of the VAT review indicated undeclared sales which, Ms O'Connor considered enabled her, to "discover", within paragraph 41(1) schedule 18 Finance Act 1998 (schedule 18), that there was "an amount which ought to have been assessed to tax [which] has not been assessed".

231. Having made a discovery, an officer "may make an assessment (a "discovery assessment") in the amount or further amount which ought in his opinion be charged in order to make good to the Crown the loss of tax".

232. Mr Arenstein pointed out that, although Mr Beard had been ambivalent in cross-examination on the question of suppression of purchases, there were a number of letters in which he had stated that the cash reconciliations "showed" that purchases had been supressed. In his letter of 21 June 2021, he stated:

> "…there are some changes to the calculation…though these do not affect the outcome of the original calculation that sales have been under declared and purchases have also been under declared *by a similar amount*." (emphasis added)

233. This did not affect the VAT position as most of the purchases were zero rated, but clearly, if there were additional purchases as well as additional sales, this would affect the corporation tax computation as this is based on profits, not turnover. Mr Arenstein carried out a series of computations using the cash reconciliation figures which showed that, on HMRC's own figures, the gross profits each quarter had been *overstated*. This does not, of course, show the "correct" level of profits, but illustrates that Mr Beard's conclusion on the purchases would affect the corporation tax computation. Mr Beard did not pass on to Ms O'Connor any indication that he considered that purchases had also been suppressed. Indeed at the time she issued the assessments, Ms O'Connor was unaware of the cash reconciliation exercise, the covert invigilation and all the other details of the VAT enquiry, relying solely on the VAT, and VAT penalty assessments, to inform her conclusions. She did not ask for any other documents or ask any questions about methodology or anything else. She indicated that this was "standard procedure".

234. Ms O'Connor did calculate the Gross Profit Ratio (GPR) for the business based on the revised sales figures. The average for a fish and chip chop is 51% to 58%. Ms O'Connor calculated the Company's GPR as 72% to 73%. In cross-examination she admitted that this was "not credible". Even so, she made no further enquiries as it was "not standard practice to do so". Her task was simply to look at the VAT assessment in order to see if an adjustment was required in relation to the profits for corporation tax.

235. The only request for information she made was to Mr Georgiou (in relation to the director's loan account) at a time when he was unable to act or respond on the Company's behalf.

236. Although paragraph 41 of schedule 18 does not in terms require a "best judgement" exercise, the requirement that the assessment is made "in the amount… which ought in his opinion be charged in order to make good to the Crown the loss of tax" in our view requires

the officer to exercise judgement in the light of the circumstances in order to form a reasonable opinion that there has been a loss of tax and as to the amount of the tax loss.

237. This is clearly HMRC's own view. At paragraph 2030 of HMRC's Enquiry Manual, it sets out advice to its officers in raising discovery assessments and determinations as follows:

> "When a case comes before the tribunal you should at an early stage make sure that all assessments and determinations have been properly made for all years, including any necessary alternatives.
>
> You should always send a letter slightly in advance of the actual making of the assessments warning the taxpayer and agent of what you are doing, as well as stating that the assessments are to `prevent the loss of tax'. In an enquiry case the authority for raising assessments are TMA70/S29 or FA98/SCH18/Para41. *Assessments must be to the best of your judgment.* Information on which to base a judgment may be severely limited, but care should be taken in arriving at a figure, which will ideally be neither too low nor indefensibly high. Assessments must not be inflated grossly to try and frighten the taxpayer into co-operating or settling. Such tactics can, anyway, be self-defeating if the appeals come before the tribunal. If your estimates are ludicrously high the credibility of HMRC's case may be undermined. Your case will always be stronger if you can contend for confirmation of the amounts assessed rather than determination in lower figures." (emphasis added)

238. And at EM3251:

> "Before an officer issues a discovery assessment they must first identify the quantum as accurately as possible to ensure that the correct amount of tax has been recovered.
>
> However, there will be times when it is not possible to identify the quantum accurately. If this happens the officer can use their best judgment to calculate the amount of tax due and issue the assessment. Officers should keep a record of any reasonable inferences they make from the facts available at the time they make the assessment."

239. In their closing submissions, HMRC stated that the requirements for an officer to make a discovery assessment include:

> (1) Whether the assessing officer came to the subjective conclusion that there was a loss of tax; and
>
> (2) Whether that conclusion was objectively reasonable.
>
> (3) Whether the requirements of schedule 18 are satisfied in respect of the assessments for the tax in dispute.

240. Paragraphs (1) and (2) appear to be derived from the Upper Tribunal case of *Anderson v Revenue and Customs Commissioners* [2018] 4 All ER 338. That case required a subjective belief as to the insufficiency of tax and an objective test as to the reasonableness of that belief. It was summarised in the headnote as follows:

> "…the concept of an officer discovering something involved, in the first place, an actual officer having a particular state of mind in relation to the relevant matter. That involved the application of a subjective test. For that test to be satisfied, the officer had to believe that the information available to him pointed in the direction of there being an insufficiency of tax. Such a formulation acknowledged that both the discovery had to be something more than suspicion of an insufficiency of tax and that it need not go so far as a

> conclusion that an insufficiency of tax was more probable than not. The concept of an officer discovering something also involved, in the second place, the officer's state of mind satisfying some objective criterion. That involved the application of an objective test. That was to be tested by reference to public law concepts. As regards the requirement for the action to be reasonable, that was expressed as a requirement that the officer's belief was one that a reasonable officer could form."

241. Officer O'Connor might, subjectively, have believed there was an insufficiency of tax, based solely on the VAT assessment. However, in order to constitute a "discovery", Ms O'Connor's belief of the insufficiency has to be objectively reasonable. Ms O'Connor does not seem to have exercised any judgement at all or sought to reach her own conclusion as to whether there was a loss of tax or to form her own opinion as to the amount of any loss of tax. We are not suggesting that she should have carried out a whole new enquiry of her own, but VAT and corporation tax are very different taxes and she should have considered whether it was appropriate simply to take the figures for the additional turnover from the VAT assessment and turn that into a corporation tax liability. She should also have carried out some sort of credibility check on the VAT assessment to satisfy herself it was reasonable. She must have seen some of the VAT papers at some stage as she referred to the cash reconciliations and the covert invigilations in her witness statement. She should perhaps have reviewed these before raising the assessments in order to satisfy herself that the VAT figures were reasonable so she could form her own objectively reasonable belief that there had been an insufficiency of corporation tax. Having calculated a GPR which, by her own admission, was not credible, we would have expected her to ask some questions to try and find out why this metric was so out of line with expectations and whether that indicated any flaws in the VAT enquiry which would impact her own review.

242. Ms O'Connor might have come to the subjective conclusion that there was a loss of tax based solely on the VAT assessment, but for the reasons set out above, that conclusion was not objectively reasonable and, accordingly, she did not make a "discovery" within paragraph 41 of schedule 18.

243. Further, HMRC assert that the procedural requirements of schedule 18 are satisfied.

244. Paragraph 42 of schedule 18 provides:

> "42 (1) The power to make—
>
> (a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or
>
> (b) a discovery determination, is only exercisable in the circumstances specified in paragraph 43 or 44…"

245. Those paragraphs provide:

> "43 A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) or (2) was brought about carelessly or deliberately by]—
>
> (a) the company, or
>
> (b) a person acting on behalf of the company, or
>
> (c) a person who was a partner of the company at the relevant time.
>
> 44 (1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) in a case where a notice of enquiry into the return was given…

He could not have been reasonably expected, on the basis of the information made available him before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to [an officer of Revenue and Customs] if— …"

246. HMRC simply did not address whether either of these requirements was satisfied. They asserted that Mr Georgiou's behaviour was "deliberate" or failing that careless, but this was in the context of the time limits for raising an assessment. As set out above in relation to the VAT assessment, we find that Mr Georgiou did not "deliberately" provide an inaccurate document. HMRC have not made any submissions as to why his behaviour should be regarded as careless. We have inferred that as, in their view, the VAT returns were inaccurate, he must, *ipso facto*, have failed to take reasonable care. That is not enough, in our view. In any event, HMRC have not actually proved that, on the balance of probabilities, the VAT returns were inaccurate.

247. In relation to the time limits, the normal four year limit would apply, unless HMRC could satisfy us that Mr Georgiou's behaviour was "careless" or "deliberate". They have not done so, so the assessment for year ending 2014 was, in any event, out of time.

248. In summary, Ms O'Connor did not make a valid discovery. Although she might subjectively have concluded there was a loss of tax, purely on the basis of the VAT assessment, we do not consider that the conclusion was objectively reasonable as she failed to consider whether the VAT assessment was reasonable or to seek any information at all, even when the revised profit figures produced a GPR which was not credible. Nor, for the same reasons, did she exercise best judgement in forming an opinion as to the amount of the alleged loss of tax.

249. In any event, HMRC have not shown, or attempted to show, that the requirements of paragraphs 43 or 44 of schedule 18 have been satisfied and so have not satisfied the burden of proof of showing that the discovery assessment was properly made.

250. The corporation tax assessments cannot therefore stand.

The corporation tax determination

251. As the Company did not deliver a tax return for the year ended 31 March 2017, Officer O'Connor made a determination for that year under paragraph 36 of schedule 18. This provides:

"36 (1) If no return is delivered in response to a notice requiring a company tax return, [an officer of Revenue and Customs] may determine *to the best of [his] information and belief* the amount of tax payable by the company.

(2) The power to make a determination under this paragraph becomes exercisable if no return is delivered on or before the following date—

(a) if the filing date for any return required by the notice can be ascertained, that date;

(b) if no such date can be ascertained, the later of—

(i) 18 months from the end of the period specified in the notice, or

(ii) three months from the day on which the notice was served." (emphasis added)

252. Paragraph 36(1) requires a "best judgement" to be made of the amount of tax payable. In cross-examination, Ms O'Connor said that she arrived at the figure for the 2017 assessment by

looking at the revised sales and profits which she had calculated for the previous three years. Those were:

(1) 2014: omitted sales-£160,935: revised profits-£119,403

(2) 2015: omitted sales-£245,295: revised profits-£200,967 [this was the period when there were four chip shops]

(3) 2016: omitted sales-£153,075: revised profits- £133,734

(4) 2017: omitted sales-£119,458

253. Although the alleged omitted sales were significantly less than the previous years, Ms O'Connor assessed significantly increased profits. She admitted that with hindsight it was, perhaps, "on the high side".

254. For the reasons set out above in relation to the discovery assessments, we do not consider that Ms O'Connor's assessment of the tax payable for year ended 2017 constituted a best judgement determination.

255. The corporation tax determination must also therefore fail.

The corporation tax penalties

256. As the assessments and determination have failed, the penalties fall away. However, we observe that in determining that the behaviour was deliberate, Ms O'Connor simply cut and pasted Mr Beard's reasons set out in the VAT penalty assessments and did not come to her own conclusion on this matter. For the reasons set out above, we have concluded that Mr Georgiou's behaviour was not deliberate and HMRC have not shown, on the balance of probabilities, that it was careless.

257. The reductions for "telling", "helping" and "giving" also followed those in the VAT penalty assessment and were not tailored to the corporation tax enquiry. As noted, Ms O'Connor did increase the reduction for telling as she had, in fact, only asked about the director's loan account.

The director's loan account: the loans to participators charge

258. Under section 455 Corporation Tax Act 2010, where a close company makes a loan to a "participator" (which includes a shareholder) or where a participator incurs any indebtedness to the company, and it is not repaid within nine months of the end of the accounting period, the company must pay corporation tax on the outstanding amount of the loan at 32.5% or 25% before 6 April 2016.

259. A "close company" is defined in section 439 Corporation Tax Act 2010 and is a company controlled by five or fewer participators (not merely having five or fewer participators as stated by HMRC) or controlled by participators who are directors. The Company is a close company, so the provisions apply. The burden of proof is on HMRC to prove that a loan was made to Mr Georgiou as a participator in the company.

260. Ms Parlour submitted that where cash which has not been accounted for, is extracted from the company by a participator or participators and does not appear in the company accounts, then the participator(s) incur a debt to the company in common law and this creates an overdrawn director's loan account subject to a tax charge under section 455. We agree with this general proposition.

261. HMRC allege that Mr Georgiou took the best part of £1 million, tax free, out of the Company over a four year period. That is the total of the alleged omitted sales, somehow extracted from the cash takings. As noted, Mr Georgiou was only responsible for the finances of the Company following the death of his father in any event. Even if sales were undeclared

(and HMRC have not proved this on the balance of probabilities) HMRC have not produced a shred of evidence that any money was taken by Mr Georgiou for his own use. Ms O'Connor admitted that she did not look at Mr Georgiou's lifestyle or carry out any sort of credibility check, such as an examination of personal bank statements for suspicious deposits, to consider whether he had taken the money. She had taken the view that the money from the assumed omitted sales as calculated in the VAT assessment must have gone somewhere and by default, she assumed that the director took it for his own use.

262. This does not discharge the burden of proof and the assessment made under section 455 Corporation Tax Act 2010 must fail.

DECISION

263. For the reasons set out above we have concluded:

(1) That the VAT assessment was not to best judgement and must fail

(2) Accordingly, the VAT penalties fall away, and in any event, HMRC have failed to prove, to the required standard, deliberate or careless behaviour on the part of Mr Georgiou or the Company.

(3) The VAT Personal Liability Notice falls away as Mr Georgiou's behaviour was not deliberate.

(4) The corporation tax discovery assessments do not meet the requirements of paragraphs 41 and 42 of schedule 18 and the determination does not meet the best judgement requirements of paragraph 36 of schedule 18. Accordingly the corporation tax assessment fails.

(5) It follows that the corporation tax penalties also fall away, and in any event, HMRC have failed to prove, to the required standard, deliberate or careless behaviour on the part of Mr Georgiou or the Company.

(6) We are not satisfied that Mr Georgiou took a loan from, or incurred any indebtedness to, the Company and therefore the section 455 Corporation Tax Act 2010 charge must fail.

264. In conclusion, we allow the appeal in full and set aside all the tax and penalty assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

265. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 05th DECEMBER 2022

SCHEDULE OF PRINCIPAL LEGISLATION

VALUE ADDED TAX ACT 1994

Section 73:

73 Failure to make returns etc.

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

Section 77

77 Assessments: time limits and supplementary assessments.

(1) Subject to the following provisions of this section, an assessment under section 73 ... or 76, shall not be made—

(a) more than [4 years] after the end of the prescribed accounting period or importation ... concerned, or

(b) in the case of an assessment under section 76 of an amount due by way of a penalty which is not among those referred to in subsection (3) of that section, [4 years] after the event giving rise to the penalty.

[(2) … (2A) Subject to subsection (5) below, an assessment under section 76 of a penalty under section 65 or 66 may be made at any time before the expiry of the period of 2 years beginning with the time when facts sufficient in the opinion of the Commissioners to indicate, as the case may be—

(a) that the statement in question contained a material inaccuracy, or

(b) that there had been a default within the meaning of section 66(1), came to the Commissioners' knowledge.]

FINANCE ACT 2007 SCHEDULE 24

Paragraph 1

Error in taxpayer's document

1 (1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of liability to tax,

(b) a false or inflated statement of a loss ..., or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was [careless (within the meaning of paragraph 3) or deliberate on P's part].

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

The table

VAT	VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994.
Corporation tax	Company tax return under paragraph 3 of Schedule 18 to FA 1998.

Paragraph 3

Degrees of culpability

3 (1) [For the purposes of a penalty under paragraph 1, inaccuracy in] a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate [on P's part] but P does not make arrangements to conceal it, …

Paragraph 4

Standard amount [of penalty]

[4 (1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is—

(a) for careless action, 30% of the potential lost revenue

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

Paragraph 9

Reductions for disclosure

9 [(A1) Paragraph 10 provides for reductions in penalties—

(a) under paragraph 1 where a person discloses an inaccuracy that involves a domestic matter,

…

(A2) …

(A3) Sub-paragraph (1) applies where a person discloses—

(a) an inaccuracy that involves a domestic matter, …

(1) A person discloses [the matter] by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy [the inaccuracy attributable to the [supply of false information] or withholding of information, or the] under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy [the inaccuracy attributable to the [supply of false information] or withholding of information, or the] under-assessment is fully corrected.

Paragraph 10

10 (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a

disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
70%	35%	20%
100%	50%	30%

Paragraph 19

Companies: officers' liability

19

(1) Where a penalty under paragraph 1 is payable by a company for a deliberate inaccuracy which was attributable to an officer [of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC] may specify by written notice to the officer.

(2) Sub-paragraph (1) does not allow HMRC to recover more than 100% of a penalty.

(3) In the application of sub-paragraph (1) to a body corporate [other than a limited liability partnership] "officer" means—

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006 (c 46)), . . .

[(aa) a manager, and]

(b) a secretary.

CORPORATION TAX ACT 2010: SCHEDULE 18: COMPANY TAX RETURNS, ASSESSMENTS ETC

Paragraph 36

Determination of tax payable if no return delivered in response to notice

36 (1) If no return is delivered in response to a notice requiring a company tax return, [an officer of Revenue and Customs] may determine to the best of [his] information and belief the amount of tax payable by the company.

(2) The power to make a determination under this paragraph becomes exercisable if no return is delivered on or before the following date—

(a) if the filing date for any return required by the notice can be ascertained, that date;

(b) if no such date can be ascertained, the later of—

(i) 18 months from the end of the period specified in the notice, or

(ii) three months from the day on which the notice was served.

(2) The accounting period or periods for which a determination may be made are—

(a) if there is only one accounting period ending in or at the end of the period specified in the notice, that period;

(b) …

(4) Notice of a determination under this paragraph must be served on the company, stating the date on which the determination is issued

Paragraphs 41 to 44: Discovery assessments

Assessment where loss of tax discovered or determination of amount discovered to be incorrect

41 (1) If [an officer of Revenue and Customs][discovers] as regards an accounting period of a 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,

[he] may make an assessment (a "discovery assessment") in the amount or further amount which ought in [his] opinion to be charged in order to make good to the Crown the loss of tax….

Restrictions on power to make discovery assessment or determination

42 (1) The power to make—

(a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or

(b) a discovery determination, is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below….

[**Loss of tax brought about carelessly or deliberately]**

43 A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) or (2) [was brought about carelessly or deliberately by]—

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time.

Situation not disclosed by return or related documents etc.

44 (1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when [an officer of Revenue and Customs]—

(a) ceased to be entitled to give a notice of enquiry into the return, or

… [he] could not have been reasonably expected, on the basis of the information made available to [him] before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to [an officer of Revenue and Customs] if—

(a) it is contained in a relevant return by the company or in documents accompanying any such return, or (b) … or

(c) … or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1) or (2)—

(i) could reasonably be expected to be inferred by [an officer of Revenue and Customs] from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing to [an officer of Revenue and Customs] by the company or a person acting on its behalf.

(3) In sub-paragraph (2)— "relevant return" means the company's company tax return for the period in question or either of the two immediately preceding accounting periods,…

Paragraph 46

General time limits for assessments

46 (1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than [4 years] after the end of the accounting period to which it relates.

[(2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).

(2A) An assessment in a case involving a loss of tax—

(a) brought about deliberately by the company (or a related person),…

may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(2B) In this paragraph "related person", in relation to a company, means—

(a) a person acting on behalf of the company, or

(b) a person who was a partner of the company at the relevant time.]

CORPORATION TAX ACT 2010

Section 455

455 Charge to tax in case of loan to participator

[(1) This section applies if a close company makes a loan or advances money to—

(a) a relevant person who is a participator in the company or an associate of such a participator, …

(2) There is due from the company, as if it were an amount of corporation tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to [such percentage of the amount of the loan or advance as corresponds to the dividend upper rate specified in section 8(2) of ITA 2007 for the tax year in which the loan or advance is made] .

(3) Tax due under this section in relation to a loan or advance is due and payable in accordance with section 59D of TMA 1970 on the day following the end of the period of 9 months from the end of the accounting period in which the loan or advance was made.

(4) For the purposes of this section and sections 456 to 459, the cases in which a close company is to be treated as making a loan to a person include a case where—

(a) that person incurs a debt to the close company, or

(b) a debt due from that person to a third party is assigned to the close company.

In such a case, the close company is to be treated as making a loan of an amount equal to the debt.

(5) …

(6) In this Chapter, "relevant person" means—

(a) an individual, or …