Neutral Citation: [2023] UKFTT 703 (TC)

Case Number: TC 08894

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2016/03127

VAT – personal liability notice – whether the assessment was correct – yes – whether the inaccuracy was deliberate – yes – whether the deliberate inaccuracy was attributable to the appellant – yes – appeal dismissed.

Heard on: 12 to 15 December 2022
and 16 February 2023
Judgment date: 9 August 2023

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MS ANN CHRISTIAN

Between

MOHAMMED NASEEMDOST

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Taher Nawaz, Chartered Accountant

For the Respondents: Miss Lucy Wilson-Barnes of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal is against a personal liability notice dated 4 December 2013 issued to Mr Mohammed Naseemdost in the sum of £271,251.60 ("the PCN"). The PCN relates to a penalty assessment against Aglow Fashions Limited ("Aglow") also dated 4 December 2013 ("the Penalty"). The relevant element of the Penalty was issued upon the basis that (on HMRC's case), Aglow had underdeclared output tax for the period ending 04/09 to the period ending 04/12 ("the Relevant Periods"), that the inaccuracies arose because of deliberate behaviour, and because such behaviour was concealed.

2. In short, HMRC's case is that Aglow's deliberate inaccuracy was attributable to Mr Naseemdost as an officer of Aglow, whereas Mr Naseemdost's case is that there was no such deliberate inaccuracy and so that no such conduct was attributable to him.

THE LEGAL FRAMEWORK

3. There was no dispute as to the legal framework and so it is convenient to set it out at this stage.

4. Schedule 24 to the Finance Act 2007 provides for penalties payable in respect of errors in a taxpayer's documents including a VAT return.

5. Paragraph 1 provides two conditions for liability to a penalty. Condition 1 is that the document contains an inaccuracy which amounts to or leads to an understatement of a liability to tax, a false or inflated statement of a loss, or a false or inflated claim to repayment of tax. Condition 2 is that the inaccuracy was careless or deliberate on P's part.

6. Paragraph 3 deals with degrees of culpability and, at 3(1)(c), defines "deliberate and concealed" as being where, "the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure)."

7. Paragraph 19 deals with a company officer's liability as follows:

> "(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.
>
> ...
>
> (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 ..."

8. Section 251(1) of the Companies Act 2006 defines a shadow director as follows:

> "(1) In the Companies Act "shadow director", in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act."

9. The burden of proof is upon HMRC to establish deliberate behaviour for the purposes of a personal liability notice (see *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) and *Osman v HMRC* [2021] UKFTT 381 (TC)).

10. The meaning of "deliberate behaviour" was explained as follows by the First-tier Tribunal (Judge Ashley Greenbank and Mr Michael Bell) in *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) at [62] and [63]:

> "[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. That 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."

11. HMRC submitted, and we accept, that although an appeal against a personal liability notice does not itself operate as an appeal against the assessment (which would have to be made by the company assessed) the Tribunal may still consider the amount of the assessment and, if appropriate, substitute a different sum for the purposes of calculating the penalty. In the context of a dishonesty penalty rather than a personal liability notice, the First-tier Tribunal (Judge Christopher Staker and Mr Leslie Brown) stated as follows in *Lamb v HMRC* [2020] UKFTT 206 (TC) (which, whilst not binding, we agree with):

> "[24] The Appellant has not appealed against the consequential "dishonesty" penalty imposed by HMRC under s 60 VATA, nor the "deliberate" penalty imposed by HMRC under Schedule 24 to the Finance Act 2007. Nevertheless, HMRC acknowledge that the making of an assessment to cover periods as far back as period 03/04 is dependent on the Appellant's behaviour being deemed to have been dishonest, and during later periods, deliberate. HMRC submit that his conduct was relevantly dishonest (relying on *Ivey v Genting Casinos (UK) Ltd t/a Crockfords* [2017] UKSC 67) and deliberate (relying on *Auxilium Project Management Ltd v Revenue and Customs* [2016] UKFTT 249 (TC)).
>
> [25] At the end of the hearing, the Tribunal was satisfied that the Appellant was not seeking to appeal against the penalties (except to the extent that any reduction in the VAT assessment would lead to a consequential reduction in the penalties), and did not take any issue with the right of HMRC to make assessments covering the periods 03/04 to 09/17 inclusive. Given the Appellant's admission referred to in paragraph 8 above, the Tribunal is in any event satisfied that the understatement of VAT liabilities was relevantly dishonest and deliberate and that HMRC were entitled to make assessments extending back to period 03/04."

12. The officer cannot be placed in a better position than the company when challenging such an assessment, and so the burden is upon the officer to establish that the assessment is incorrect. In *HMRC v Zaman* [2022] UKUT 252 (TCC), the Upper Tribunal (Upper Tribunal Judge Andrew Scott and Upper Tribunal Judge Jennifer Dean) stated as follows at [20] and [34]:

> "[20] It is, therefore, well-established law that on an appeal from an assessment to VAT the assessment stands good unless the appellant is able to produce evidence to show that it is wrong.
>
> ...
>
> [34] However, in our judgment, HMRC are plainly right that, as per their submissions that we have set out above, if the challenge to the PLN was brought on the basis that the assessment to VAT on Zamco was wrong, the legal rules relating to the way in which the assessment could have been challenged by Zamco if it had appealed the assessment remain in play in any appeal against the PLN. As we set out above, it is well-established law that it is for the taxpayer to prove, by evidence, that an assessment to VAT issued by

HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong. In our judgment, it is clear that the FTT lost sight of the fact that after establishing whether the PLN was validly issued, the evidential burden in relation to the assessment to VAT on Zamco shifted to Mr Zaman when he sought to positively challenge the assessment as the sole basis on which the PLN was invalidly issued: see the FTT's overall conclusion at [96] as to whether HMRC had discharged the burden of proof: (emphasis added)

> 'We thus find that it has not been proven, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all of Zamco's supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. Given the burden of proof on HMRC, this means that we have to allow the appeal…'"

13. The position for (as is the case here) best judgment decisions was summarised as follows by the Court of Appeal in *Customs and Excise Commissioners v Pegasus Bird Ltd* [2004] EWCA Civ 1015 at [38] *per* Carnwath LJ:

> "[21] Chadwick LJ (para 5) noted that the wording of s 83(p) reflected 'the two distinct questions' which may arise where an assessment purports to be made under s 73(1):
>
> > 'First, whether the assessment has been made under the power conferred under that section; and, second, whether the amount of the assessment is the correct amount for which the taxpayer is accountable.'
>
> Having referred with approval (para 31) to my judgment in *Rahman* (*1*) and that of Dyson J to like effect in *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553, he addressed the taxpayer's submission that because the tax due had been found to be less than half the amount of the assessment, the assessment could not have been to 'best judgment' (para 32). He regarded that as a 'non-sequitur':
>
> > 'The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or "quantum", stage of the appeal, has made different assumptions—say, as to food/drink ratios, wastage or pilferage—from those made by the commissioners. As Woolf J pointed out in *Van Boeckel* ([1981] STC 290), that does not lead to the conclusion that the assumptions made by the commissioners were unreasonable; nor that they were outside the margin of discretion inherent in the exercise of judgment in these cases. Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake—that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. *In such cases—of which the present is one—the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary* [emphasis added].'

That formulation of the 'relevant question' was part of the ratio of the decision in that case; it is binding on us, and on the tribunal in future cases.

[22] In the light of that authoritative statement of the law, I would caution against attempts to refine or add to it, by reference to individual sentences or phrases from previous judgments. In *Rahman* (*1*), as already noted I listed a number of phrases used in earlier cases as 'examples', to illustrate that the test was higher than was being submitted by the taxpayer. I added that the tests were 'indistinguishable from the familiar *Wednesbury* principles'. In retrospect, I think the reference to *Wednesbury* principles was unhelpful and a possible source of confusion, and may raise as many questions as it answers (see the comments of Neill LJ in *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941; and of the tribunal in *W H Smith Ltd v Customs and Excise Comrs* [2000] V&DR 1 at para 124). Another phrase (used by Woolf J in *Van Boeckel* [1981] STC 290) referred to the obligation of the commissioners 'fairly [to] consider all material placed before them'. As a general proposition that is uncontroversial. However, it should not be seen as providing a separate and sufficient test of the invalidity of the assessment, nor as justifying lengthy cross-examination to establish whether the relevant officers have in fact looked at *all* the available material. Even the term 'wholly unreasonable' (also used in *Van Boeckel*) may be misleading if it is treated as a separate test, rather than as simply an indication that there has been no 'honest and genuine attempt' to make a reasoned assessment.

..

[38] In the light of the above discussion, I would make four points by way of guidance to the tribunal when faced with 'best of their judgment' arguments in future cases:

(i) The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment.

(ii) Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.

(iii) In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the Commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.

(iv) There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing."

14. We were also referred by Mr Nawaz to *Han & Yau v HMRC* [2001] EWCA Civ 1048 and *King v Walden* [2001] STC 822 for the proposition that such penalties engage article 6 of the European Convention on Human Rights.

15. Further, Mr Nawaz relied upon *Darren Cresswell v HMRC* [2017] UKFTT 879 as an example of HMRC failing to establish deliberate behaviour.

FINDINGS OF FACT

Preliminary matters

16. We heard oral evidence on behalf of HMRC from Mr Mark Summers and on behalf of Mr Naseemdost from Mr Nawaz and also from Mr Naseemdost himself. All three of these witnesses provided witness statements, verified those witness statements as evidence in chief, and were cross-examined. We make the following preliminary points about the witness evidence.

17. From about October or November 2010, HMRC's investigations into Aglow's VAT affairs were conducted by Mr Peter Lott. Mr Lott was also responsible for much of the correspondence with Aglow, the calculation of HMRC's analysis of allegedly underdeclared VAT, and the assessment decisions. The penalty assessment decision issued to Aglow and the PCN issued to Mr Naseemdost were made by Mr Summers. Mr Lott has retired from the relevant department and did not give evidence. We note that Mr Summers gives evidence about the period of Mr Lott's involvement. We treat this as hearsay evidence and, as it cannot be verified by Mr Lott himself, give it limited weight insofar as it goes any further than adducing and reciting the contents of the documents prepared by Mr Lott.

18. The rest of Mr Summers' witness statement was effectively a commentary upon the documents together with an explanation of his reasoning for the penalty decision. As this was reflected in the documents themselves, Mr Summers' witness evidence adds little to our consideration save that he confirmed the explanations for the reasoning for the assessments, penalties and PLN. Nevertheless, Mr Summers was cross-examined extensively. At various points, he failed to distinguish between being talked through calculations by Mr Nawaz so that Mr Naseemdost's case could be put to him and being asked whether or not those calculations were correct. Nevertheless, it is a matter for this Tribunal as to which calculations are correct and so this too adds little to our consideration.

19. Mr Nawaz informed us that, whilst Mr Naseemdost understood English very well, he had difficulty with reading and in navigating the electronic bundle. An added difficulty emerged that only one computer was available to Mr Nawaz and Mr Naseemdost from which to view the electronic bundle. This was because (with the agreement of the parties) the hearing had been changed at short notice from an in person hearing to a video hearing by virtue of train strikes and the impact on Mr Naseemdost's ability to travel to Manchester. As such, with the agreement of Mr Nawaz, Mr Naseemdost, and (on behalf of HMRC) Miss Wilson-Barnes, we made the following accommodations: we gave time to Mr Nawaz to read out Mr Naseemdost's witness statement to him before Mr Naseemdost gave his evidence; we allowed Mr Nawaz to navigate the electronic bundle on Mr Naseemdost's behalf; and we gave Mr Naseemdost extra time whenever required. Whenever Mr Nawaz felt that cross-examination questions had been asked too quickly or that Mr Naseemdost had not understood a question, Mr Nawaz rightly interjected, and the questions were put by Miss Wilson-Barnes again.

20. For the most part, Mr Naseemdost was trying to assist the Tribunal in the course of his evidence. The overriding sense was that he remembered very little of Aglow's financial affairs. However, there were various occasions upon which Mr Naseemdost was inconsistent in his answers and gave evidence that was demonstrably wrong. By way of example, Mr Naseemdost said in his written evidence that he could not recall seeing the schedules attached to HMRC's letter dated 26 September 2012. In oral evidence, he changed this to disputing ever receiving them. However, it is clear from a letter from HMRC dated 3 December 2012 that this is not true as the letter refers to Mr Naseemdost having contacted HMRC to say that he was analysing

the figures with his accountant (it being of note that Mr Naseemdost did not dispute that that phone call took place). Further, in the course of cross-examination on invoice 932 to a customer called Flexcom, Mr Naseemdost said that the reference on the invoice to "kiddies" was correct as Flexcom only dealt with children's clothes. However, when he was then taken to some Flexcom invoices which were for ladies' clothes, he changed this to 70% children's clothes and 30% ladies' clothes, and then went on to change his mind about the percentages. It is of note that of the ten invoices issued to Flexcom only two were for children's clothing and eight were for ladies' clothing. Mr Naseemdost's evidence as to these points does not mean his evidence on this or other matters cannot be relied upon. Instead, this is merely one of the factors to be taken into account when assessing Mr Naseemdost's credibility in respect of the factual disputes within this appeal.

21. Mr Nawaz gave helpful evidence which explained his schedules. He did so in a professional way and we have no reservations whatsoever about his credibility.

22. We make the following findings of fact upon the basis of the witness evidence and the documents provided to us by the parties.

Aglow

23. Aglow was incorporated on 18 April 2001 and carried on business in the sale and manufacture of clothing. Aglow went into creditors voluntary liquidation on 24 January 2014.

24. Mr Naseemdost was a *de jure* director of Aglow between 22 March 2004 and 23 September 2009 and again from 4 October 2010 to 1 December 2013. HMRC have proceeded upon the basis that Mr Naseemdost was also a shadow director or *de facto* director of Aglow between 24 September 2009 and 3 October 2010 (and therefore for the whole of the period when Mr Naseemdost was not a *de jure* director). Mr Naseemdost has not disputed this assertion and we accept that it is the correct characterisation of his role in Aglow at the relevant times.

25. For completeness, we note that Mr Tariq Nasim (Mr Naseemdost's son) was a *de jure* director of Aglow between 23 September 2009 and 4 October 2010 and again between 5 July 2011 and 1 May 2012.

The VAT returns

26. Where the same are available within the papers before us, we set out below the relevant information declared upon Aglow's VAT returns for the Relevant Periods, together with HMRC's calculations of the zero-rated sales and zero-rated purchases which this entails. We note that Mr Naseemdost has not disputed that this is what the VAT returns declare (as distinct from later schedules and calculations setting out alternative sales and purchases figures as effectively variations to the VAT returns). The figures have been rounded to the nearest pound.

Period	Outputs	Standard rated sales	Zero rated sales	Output tax	Inputs	Input tax	Net VAT:
04/09	£190,189	£190,189	£0	£28,528	£498,391	£74,759	(£46,230)
07/09	£691,469	£323,245	£368,224	£48,487	£623,242	£93,486	(£45,000)
10/09	£889,830	£540,952	£348,878	£81,143	£892,599	£126,649	(£45,506)
01/10	£784,607	£460,504	£324,103	£72,913	£796,072	£117,911	(£44,998)
04/10	£524,437	£116,437	£408,000	£20,377	£500,844	£66,773	(£46,396)

07/10	£550,664	£147,915	£402,749	£25,885	£450,330	£70,889	(£45,004)
10/10	£193,626	n/a	n/a	£29,505	£447,048	£74,509	(£45,004)
01/11	£589,948	n/a	n/a	£38,848	£493,949	£88,168	(£49,321)
04/11	£381,957	£351,555	£30,402	£70,311	£317,849	£63,570	£6,741
07/11	£285,341	£238,015	£47,327	£47,603	£282,911	£43,861	£3,742
10/11	n/a	n/a	n/a	£19,431	n/a	n/a	(£27,164)
01/12	£55,536	£55,536	£0	£11,107	£689	£138	£10,969
04/12	£49,812	£48,812	£0	£9,963	£1,260	£252	£9,711

27. It is common ground that the zero-rated sales were for children's clothes and that the standard rated sales included ladies clothes. There is a dispute as to the extent to which the standard rated sales included fabric (about which we make our determination below).

HMRC's investigations

28. HMRC officers (Ms Laura Hartell and Mr Mark Chisman) visited Aglow's premises on 19 October 2010. Aglow's business records were uplifted for the periods 01/10, 04/10 and 07/10. A note of the visit records that Mr Naseemdost explained that he had previously manufactured clothing himself but that there was a fire in January 2009 which meant that a lot of equipment and stock had been lost. He further explained that he did not keep stock records as it would be too much work for little gain and he knew where everything was in his warehouse without the need for stock records. The note records that Mr Naseemdost said that he usually sold all the goods he purchased in each VAT quarter. The note also records that Mr Naseemdost said that 90% of his sales were garments and 10% of his sales were fabric, that it takes two to three weeks for the garments to be manufactured, and that some stock will roll over into the following VAT quarter. HMRC uplifted purchase invoices and sales invoices for the VAT periods from 01/10 to 07/10.

29. Mr Naseemdost addresses HMRC's note in his witness statement. We note that he does not say in his witness statement that the elements of the note referred to above are incorrect. In particular, as regards the assertion that Mr Naseemdost said that he usually sold all the goods he purchased in each VAT quarter, he simply provides evidence from his accounts and his insurance claim that there was stock at his premises. He does not say in his witness statement what he did or did not say to Ms Hartell and Mr Chisman in this regard. During cross-examination he disputed that he said this but does not provide any detail as to exactly what was said as regards stock.

30. In view of the detail in the record of the 19 October 2010 and the absence of any detailed alternative explanation by Naseemdost, we find that HMRC's note is an accurate record of what Mr Naseemdost said at the time.

31. The fire referred to in the note of the visit took place on 5 January 2009. A garage next to Aglow's business premises caught fire and caused extensive damage. Mr Naseemdost said, and we accept, that most of the stock other than fabric was destroyed. Although Mr Naseemdost valued the stock at £1,000,000, Aglow's eventual insurance payment was approximately £240,000 in respect of stock and approximately £360,000 for building repairs. Aglow was, however, able to salvage substantial amounts of fabric; the rolls of fabric were 80 to 100 metres in length and could be used once the first four or five metres were removed and the edges cut away.

32. Further correspondence passed between HMRC and Aglow or Aglow's then accountants. Mr Lott and Mr Chisman then carried out a visit to the offices of Aglow's then accountants on 7 March 2012. Mr Lott's note refers to a discussion about stock and that Mr Naseemdost stated that what comes in goes out, and any that is not sold remains "on the floor" at Aglow's premises. Further correspondence then followed.

33. By a letter dated 26 September 2012, Mr Lott notified Aglow of errors in the sum of £321,017 in respect of the Relevant Periods. This included duplicate input tax claimed in the sum of £25,046 in the periods 01/11, 04/11, and 07/11 ("the Input Tax Duplication") and recording errors when comparing sales invoices and sales listings resulting in further output tax in the sum of £9,337 ("the Recording Errors"). Neither the Input Tax Duplication nor the Recording Errors are the subject of the PLN. Of greater relevance is Mr Lott's position that Aglow underdeclared £286,634 of output tax in respect of sales of adult clothing between February 2009 and March 2012. Mr Lott analysed the invoices available to him and reached the view that input tax had been reclaimed on the purchase of 679,143 units of ladies clothing but that output tax had only been declared on sales of 327,500 units. He treated stock as being 105,773 units as at 31 March 2012 and so found a shortfall of 245,870 units. For the purposes of his calculations, he used a unit price of £7.42, which he calculated by reference to the sales figures available to him at the time; namely, £190,189.52 (the outputs declared on the VAT return) divided by 25,632 units (the units from the sales invoices provided to him). For this period, he also treated the whole of the 47,593 shortfall between the 73,225 units purchased and the 25,632 units declared as sold as being undeclared sales, treating the stock as at 31 March 2009 as nil. Mr Lott then applied the £7.25 unit sale price to the later periods, taking into account stock levels provided to him by Mr Naseemdost.

34. Aglow then provided further information and schedules, received by HMRC on 5 December 2012. These provided variations to the number of units sold during the Relevant Period. In his covering letter, Mr Naseemdost said that this was because some of the accounting figures that Mr Lott was working from were estimated and that these were the actual accounting figures. These schedules provide for purchases of 612,721 items of ladies clothing and sales of 491,054 items of ladies clothing.

HMRC's decisions

35. After further correspondence, notices of assessment for the Relevant Periods were sent to Aglow by a letter dated 18 February 2013. The total VAT due was £319,911, being a modest reduction from Mr Lott's letter dated 26 September 2012 but based upon substantially the same calculations.

36. A notice of penalty assessment was issued to Aglow on 4 December 2013 in the sum of £276,546.90. The penalty explanation set out HMRC's basis for finding Aglow's behaviour to be "deliberate and concealed" as follows:

> "We consider that the behaviour was 'deliberate and concealed'. This is explained below.
>
> An analysis of the records showed that the business declared considerably less S/Rated ladies clothing than it bought.
>
> The records also contained far more Z/Rated sales than was possible from that bought or manufactured.
>
> The trader was unable to explain how more children's clothing can be sold than bought or manufactured.

> Several schedules were produced by the trader to counter Mr Lott's calculations, but these contradicted information that had been provided during interview and were therefore deemed not credible."

37. The PLN was issued to Mr Naseemdost on 4 December 2013 in the sum of £271,251.60. It is only this PLN which is appealed against within these proceedings.

Further events

38. Aglow entered into creditors voluntary liquidation on 17 January 2014 and was dissolved on 5 September 2018.

39. On 4 August 2016, Mr Naseemdost signed and entered into a director disqualification undertaking for a period of six years. This undertaking included the following matters of unfitness:

> "I caused Aglow Fashions Limited ("Aglow") to submit incorrect Value Added Tax ("VAT") returns for VAT period 04/09 to VAT period 04/12, which wrongfully declared Aglow's tax liability, under-declaring tax due.
>
> In particular:
>
> I did not declare sales of clothing, estimated by HMRC as 245870 items, on the VAT returns that Aglow submitted in the period February 2009 to March 2012, for which my failing to keep records of Aglow's stock made it impossible for Her Majesty's Revenue and Customs ("HMRC") to identify these items and caused them to ensure fair quantification of the value of the additional sales, which they calculated as an additional amount of £285,527."

40. Mr Naseemdost states in his witness statement that the solicitor acting for him in the disqualification proceedings did not meet deadlines, that his defence was struck out, and that he, to use his words, "ended up having to sign a declaration" which he says appears to him to be "unsafe". However, Mr Naseemdost does not explain why he says this is "unsafe". In particular, he does not explain why he stated in an undertaking to the court that he had not declared sales of clothing if such a statement was untrue. In the absence of such an explanation, we treat the undertaking as being an admission by Mr Naseemdost to the court in those proceedings that he had not declared sales of clothing. We do not, however, treat this as being an admission that HMRC's figures are correct as the undertaking on its face refers to those as being HMRC's estimates.

41. The appeal was issued on 6 June 2016. An extension of time for bringing the appeal was granted by Judge Jennifer Dean in a decision dated 29 June 2017.

42. Prior to a hearing on 9 November 2020, Mr Naseemdost and his representatives found a schedule listing sales from 7 February 2009 to 24 April 2012 on a discarded laptop computer, which they provided to HMRC and the Tribunal ("the 2020 Schedule"). Mr Naseemdost said in evidence that this was produced a long time ago by his then accountants, Sagheer and Co and that this was from invoices which he had given to them. Mr Naseemdost's position is that the 2020 Schedule is corrupted and he does not rely upon it. There is no dispute as to Mr Naseemdost's evidence that information on the laptop computer was corrupted and so we accept that this was the case. However, we do not accept that the 2020 Schedule is itself corrupted. It appears to be a complete document, it is consecutively numbered from page 1 of 43 to page 43 of 43, it is in chronological order, and the information is legible. Notwithstanding that Mr Naseemdost does not wish to rely upon its contents, it is a document which is before us and which Mr Naseemdost has been cross-examined upon. We deal below with the accuracy or otherwise of its contents. At this stage, however, we find as a matter of fact that it is an uncorrupted document which was prepared on behalf of Mr Naseemdost and purports to be a list of Aglow's sales apparently by reference to Aglow's sales invoices.

Specific factual issues

43. We now deal with various specific factual disputes.

The availability of records

44. Mr Naseemdost asserted in the course of cross-examination that HMRC still had Aglow's original records and that he did not have sufficient access to them for him or Aglow to be able to respond to HMRC's schedules. HMRC disputes this.

45. We find as a matter of fact that HMRC did not retain the underlying records and that Aglow and Mr Naseemdost had access to them. Crucially, this is because in the course of correspondence Mr Naseemdost referred to examination of records and did not suggest that these had been retained by HMRC. This is apparent from letters from Mr Naseemdost dated 4 December 2012, 6 April 2013, and 17 December 2013.

The reliability of the invoices

46. Mr Naseemdost was emphatic that Aglow's sales invoices were genuine and accurate. He repeatedly said that his invoices were correct and any discrepancy between the invoices and any schedules were the errors of his accountants. In response to Miss Wilson-Barnes putting to him in cross-examination that he had been under-declaring Aglow's sales, Mr Naseemdost said that, "You can tell me that all day long; my sales are 100% correct." By contrast, HMRC's position was that the invoices could not be relied upon or alternatively were not for the items which Mr Naseemdost said they were for.

47. The following discrepancies between the sales invoices relied upon by Mr Naseemdost (and relied upon by Aglow in the schedules and invoices provided in support of the VAT returns) and the 2020 Schedule are of particular significance (the total prices for the entries on the 2020 Schedule being our calculations as only the quantities and unit prices are contained on the 2020 Schedule):

> (1) Invoice 47 relied upon by Mr Naseemdost describes the goods as "Kids Suits" and "Kid Mix Lot of Garments", is for £48,010, and is zero-rated. The entry for invoice 47 on the 2020 Schedule describes the goods as "L Garments" and is for 40 units at a unit price of £7.50 (therefore being a total of £300).
>
> (2) There are two invoices numbered 56 relied upon by Mr Naseemdost. The first of these describes the goods as "Poly Vixo" and "Cotton Drill", each with the narrative "FAB". The second invoice numbered 56 describes the goods as "Clearances", "Kids Skirts Suits", "Kids Trs Suits" and "Kids Tops", is for £62,470 and is zero-rated. The entry for invoice 56 on the 2020 Schedule describes the goods as "L Garments" and is for 65 units at a unit price of £6 (therefore being a total of £390).
>
> (3) Invoice 59 relied upon by Mr Naseemdost describes the goods as "Clearances", "Kids Suits" and "Kids Trs", is for £46,224, and is zero-rated. The entry for invoice 59 on the 2020 Schedule describes the goods as "L Garments" and is for 55 units at a unit price of £6.75 (therefore being a total of £371.25).
>
> (4) Invoice 65 relied upon by Mr Naseemdost describes the goods as "Clearance", "Kids Mix Garments" and "Suits", is for £44,300, and is zero-rated. The entry for invoice 65 on the 2020 Schedule describes the goods as "L Garments" and is for 50 units at a unit price of £5.75 (therefore being a total of £287.50).
>
> (5) There are two invoices numbered 69 relied upon by Mr Naseemdost. The first is dated 10 July 2009, describes the goods as "Satin Stretch Fabrics", and is for £5,500 including VAT of £837. The second is dated 12 July 2009, describes the goods as "Kids Suits", is for £40,000 and is zero-rated. There is only one entry for invoice 69 on the

2020 Schedule, which is dated 12 July 2009, describes the goods as "L Garments", is for 64 units and has no unit price listed.

(6) Invoice 70 relied upon by Mr Naseemdost describes the goods as "Clearance, "Kids Skirts", "Kids Dress", "Kids Trs", and "Kids Suits", is for £51,060 and is zero-rated. The entry for invoice 70 on the 2020 Schedule describes the goods as "L Garments" and is for 66 units at a unit price of £6 (therefore being a total of £396).

(7) Invoice 76 relied upon by Mr Naseemdost describes the goods as "Kids Suits", is for £12,900, and is zero-rated. The entry for invoice 76 on the 2020 Schedule describes the goods as "L Garments" and is for 250 units at a unit price of £5.50 (therefore being a total of £1,375).

(8) Invoice 92 relied upon by Mr Naseemdost describes the goods as "Clearances" and "Job Lot" and is for £2,397.48 plus VAT of £359.62. The entry for invoice 92 on the 2020 Schedule describes the goods as "Fabric" and is for 1,800 units at a unit price of £1.55, 1412 units at a unit price of £1.25, 1465 units at a unit price of £0.95, and 1,558 units at a unit price of £1.25 (therefore being a total of £7,894.25).

(9) Invoice 125 relied upon by Mr Naseemdost describes the goods as "Bengaline" and "Legging" and is for £500 plus VAT of £75. The entry for invoice 125 on the 2020 Schedule describes the goods as "Fabric", is for 1,995 units at a unit price of £2.35 and 2,335 units at a unit price of £2.15 (therefore being a total of £9,708.50).

(10) Invoice 605 relied upon by Mr Naseemdost describes the goods as "Kids Garments" and "Suits", is for £35,100 and is zero-rated. The entry for invoice 605 on the 2020 Schedule describes the goods as "L Dress" and is for 3,510 units at a unit price of £10 (therefore being a total of £35,100).

(11) Invoice 754 relied upon by Mr Naseemdost describes the goods as "Fabrics Georgette" and is for £12,660 plus VAT of £2,522. The entry for invoice 754 on the 2020 Schedule describes the goods as "L Jkts", "L Tops" and "L Dress", is for 975 units at a unit price of £7.50 per unit, 475 units at £6.50 per unit, and 4 units at £8 per unit (therefore being a total of £10,432).

(12) Invoice 766 relied upon by Mr Naseemdost describes the goods as "Ladies Garments" and is for £100 plus VAT of £20. The entry for invoice 766 on the 2020 Schedule describes the goods as "L Trousers" and is for 700 units at a unit price of £7.75 (therefore being a total of £5,425).

(13) Invoice 791 relied upon by Mr Naseemdost describes the goods as "Ladies Garments" and is for £90 plus VAT of £18. The entry for invoice 791 on the 2020 Schedule describes the goods as "L Garments" and is for 625 units at a unit price of £7 (therefore being a total of £4,375).

(14) Invoice 932 relied upon by Mr Naseemdost describes the goods as "Kids Suits" and "Sample", is for £10,627.50 and is zero-rated. The entry for invoice 932 on the 2020 Schedule describes the goods as "L Garment" and is for 1,635 units at a unit price of £6.50 (therefore being a total of £10,627.50).

(15) Invoice 951 relied upon by Mr Naseemdost describes the goods as "Kids Suits" is for £11,437.50 and is zero-rated. The entry for invoice 951 on the 2020 Schedule describes the goods as "L Garment" and is for 1,525 units at a unit price of £7.50 (therefore being a total of £11,437.50).

48. We find as follows in respect of these discrepancies.

49. It became clear during cross-examination (and in any event we infer from the context) that the reference to "L" means ladies' clothes and "Fab" means fabrics. All of these were therefore standard rated sales.

50. When comparing those invoices which match the entries on the 2020 Schedule, it is clear that the unit prices on the 2020 Schedule are net of any applicable VAT.

51. We do not accept Mr Naseemdost's evidence that all the invoices relied upon in support of the VAT returns or subsequently provided to HMRC were genuine or correct. This is because, as set out above, various of the invoices relied upon differ from the 2020 Schedule. Mr Naseemdost's evidence is that any discrepancy is because the 2020 Schedule is either corrupted or was compiled in error. For the reasons set out above, we do not accept that the 2020 Schedule is corrupted. Further, we find on the balance of probabilities that the 2020 Schedule reflects the documentation provided by Mr Naseemdost to the accountant who compiled the 2020 Schedule. This is for the following reasons: (as set out above) Mr Naseemdost's evidence is that his accountant compiled the 2020 Schedule a long time ago; Mr Naseemdost said that he provided all his documentation to his accountant; Mr Naseemdost has not explained where his accountant would have obtained any other documentation from; there is no logical reason why Mr Naseemdost would provide inaccurate invoices to his accountant; and, crucially, it is not part of Mr Naseemdost's evidence that he did so. We therefore infer that where there was a disparity between the invoices presented to HMRC and the invoices provided to Aglow's accountants, those provided to Aglow's accountants and contained in the 2020 Schedule were correct.

52. We note that in various cases Mr Naseemdost accepted that there were differences in how goods were described but said that the VAT would be the same notwithstanding the discrepancies with the 2020 Schedule and that it did not matter if the descriptions on the invoices were incorrect. We agree that in some instances the VAT was the same. However, this was not the case for, by way of example, the invoices set out above. In any event, this acceptance by Mr Naseemdost further serves to undermine the reliability of the body of invoices presented to HMRC.

53. As a possible explanation for duplicated invoice numbers, Mr Naseemdost said that, when he compiled an invoice, he would use a previous invoice as the template and so he may have forgotten to change the invoice number. However, he was not saying that this is what in fact happened as he when first asked about this he went on to say, "though I don't think so as my invoices are correct." Later in the cross-examination, Mr Naseemdost seemed to be firmer in his resolve that the duplicates were because he had forgotten to change the invoice number. This explanation necessarily involves all the duplicated invoices being sales. However, only one invoice in each set of duplicates was declared in the VAT returns. Regardless of the reasons for the duplication, therefore, we find that invoices are missing from the returns and so, on the basis of the 2020 Schedule, sales were underdeclared.

54. The invoices set out above are therefore examples of Mr Naseemdot presenting documents to HMRC which were incorrect or not genuine. Various of these invoices present the goods as being childrens' clothes and so zero-rated when in fact (as shown by the 2020 Schedule) they were not and were subject to the standard rate of VAT. This is particularly stark in respect of invoices 932 and 951, in which the only differences between the invoices and the 2020 Schedule are the descriptions and the applicability of the VAT as the volumes and net price are the same. Various of these invoices also present the goods as being of a lower value than they in fact were.

Young Sansi

55. The 2020 Schedule includes eight invoices to a customer named Young Sansi Limited for the period 10/11 ("the Young Sansi Invoices"). With the exception of invoice 991, each of the Young Sansi Invoices has the same invoice number as another invoice on the 2020 Schedule ("the Return Invoices"). As regards invoice 991, the Young Sansi Invoice and the Return Invoice have different descriptions and are for different sums. The Return Invoices were listed on the supporting documentation of the 10/11 VAT return but the Young Sansi Invoices were not (and were not otherwise declared on the return).

56. The relevant details of the Young Sansi Invoices (taken from the 2020 Schedule and, again, including our calculations of the totals) and the correspondingly numbered Return Invoices are as follows:

Invoice No:	Young Sansi Invoices: (description/units/unit price) *(price)*	Return Invoices: (description/units/unit price) *(price)*
972	L Garment/900/£6.60 L Garment/800/£7.00 *£11,540 plus VAT*	Ladies Garments/325/£8.00 *£2,600 plus £520 VAT*
976	L Garment/2,000/£7.50 *£15,000 plus VAT*	Ladies Garments/366/£10 *£3,660 plus £732 VAT*
980	L Garment/1,800/£7.15 *£12,870 plus VAT*	Kids Suits/770/£8.50 Kids Suits/10/£5.50 *£6,600, zero-rated*
983	L Garment/1,800/£7.15 *£12,870 plus VAT*	Kids Garments/845/£5 *£4,225, zero-rated*
985	L Garment/1,650/£7.25 L Garment/1,500/£7.00 *£22,462.50 plus VAT*	Ladies Garments/870/£6 *£5,220 plus £1,044 VAT*
988	L Garment/1,500/£7.50 L Garment/1,400/£7.00 L Garment/1,200/£6.50 *£28,850 plus VAT*	Kids Suits/550/£10 *£5,500, zero-rated*
991	L Trousers/1,000/£6.50 L Skirts/1,000/£6.75 L Tops/1,000/£6.50 *£19,750 plus VAT*	Ladies Garments/800/£6 *£4,800 plus £960 VAT*
994	L Garment/500/£6.75 L Garment/500/£6.50 L Garment/500/£6.00 *£9,625 plus VAT*	Kids Suits/555/£8 *£4,440, zero -rated*

57. Various of the Young Sansi Invoices were also apparently included in documents uplifted by HMRC and prompted the following in HMRC's notes of a meeting on 7 March (which was not the subject of contrary evidence from Mr Naseemdost):

> "After the records were removed Mr Naseemdost phoned the office to explain that there were some duplicate sales invoices in by mistake – these were all made out to Young Sansi – and had not been declared. Examination of these

> invoices showed that the invoice number and date had been duplicated but the name and amounts were not the same. All the declared invoices were cash and for lower amounts."

58. Mr Naseemdost (on behalf of Aglow) repeated on 7 January 2013 that the Young Sansi Invoices were genuine sales which had been missed as they had the same invoice numbers as other invoices. This was reinforced by calculations on behalf of Aglow which included the Young Sansi Invoices as genuine sales, as well as the provision of the 2020 Schedule itself. However, in the course of cross-examination, Mr Naseemdost refused to accept that he had generated any of the Young Sansi Invoices which were on the 2020 Schedule but not on the VAT returns. He said, "If I did not declare them then they are not generated". Further, the Young Sansi Invoices are not included in the schedules prepared by Mr Nawaz.

59. We find as follows as regards the Young Sansi Invoices.

60. As set out above, the reference to "L" means ladies' clothes. All of these were therefore standard rated sales.

61. The Young Sansi Invoices represent sales which were not declared on the 10/11 VAT return. We do not accept Mr Naseemdost's evidence that he did not generate the Young Sansi Invoices. This is because he has not provided any explanation for the invoices' existence in the records uplifted by HMRC, he has not provided any explanation for the invoices' inclusion in the 2020 Schedule, and he has not provided any explanation for why his original stance was that the Young Sansi Invoices were duplicates and later that they were genuine sales.

62. As set out in the table above, the total sum of the Young Sansi Invoices omitted from the 10/11 VAT return was £120,097.50 plus VAT in respect of 19,050 units.

Sales in 04/09

63. We note that the significance of the volume and make up of sales in 04/09 is that this impacts upon the calculation of the average sales price per unit of the ladies' clothes used for Mr Lott's calculations in later periods. Of course, the VAT treatment is the same for ladies' clothes and fabric.

64. It is Mr Naseemdost's evidence that of the £190,189.52 goods sold in the period ending 04/09, £99,005.41 represented ladies clothing and £91,184.87 represented fabric. Mr Naseemdost based this evidence on the assertion that wherever an invoice referred to a quantity with a decimal point it was referring to fabric, and also that references to types of fabric such as "Geoigette", "Plain Satin Stretch", "Satin", "Silks" and "Velvets" referred to fabric sales. Further, it is Mr Naseemdost's evidence that 35,696 units of ladies' clothes were sold as opposed to Mr Lott's calculations of 25,632 units. Mr Naseemdost bases this on Mr Nawaz's calculations from the combination of the invoices relied upon for the 04/09 VAT return and additional invoices which have become available.

65. We find as follows as regards the sales in 04/09.

66. The provision of a decimal point does not indicate fabric. Some of the invoices for the period have a decimal point when clearly referring to clothing (examples including invoice 1, which refers to 1,600.08 units of black "Satin Stretch Trs" which we take to mean trousers, invoice 2 which refers to 3664.15 "Cotton Drill Skts" which we take to mean skirts and invoice 4 which refers to 3664.15 units of "Silks Tops"). It is also not clear what the decimal point represents, as it would be surprising if it is length in metres – to use the above examples it is not likely that these refer to 1,600.08 metres or 3,664.15 metres of fabric.

67. The inclusion of the type of fabric does not itself denote a fabric sale. We note that invoice 9 refers to "Geoigette" and "Plain Satin Stretch" but also includes the description "Garments".

68. We do accept that invoice 8 is for fabric as it includes the reference "FAB". However, this is the only instance in 04/09. We also note that the unit prices are £2.15, £1,95 and £2.75, which are broadly comparable with the invoices for clearance items. As such, the inclusion of this within HMRC's calculations of average prices ought not to result in a higher average unit price for ladies' clothes. The absence of any reference to "FAB" or "Fabrics" in the descriptions on the other invoices for 04/09 reinforce our view that they are for clothing. Indeed, we note that in later periods, fabric sales are referred to by including "Fabric" in the descriptions.

69. We also note that the 2020 Schedule does not include any references to fabric in any of the invoices listed for 04/09. This in contrast to later periods which describe goods as "Fabric" where appropriate.

70. We cannot reach any conclusions as to the actual amounts of units of ladies' clothes sold during the 04/09 period. The 2020 Schedule, the available invoices, and the invoices relied upon for the 04/09 VAT return are all inconsistent. There are also two invoices numbered 31 and two invoices numbered 39 with different descriptions, quantities, and values.

Stock

71. We have already made findings above as to stock levels following the fire in January 2009. Mr Naseemdost's evidence is that as at 31 March 2009 the stock value was £233,025. This figure was taken from Aglow's accounts. Mr Naseemdost maintains that the stock values in the accounts were the result of stock takes at the end of the year.

72. We note that HMRC's calculations take into account the stock values provided by (and relied upon) Mr Naseemdost other than for 04/09. We therefore accept those stock values.

73. As regards 04/09, we note that the fire in January 2009 had destroyed Aglow's stock save that he had been able to salvage substantial amounts of fabric. As such, we find that the stock valuation of £233,025 as at 31 March 2009 would have included much of this fabric. We are not in a position to make any findings as to how much of the £233,025 this would have been.

74. Given the proximity of the fire to the 04/09 period, it is reasonable to infer that some of Aglow's purchases of ladies' garments during the period 04/09 went towards replenishing the stock. Again, however, in the absence of any documentation or witness evidence as to this, we are not in a position to make any findings as to how much of the £233,025 as at 31 March 2009 comprised ladies' garments.

THE CHALLENGE TO THE ASSESSMENTS

75. It was common ground that the challenge to the assessments was solely for the purpose of reducing (or extinguishing) the penalty within the PLN, given that any appeal against the assessments themselves would have to be brought by Aglow and no such appeal had been commenced.

Best judgment

Submissions

76. Mr Nawaz submitted that the assessments were not to best judgment. He says that Mr Lott was unreasonable in failing to take into account the sale of fabrics in 04/09, treating stock as nil and using too high an average unit price.

77. Miss Wilson-Barnes submitted that the assessment was to best judgment as Mr Lott was doing the best he could with the information available to him.

Discussion

78. We find that the assessments were to best judgment. Mr Lott was working with incomplete information and a lack of detailed explanations from Mr Naseemdost. As set out above, the invoices made available at the time of the assessments did not identify substantial fabric sales for the period 04/09 and the one invoice that did was for a similar value to clearance clothing. Similarly, the significance of stock levels is that Mr Naseemdost now effectively says that many of the purchases in the period 04/09 went into stock rather than being sold during the period. However, Mr Naseemdost has not attempted to explain how much of the stock was clothing as opposed to fabric, how much represented salvage from the fire, and, crucially, how many of the purchases during 04/09 went into stock rather than being sold. This is further complicated by the stock being expressed as monetary value rather than units. Further, HMRC had previously been told by Mr Naseemdost that Aglow usually sold all the goods he purchased in each VAT quarter.

Amount of the assessments

Submissions

79. Mr Nawaz submitted that there was no evidence of any misdeclarations of goods as children's clothing when they were in fact ladies' clothing and no failures to declare goods. He was also critical of the average sales price used for 04/09, which of course has an impact upon the remainder of the assessment. Additional invoices have also been found which have allowed Mr Nawaz, on behalf of Mr Naseemdost, to produce schedules with what he says are the accurate figures. Mr Nawaz also questions whether anyone can be sure of Mr Lott's calculations of purchases.

80. Mr Nawaz provided a summary schedule setting out Mr Naseemdost's position, which results in a modest omission of sales and duplications of input tax. The schedule also helpfully compared Mr Nawaz's calculations with various of Mr Lott's (being a tabular form of the calculations in the assessments and set out above). We have reproduced Mr Nawaz's figures but, for ease and clarity, have provided the schedule in a different format with some additional headings and calculations where appropriate or possible.

Period:	Narrative:	Mr Naseemdost's amount:	HMRC's amount:
02-03/09	Total purchases (net)	£404,206.53	£404,206.53
	Average cost per item	£5.52	£5.52
	Number purchased	73,225	73,225.00
	Total sold – net	£99,005.41	£190,189.52
	Average unit price	£2.77	£7.42
	Number sold	35,696	25,632
	Stock at 31/3/09	21,975.26 (£233,025 in proportion to sales)	0
	Additional sold	15,553.74	47,593
	Sales underdeclared	£43,139.41	£353,140.21
	Output tax (15%)	£6,470.91	£52,971.03
04/09-03/10	Units purchased	344,391	344,391
	Total sold		£864,197.00
	Units sold	287,237	155,235

	Stock	29,199	29,199
	Expected additional sales	27,955	159,957
	Value	£4,472.80	£1,186,880.94 (£7.42 per unit)
	VAT		£179,773.23
04/10-03/12	Purchases	261,527	261,527
	Value at £5.52 per unit	£1,443,629.04	£1,443,629.04
	Units sold	161,190	146,633
	Nov/Dec 11 sales	13,013	
		174,203	
	Shortfall	87,324	
	Stock increase	76,574	76,574 (29,199 at 1/4/10, 105,773 at 31/3/12)
	Shortfall after stock	10,750	38,320 (units purchase minus units sold minus stock increase)
	Value	£29,777.50	£284,334.40 (£7.42 per unit)
	VAT	£5,211.06	£53,896.08

81. Mr Nawaz reached the average unit price by separating out ladies' clothing and fabrics, reaching a unit price of £2.77 for ladies' clothes. He has calculated stock levels from Aglow's accounts. He has also calculated the units sold from schedules of sales and invoices.

82. Miss Wilson-Barnes submitted that the challenge to the assessment is without any basis. In particular, she said that the calculation of the unit price of £2.77 was flawed, there was no evidence of stock, and the invoices could not be relied upon.

Discussion

83. We do not accept that Mr Naseemdost has established that Mr Lott's calculations are wrong or provided an accurate alternative. Indeed, we find that Mr Lott's methodology is the most appropriate approach to be taken given the deficiencies in the records. This is for the following reasons.

84. As regards purchases, Mr Naseemdost has not provided any alternative calculations or records. Indeed, we note that Mr Nawaz has used HMRC's purchase figures as the basis for his own calculations. As such, we are not in a position to find that the purchases were anything other than those relied upon by HMRC.

85. For the reasons set out above, we do not accept that the invoices are accurate. As such, the schedules of sales prepared on behalf of Mr Naseemdost cannot be relied upon. This is reinforced by the fact that such schedules do not take into account the 2020 Schedule.

86. For the reasons set out above, we do not accept Mr Nawaz's calculations of the amount of fabric in the period ending 04/09. As such, we do not accept his variation to the unit price. Indeed, as we have already noted, given that the only invoice apparently relating to fabric is for a similar price to the clearance goods, its inclusion should not affect the unit price.

87. Mr Naseemdost's evidence as to the stock as at 03/09 is unsatisfactory in that it does not explain how much of this stock was pre-existing stock (particularly the salvaged fabric) and how much was newly purchased stock. We are therefore not in a position to amend the calculations upon the basis of any purchases in fact forming stock rather than being sales. In any event, we note that for the period 04/09 to 03/10, Mr Lott's calculations give Aglow the benefit of the whole of the stock, treating it as having increased from nil, which would not be the case if some of that stock is to be treated as having been purchased in the earlier period.

88. It follows that we accept Miss Wilson-Barnes' submission that there should not be any reduction in the amount of the underlying VAT due and so the amount of the penalty should not be reduced accordingly.

DELIBERATE AND CONCEALED

89. We find that the inaccuracies in the VAT returns were deliberate for the following reasons. In reaching these conclusions, we refer to the actions of Mr Naseemdost but this is of course Mr Naseemdost acting on behalf of Aglow.

90. Mr Naseemdost's evidence was that he had a clear knowledge of his goods, his sales and his stock. Indeed, his reasoning for not conducting a stock take was that he did not need to because he knew what stock he had. It was also clear that Mr Naseemdost prepared all invoices and knew the details and volumes of his sales. Athough the VAT returns were prepared by Aglow's accountants, Mr Naseemdost provided the information and documents to the accountants and signed the returns. As such, we find that he was in a position to know if invoices had not been declared on the VAT returns and, on the balance of probabilities, did know that the sales had been omitted.

91. There were numerous instances of undeclared invoices. We find that there were too many of these simply to be inadvertent (indeed, neither Mr Naseemdost nor Mr Nawaz said that they were inadvertent). The Young Sansi Invoices were particularly stark examples of this. Mr Naseemdost originally relied upon the Young Sansi Invoices and then distanced himself from them. He had no satisfactory explanation for them not being declared. We therefore find on the balance of probabilities that he knowingly withheld the Young Sansi Invoices from the return.

92. We have set out above our findings in respect of the 2020 Schedule. This reveals that either invoices had been presented as zero-rated when they were in fact standard rated or both zero-rated and standard rated sales had taken place but only the zero-rated invoices had been declared. We find that Mr Naseemdost was well aware of this as he produced the invoices and the 2020 Schedule was prepared by Aglow's accountants upon the basis of information and documents provided by Mr Naseemdost.

93. Even though he could not remember all the details given the passage of time, Mr Naseemdost was adamant that the invoices were all accurate and genuine as they were his responsibility. Indeed, he refers to them as "my invoices". It follows from our findings that the invoices were not all accurate and genuine that this was due to Mr Naseemdost rendering invoices which did not reflect the reality.

94. Mr Naseemdost seeks to blame Aglow's accountant for the inaccurate returns. However, we do not accept this. This is because Mr Naseemdost gave no explanation as to what documents he gave to his accountant or as to what information or advice the accountant gave to him.

95. We have considered whether Mr Naseemdost was acting carelessly or negligently rather than deliberately. However, it is no part of Mr Naseemdost's case that he was careless or negligent. He is clear in saying that the invoices were, as he put it, 100% correct. In any event, for the reasons set out above, we find that his conduct was deliberate.

96. We also bear in mind the scale of the misdeclarations. The assessments represent 245,870 units which were not declared with a value of over £1,800,000. Given Mr Naseemdost's knowledge of his goods, purchases, stock and sales, we find on the balance of probability that he knew that sales of this size had not been accounted for as the amounts on the returns would have been substantially less than he would have expected.

97. We are reinforced in our views by the fact that Mr Naseemdost admitted to his responsibility for under-declarations of Aglow's VAT in undertakings which he gave to the Court in the director disqualification proceedings.

98. We are also satisfied that HMRC's calculations reveal a disparity between purchases and sales throughout the Relevant Period rather than being restricted to any one particular VAT return.

99. The very nature of the deliberate conduct set out above is that it was concealed. In particular, invoices have been withheld or duplicated. It also follows from our findings above that Mr Naseemdost failed to provide full and accurate records even within the appeal.

THE PLN:

100. There were no freestanding arguments in respect of the PLN as Mr Naseemdost's case was simply that the PLN was not justified because the VAT returns were not inaccurate (or not as inaccurate as HMRC had maintained) or because the behaviour was not deliberate. For completeness, however, we find that the PLN is valid for the following reasons:

(1) Mr Naseemdost was a *de jure* or *de factor* director or shadow director throughout the relevant periods.

(2) Mr Naseemdost was directly involved in all matters relating to invoicing, purchases and sales. Indeed, there is no suggestion that anybody else was involved other than Aglow's accountant.

(3) The whole of the deliberate and concealed conduct was therefore attributable to Mr Naseemdost.

DISPOSITION

101. It follows that we dismiss the appeal for the reasons set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. 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.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 9 August 2023