Neutral Citation: [2023] UKFTT 00728 (TC)

Case Number: TC08917

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard at Taylor House, London and by video

Appeal reference: TC/2018/07459

Corporation tax and VAT - corporation tax liability included a charge under CTA s 455 – penalties for deliberate behaviour – Personal Liability Notices – HMRC failed to meet burden of proving deliberate behaviour in relation to the s 455 part of the liability – appeal allowed in part

Heard on 22 February and 1 August 2023
Judgment date: 23 August 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR MICHAEL BELL

Between

PRUTISH GOPAUL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Alan Arenstein of WLH Taxation Ltd

For the Respondents: Mrs Mary Donnelly and Ms Siobhan Brown, Litigators of HMRC's Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. In 2012, Mr Gopaul established a company, Gopaul Ltd ("the Company"), of which he was the only shareholder and director. The Company traded as a take-away pizza business under the name "Milano Pizza".

2. On 12 June 2017, HM Revenue & Customs ("HMRC") issued the Company with "best judgement" assessments under Value Added Taxes Act 1994 ("VATA"), s 73(1), charging the VAT of £74,170 because in HMRC's view it had systematically suppressed its turnover.

3. On 28 March 2018, HMRC issued the Company with a penalty of £9,128.56 under Finance Act 2007, Schedule 24 ("Sch 24") in relation to periods 02/16 to 08/16, on the basis that the behaviour had been deliberate. On the same date, HMRC issued Mr Gopaul with a personal liability notice ("PLN") under Sch 24, para 19 making him liable for 100% of the penalty on the basis that the inaccuracies were attributable to him.

4. On 11 September 2017, HMRC opened enquiries into the Company's corporation tax returns, and subsequently issued closure notices and amended assessments for the years 2016 and 2017 and discovery assessments for years 2014 and 2015. The assessments were made up of (a) corporation tax on undisclosed profits, and (b) amounts due from the Company under the loans to participators provisions at Corporation Tax Act 2010, s 455 ("s 455").

5. On 31 August 2018, HMRC issued the Company with a penalty of £71,537.75, being 56% of the total extra corporation tax, on the basis that the behaviour had been deliberate. On 4 September 2018, HMRC issued Mr Gopaul with a PLN of the same amount. Meanwhile, on 5 February 2018 the Company had entered liquidation; it was struck off on 19 August 2020.

6. Mr Gopaul appealed the PLNs to the Tribunal. We upheld the VAT PLN in full. In relation to the corporation tax, we agreed with Mr Arenstein, who appeared for Mr Gopaul, that HMRC had failed to prove that the Company had acted deliberately in relation to the s 455 part of its corporation tax liability, and in consequence we reduced the PLN to £31,399.31.

7. Mr Gopaul's appeal was thus allowed in part. The amount payable by him now totals £40,527.87 rather than the £80,666.31 originally assessed.

JURISDICTION AND BURDEN OF PROOF

8. As set out in the above summary, the Company had received both assessments and penalties, none of which had been appealed. Had they been appealed, the Company would have had the burden of displacing the VAT best judgement assessments and two closure notice amendments; HMRC would have had the burden in relation to the penalties, and the burden in relation to the two corporation tax discovery assessments would have initially rested on HMRC and then passed to the Company.

9. However, the only decisions before us were the VAT and corporation tax PLNs, on which HMRC had the burden of proof. We therefore considered whether, in deciding Mr Gopaul's appeal against those PLNs, the Tribunal had the jurisdiction to consider the underlying assessments and penalties, and if so, which party had the burden of proof.

10. We received a helpful supplementary submission on those issues from Mrs Donnelly, who with Ms Brown represented HMRC on the first hearing day. Mr Arenstein concurred with her submissions and we also agree.

11. Mrs Donnelly set out the following case law:

    (1) In *Jason Andrew v HMRC* [2016] UKFTT 0295 (TC) ("*Andrew*"), the FTT (Judge Kempster and Mrs Tanner) decided that a person issued with a PLN could also challenge the penalty issued to the company, see in particular [33]-[38] of that judgment.

(2) In *Bell & Hovers v HMRC* [2018] UKFTT 225 (TC) ("*Bell*") the FTT (Judge Dean and Mr Wilson) agreed with the FTT in *Andrew*, and held that the Tribunal had jurisdiction to consider the underlying company penalty when determining the validity of a PLN. For essentially the same reasons, the FTT also held that it could consider the assessments previously issued to the company.

(3) In *Zaman v HMRC* [2021] UKFTT 0228 (TC), Mr Zaman had challenged the PLN issued to him on the basis that the underlying assessment issued to his company, Zamco, had been incorrect. The FTT (Judge Citron and Mr Brown) followed *Andrew* and *Bell*, and held that Mr Zaman could appeal the PLN on the basis that the underlying assessment and penalty had been wrongly issued.

(4) When that case reached the Upper Tribunal ("UT") as *HMRC v Zaman* [2022] UKUT 252 (TCC), HMRC accepted the FTT had been correct in allowing Mr Zaman to challenge the underlying assessments, and the UT (Judge Andrew Scott and Judge Dean) took that as being the starting point. However, HMRC went on to submit that the FTT had misunderstood the burden of proof, and the UT agreed, saying at [34]:

> "in our judgment, HMRC are plainly right that…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…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."

12. Consistently with that case law, we approached Mr Gopaul's appeal on the basis that we could consider whether the assessments and/or the penalties issued to the Company were correct. However, the assessments and penalties themselves were not before us to decide, and the evidential burden of showing that the assessments were incorrect rested on Mr Gopaul, notwithstanding that the burden of proof in relation to the PLN rested on HMRC.

EVIDENCE

13. The Tribunal was provided with a main Bundle and a supplementary bundle which included:

(1) the correspondence between the parties, and between the parties and the Tribunal;

(2) HMRC's Notes of an unannounced visit to the Company's premises; two pages of handwritten notes; related internal correspondence and a schedule of figures from data extracted from the till records;

(3) copies of the Company's bank statements from June 2012 to May 2016 and a related HMRC schedule;

(4) HMRC's corporation tax assessments and screenshots of other information;

(5) various documents from Companies' House;

(6) various communications between Mr Gopaul and his accountants; and

(7) notes of the meeting of the Company's creditors; the liquidator's progress report; a letter from the liquidator to HMRC and a letter from the liquidator to Mr Gopaul.

14. Ms Ann Patton is an Officer in HMRC's "Taskforce and Specialist Compliance" team. She calculated the Company's VAT underpayment and issued the assessments and penalties

which underpin the VAT PLN. She provided a witness statement, gave oral evidence-in-chief led by Mrs Donnelly, was cross-examined by Mr Arenstein and re-examined by Mrs Donnelly. We found her to be an entirely honest and credible witness.

15. Mrs Vicky Mealyer is an HMRC Officer in the same team as Mrs Patton. She issued the assessments and penalties which underpin the corporation tax PLN. She provided a witness statement, gave oral evidence-in-chief led by Mrs Donnelly and was cross-examined by Mr Arenstein. We found her too to be an entirely honest and credible witness.

16. Mr Gopaul provided a witness statement, although this contained submissions and arguments and relatively few facts. He also gave oral evidence-in-chief led by Mr Arenstein, was cross-examined by Mrs Donnelly, answered questions from the Tribunal and was re-examined by Mr Arenstein. We found him to be an unreliable witness in relation to key issues in dispute, including:

(1) the recording of cash taken by the business, see §30ff;

(2) the percentage of sales which were in cash, see §34; and

(3) the use of the till to train staff, see §75(1).

FINDINGS OF FACT

17. On the basis of the evidence summarised above, including our findings on credibility, we make the findings of fact set out below. We first make findings about the Company and its business generally, followed by findings about the unannounced visit, the assessments and the liquidation. We make a number of other findings of fact later in our decision; where we do so, they are identified as such.

The Company and its business

18. Until February 2014, Mr Gopaul worked at Ladbrokes as an Area Training Manager, taking home around £1,800 pcm. One of his responsibilities was to train other staff on the use of the till, including both card and cash transactions**.** He knew and understood the process and protocols regarding cash handling, reconciliations, and the recording of erroneous transactions.

19. On 18 April 2012 the Company was incorporated, with Mr Gopaul as its sole shareholder and director. In November 2012 it began trading as a take-away pizza business; it was open from 11am to 11pm every day other than Friday and Saturday, when it closed half an hour later**.** Mrs Gopaul worked in the business; Mr Gopaul initially continued to work at Ladbrokes during the day, and in the pizza business in the evening and at weekends**.** He left Ladbrokes in March 2014 to work full-time for the Company.

20. From inception, other staff were recruited, in particular to carry out deliveries. These employees were paid in cash; no written records were kept of their names, addresses or National Insurance numbers; no PAYE returns were made and no tax or NIC deducted. The only employees registered with HMRC were Mr and Mrs Gopaul.

21. The Company had a franchise agreement with Milano Pizza ("Milano") which provided the pizza boxes, sauces and toppings; these were paid for by bank transfer. Milano also provided tills and a monitor in the kitchen which displayed customer orders.

22. The Company received some of its orders through Just Eat and some through Hungry House; others were "walk-ins" or placed by telephone. The Company had a card reader or Process Data Quickly ("PDQ") machine, as well as a terminal for Just Eat orders and one for Hungry House orders. The income from the PDQ and from the other two terminals was remitted directly to the Company's HSBC business account.

23. Each order was recorded on a touch-screen till when made, and was then transferred via the monitor to the kitchen. Drivers took a printed receipt out to customers who had asked for home delivery. Receipts were otherwise not printed unless requested, and copies were not printed and retained by the business. Till rolls and daily Z readings were not kept.

24. Cromwell Accountants Ltd ("Cromwell") was engaged to prepare the Company's VAT and corporation tax returns, as well as payslips for Mr and Mrs Gopaul's employment with the Company. Mr Gopaul's contact at Cromwell was Mr Chet Haria.

The Visit

25. On 15 June 2016, Ms Mel Bennett, an HMRC Officer from HMRC's Systems Evasion & Audit Team, together with two other Officers, made an unannounced visit ("the Visit") to the premises. Mrs Gopaul was present throughout the Visit, and Mr Gopaul was there most of the time, apart from two breaks to make pizza deliveries. On the basis of Mrs Gopaul's statement to the Officers, we find that that the business at that time had nine employees, all of whom worked part-time.

26. After talking to Mr and Mrs Gopaul, and having been given permission to do so, the Officers downloaded data from the tills and left a copy of the data stick with Mr Gopaul. Later that month, Cromwell ceased acting for the Company.

Findings about cash

27. We next make findings as to whether the Company had a cash book; how the figures for cash used in the VAT returns were derived; and about the value of cash sales.

Whether there was a cash book

28. There was conflicting evidence as to the process used by the Company in relation to cash receipts. According to HMRC's contemporaneous notes of the Visit, Mr Gopaul told HMRC during the Visit that he cashed up every night, with the cash being taken home and included in the cash book: HMRC's note records:

> "Takings are recorded in the cash book every night. The cash is rarely banked (perhaps once a month) as it is used to pay the wages in cash. The cash is taken and left at home and is only brought back to pay the wages."

29. At the hearing, Mr Gopaul said he recorded the cash every day on "a piece of paper" and called Mr Haria each week and having done so, destroyed the piece of paper on which the cash had been recorded.

30. We find the contemporaneous evidence of the HMRC meeting notes as to the existence of a cash book to be more reliable than Mr Gopaul's later evidence, given some seven years later. We also did not find it credible that Mr Gopaul, who was experienced in the recording of cash transactions, would have written the figures on pieces of paper which he destroyed after calling Mr Haria.

The cash figures used in the VAT returns

31. It was common ground that when completing the VAT returns, Mr Haria was given the Company's bank account information. There was however conflicting evidence as to what information had been given to Mr Haria about the cash received.

32. As noted above, Mr Gopaul said at the hearing that he called Mr Haria at the end of each week with the cash figure. However, at the beginning of the hearing, Mr Arenstein handed up on behalf of Mr Gopaul, a message from Mr Haria dated 4 April 2016 saying "the VAT comes to £5,006.47 and this is with cash at 22%".

33. We prefer to rely on that message than on Mr Gopaul's much later evidence, which we have already found to lack credibility. We therefore find that:

(1) the actual cash figures were not given to Mr Haria by Mr Gopaul on a weekly basis by phone;

(2) the amount of cash takings included in the VAT returns was instead estimated as a percentage of sales recorded in the Company's bank account; and

(3) the person who provided that percentage estimate was Mr Gopaul (because it could not have come from anyone else).

The value of the cash sales

34. In his evidence-in-chief, Mr Gopaul said that the percentage of sales which were in cash was 25%, and that this "increased over the years because of more marketing". Mrs Donnelly robustly challenged that evidence, asking how he knew it was correct when (on his case) he didn't keep any paperwork, and why this percentage had emerged for the first time at the hearing. Mr Gopaul was unable to answer those questions, and Ms Brown submitted that this new evidence was unreliable. We agree. It is not credible that some seven years after the Visit, Mr Gopaul was able to estimate the cash sales, but was unable to do so at any previous point, and we reject this evidence.

The VAT assessments

35. Ms Bennett reviewed the data taken from the Company's till. She identified the transaction history from 30 October 2012 through to 7 June 2016 based on the receipts which had been printed out. From that data she eliminated any reprints and duplicates, but noted that the overall total would not include cash transactions for which no invoice had been printed. As we have already found, receipts were only routinely printed for delivery customers; walk-in customers were only given a receipt if they requested one.

36. On 20 January 2017, Mrs Patton wrote to the Company to advise that its VAT Returns were not in line with the data which HMRC had obtained from the till. She said that on the basis of that data:

(1) The Company had reached the VAT threshold on 31 May 2013 with sales of £80,779.16 and should have registered from 1 July 2013. As a result, VAT of £57,839 was due in relation to sales during the long VAT period ending with 30 November 2015 ("period 11/15"); and

(2) the turnover and VAT for the following quarters had been significantly understated, as shown below:

Quarter	VAT declared	Correct VAT	Difference
02/16	6,961.13	12,279.97	£5,318.84
05/16	7,452.57	12,171.59	£4,719.02
08/16	5,961.10	12,225.67	£6,264.57
	£20,374.80	£36,677.23	£16,302.43

37. The new figures were thus over 80% higher than those declared by the Company.

38. Mr Gopaul replied to Mrs Patton's letter on 6 February 2017, saying that the differences between the till data and the turnover figures on the VAT returns had arisen because of the following: food being ordered and not collected; prank callers, or the door not being opened

when the food was delivered, together with training new employees on the till and keying errors. We make findings of fact about this evidence at §74 below.

39. On 15 March 2017, Mrs Patton replied, saying:

> "You do not agree with my calculations and have detailed the reasons why in your letter. In order for me to understand how you get your daily gross take figure each evening, please detail your procedure for cashing up every night and how you arrive at your Daily gross taking figure, including all the adjustments you make, to cover the reasons you have previously mentioned. How do you know what customers have not paid or refused the food due to lack of funds. What happens to the food that has not been collected, do you keep wastage records as evidence of the waste of food and if this is the case, can you please forward the records to me.
>
> When you have new staff that need to train on the till, why do you not use the training mode that is available to prevent any over rings on the sales. Please send in the adjustments you make on the till rolls when a trainee has made an error with the real time mode."

40. In his reply of 5 April 2017, Mr Gopaul answered only two of the above questions, saying:

(1) all the information about cash takings had been "communicated to the accountant" but Mr Haria had only returned the bank statements to Mr Gopaul; and

(2) the Company did not keep wastage records.

41. On 12 June 2017, Mrs Patton issued assessments under VATA s 73 in the amounts set out above (rounded down); the overall total was £74,170. Mr Gopaul asked for a statutory review, but the review officer upheld the assessments by letter issued on 16 August 2017. There was no appeal to the Tribunal.

42. On 23 November 2017, Mrs Patton advised that she was about to "start penalty action" on the basis that the Company's actions had been deliberate. On 2 December 2017, Mr Gopaul replied, repeating his earlier statements about wastage, training and customers being unwilling to pay for their orders.

43. On 22 January 2018, Mrs Patton received an email forwarded from HMRC's Insolvency Unit dated 17 January 2018 advising that the Company was entering liquidation. On 15 February 2018, Mrs Patton issued the Company with a penalty explanation letter, stating that penalties would be charged at £13,881.36 for period 11/15 and further penalties would be issued for the following three quarters for amounts which totalled £9,128.56; Mrs Patton also told Mr Gopaul that these amounts had been calculated on the basis that the behaviour had been prompted and deliberate, but that she had allowed some mitigation.

44. On 11 April 2018, Mrs Patton issued penalties to the Company in the same amounts, and on the same day, issued Mr Gopaul with two PLNs, one for 100% of the £13,881.36 penalty, and one for 100% of the penalties totalling £9,128.56.

45. On 2 May 2018, HMRC received a new agent authority from Simmons Gainsford LLP ("SGL") to act for Mr Gopaul, and on 14 June 2018, SGL asked for a statutory review of the VAT PLNs. On 6 August 2018, Mrs Patton replied, saying:

> "In preparing my case for this review request, I have noticed that Mr Gopaul has received a Personal Liability notice for the quarter 11/15. As this is a missing return and the behaviour is an under assessment, a Personal liability notice is not applicable. I will take steps to have this one for £13,881.36

> formally withdrawn. The remaining notice for £9,128.56 has been sent for review as requested."

46. The PLN relating to the penalty for period 11/15 was subsequently withdrawn and the position remained as follows:

Quarter	VAT under declared	Percentage	Penalty
02/16	£5,318.84	56%	£2,978.08
05/16	£4,719.02	56%	£2,642.64
08/16	£6,264.57	56%	£3,507.84
			£9,128.56

47. On 25 October 2018, the review officer upheld Mrs Patton's decision to issue that PLN, and on 19 November 2018, Mr Gopaul appealed to the Tribunal.

The corporation tax assessments

48. The Company had filed corporation tax returns for the years ended 30 September 2013 and 2014 showing losses and nil taxation; its return for 30 September 2015 showed a profit of £150 and tax of £30.

49. On 27 January 2017, having received Ms Bennett's analysis of the data taken from the Company's till which indicated significant understatements of corporation tax, Mrs Mealyer opened an enquiry into the two years ending 30 September 2013 and 30 September 2014. She asked the Company to provide relevant data, including bank statements, cash books, invoices, till rolls and Z readings and a copy of Mr Gopaul's director's loan account.

50. On 14 March 2017, as Mr Gopaul had not responded to her letter, Mrs Mealyer issued a Sch 36 Information Notice. On 5 April 2017, Mr Gopaul provided the Company's bank statements, but none of the other requested documents. On 26 June 2017, Mrs Mealyer phoned Mr Gopaul and arranged a meeting to take place on 1 August 2017, which Mrs Patton would also attend.

51. On 30 June 2017, Mrs Gopaul called Mrs Mealyer and said she and Mr Gopaul were unable to meet with HMRC because of "childcare issues". On the same day, the Company filed its corporation tax return for the year ended 30 September 2016 showing a profit of £11,184, and corporation tax of £2,236. On 11 September 2017, Mrs Patton opened enquiries into that return and into the return for the previous year.

52. Meanwhile, on 19 July 2017, Mrs Mealyer had asked Mr Gopaul further questions about the business, saying:

> "For any takeaway business I would typically expect to see all purchase invoices, Hungry House and Just Eat statements, a record of daily gross takings, till rolls or at least till roll Z readings, a record of cash income and cash expenditure with reconciliations, records of wages, company credit card statements, for franchises, a copy of the franchise agreement and documentation to support figures reported in the balance sheet of company accounts submitted. Where the trading entity is a company I would expect to see a director's loan account detailing all capital invested and withdrawals made by the director…the bank statements and lease agreements sent to HMRC do not support the returns made."

53. Of those documents, we have already found as a fact that the Company had a cash book. We also find that the Company had purchase invoices, statements from Just Eat and Hungry House, credit card statements and franchise agreements, as these documents are always

provided by the third parties in question to a business such as that run by the Company. However, Mr Gopaul did not provide Mrs Mealyer with any of those documents.

54. Mrs Mealyer also noted that capital had been introduced into the Company's bank account referenced as being from Mr and/or Mrs Gopaul, and asked for personal bank statements to support those transfers. On 4 August 2017, Mr Gopaul responded, saying:

> "I have already detailed how the accounts were prepared. All the facts and figures are available from the bank statements and yet you continue to ask the same questions over and over again. All records are available from the bank statements printed black on white."

55. He also said "it would require an enormous amount of time to search and print all my personal bank statements again as I have already destroyed them", and he added "if you guys want to bring your investigations to a swift and fast conclusion, I will pay £3,808 from my personal credit card to settle the dispute".

56. On the basis of the till data and the Company's bank account, Mrs Mealyer decided that there had been significant understatements of the corporation tax liability for the four years ending 30 September 2013 through to 2016. These understatements were made up of two elements: profits from the underdeclared sales, and failures to include the Company's liabilities under s 455. We make further findings about the s 455 liabilities at §88. On 22 December 2017, Mrs Mealyer wrote to Mr Gopaul setting out her calculations.

57. On 17 January 2018, she became aware that the Company was about to enter liquidation. On 22 January 2018, she wrote to the Company explaining the decisions she was about to issue, and on 24 January issued closure notices and revenue amendments for all four years. On 29 January 2018, she informed the Company that it would receive a penalty; this was issued on 9 March 2018 for £71,537.75; on the same day Mr Gopaul was issued with a PLN equal to 100% of the penalty.

58. HMRC acknowledged at the hearing that there had been a computational error of £1,269.78 in those calculations because the tax actually paid by the Company for the years 2015 and 2016 had been omitted, and that the correct figures were as set out below:

Year	CT on profits	s.455 charge	PLR	PLN
2013	1,516.20	0	1,516.20	849.07
2014	11,219.20	0	11,219.20	6,282.75
2015	20,517.20	32,581.0	53,098.20	29,734.99
2016	22,817.60	36,827.50	59,645.10	33,401.26
				70,268.07

59. On 3 April 2018, Mr Gopaul appealed the PLN. On 14 June 2018, SGL wrote to Mrs Mealyer, making various points and requesting a statutory review. Having considered that letter, on 18 July 2018, Mrs Mealyer vacated the closure notices for the years ending 30 September 2013 and 2014 because the procedures had been incorrect, and she also vacated the related penalty assessment and PLN.

60. On 21 August 2018, she issued discovery assessments for the same two accounting periods for the same amounts; a new penalty assessment and a new PLN followed on 4 September 2018, also in the same amounts as previously.

61. On 9 October 2018, SGL appealed the PLN on behalf of Mr Gopaul, and asked for a statutory review, but on 27 November 2018 the review officer upheld Mrs Mealyer's decision.

On 14 December 2018, Mr Gopaul appealed to the Tribunal. That appeal was subsequently consolidated with his appeal against the VAT PLN.

The sale of the business and the liquidation

62. Meanwhile, the Company had sold the pizza business on 11 January 2018 for £13,000 to Wincesh Limited, of which Mrs Gopaul was the sole shareholder and director. A meeting of creditors took place on 1 February 2018; both Mr Gopaul and Mrs Patton attended. A liquidator was appointed and the Company entered creditors voluntary liquidation. A professional firm of valuers provided a report to the liquidator, which stated that the business had been sold to Mrs Gopaul for less than its market value. HMRC also made the liquidator aware of its view as to the understatement of profits. The Insolvency Service carried out an investigation into Mr Gopaul but on 16 November 2018 decided not to take disqualification proceedings against him.

THE APPEAL GROUNDS

63. Mr Arenstein put forward the following grounds of appeal:

(1) The VAT assessments had not been made to best judgment and were too high.

(2) The corporation tax discovery assessments issued on 21 August 2018 to replace the closure notices were invalid.

(3) The corporation tax assessments were too high.

(4) HMRC had not proved that the Company acted deliberately in relation to (a) the VAT assessments, and (b) the part of the corporation tax assessments which related to the understatement of profits.

(5) HMRC had not proved that the Company acted deliberately in relation to the s 455 liabilities included in the corporation tax assessments.

(6) HMRC had allowed too little mitigation.

GROUND 1: THE VAT ASSESSMENTS

64. We first set out the law on best judgment assessments, followed by the parties' submissions and our view.

The correct approach

65. The correct approach to a "best judgment" assessment under section 73(1) VATA was set out in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) ("*Fio*") (Judge Scott and Ms Gable), in a passage approved by the Upper Tribunal in *Kyriakos Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 0255 (TCC) (Judges Herrington and Scott):

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC) (Judge Sir Steven Oliver QC).
>
> 15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):
>
> > 'In such cases…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.'
>
> 16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:
>
> '…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment.'
>
> 17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.
>
> 18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):
>
> '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.'"

66. In *Van Boekel v HMRC* [1981] STC 390, Woolf J (as he then was) said:

> "What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

The parties' submissions

67. Mr Arenstein submitted that Mrs Patton had not exercised best judgment because she had failed to reduce the till data figure for overrings, and because her credibility checks were manifestly unreasonable.

The overrings

68. In relation to the overrings, Mr Arenstein said that:

(1) Mrs Patton should have reduced the figures derived from the till data to take into account overrings arising from the points identified by Mr Gopaul, namely food being ordered and not collected; prank callers; the customers' door not being opened when the food was delivered; training new employees on the till and keying errors.

(2) Mrs Patton had failed to take into account a letter from Integer Computers LLP, the till provider, which said that "whenever a customer receipt is printed, InTouch

includes the details of that order in the text file. If a printed order is subsequently cancelled, InTouch does not remove the details of that order from the text file".

69. Ms Brown responded on behalf of HMRC by saying that the VAT assessments had plainly been made to Mrs Patton's best judgment, and there was no reliable evidence to reduce the assessments. She made the following points:

(1) It was not credible that the enormous difference between the till data and the figures on the Company's VAT returns could be accounted for by the adjustments suggested by Mr Gopaul.

(2) Mrs Patton had asked Mr Gopaul to detail his procedure for cashing up every night and how he arrived at his daily gross taking figure, including all the adjustments he had made, and in particular how he knew how many sales related to customers not having paid for food which had been ordered; and to provide the list of his adjustments when a trainee made an error with the real time mode, but Mr Gopaul had never provided an answer to those questions.

(3) In addition, Mrs Patton had asked why Mr Gopaul did not use the training mode which was available on the till to prevent any overrings, but he did not answer that question either. She said that this question was particularly pertinent, given Mr Gopaul's experience at Ladbrokes.

(4) Mrs Patton had also asked whether Mr Gopaul kept wastage records as evidence of the waste of food, and to forward the records but he denied keeping any such records.

The credibility checks

70. Mr Arenstein relied on two pages of handwritten notes which Mrs Patton had said were credibility checks, and about which she was extensively cross-examined. She told Mr Arenstein that these notes were her workings to see if there was anything she could do to reduce the assessment figures derived from the till data, but that she realised that the information with which she had been provided was so sparse that she had no basis for a credibility check. She added that had Mr Gopaul given her a cash book, the position would have been different.

71. Mr Arenstein submitted that Mrs Patton acted unreasonably by failing to realise from the checks that she had carried out that the till data should not be relied on and/or by failing to carry out other credibility checks.

The Tribunal's view

72. It is clear from the case law that when considering a best judgment assessment, a Tribunal must first decide whether the HMRC officer used her best judgment in making the assessment and the second stage is to consider whether the amount assessed is correct.

73. In relation to the first stage, we find that Mrs Patton made an "honest and genuine attempt to make a reasoned assessment of the VAT payable". She used the till data which had been adjusted for reprints and duplicates, and she asked Mr Gopaul to provide supporting evidence for his assertions, but none was provided. She attempted to carry out credibility checks, but had almost no data on which to base those checks. The letter from Integer was dated 7 July 2017, so was sent to HMRC *after* Mrs Patton had issued the VAT assessments, so she could not take it into account.

74. In relation to the second stage, our primary task was to find "the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer", as Carnwath LJ stated in *Pegasus Birds*. Our starting point was that HMRC's figures were based on the till data which recorded the receipts, and from which any reprints and duplicates had been eliminated. However, as receipts were only routinely printed for deliveries, and not

for walk-in customers unless specifically requested, HMRC's figures would understate the sales, unless the understatement was eliminated or reversed by other factors such as overrings or errors.

75. However, Mr Gopaul provided us with no reliable evidence of those other factors. In particular:

(1) we found his statements that turnover was overstated because of staff training to lack credibility: he was experienced in using tills from his work at Ladbrokes and we find as a fact that he did not train staff on the till in live mode; and

(2) although we accepted that the figures had not been adjusted for overrings because of customers failing to pay, we had no way of estimating the extent of any overrings as no records were provided.

76. Mr Gopaul therefore failed to show that as a result of overrings and/or other errors the figures used by HMRC should be reduced.

Conclusion on VAT assessments

77. We find the VAT assessments were made to Mrs Patton's best judgement and we reject Mr Arenstein's challenges to the figures.

GROUND 2: THE DISCOVERY ASSESSMENTS

78. The second ground of appeal was that the two corporation tax discovery assessments made on 21 August 2018 after the cancellation of the closure notices and amendments for the same two tax years, were both invalid.

The parties' submissions

79. Mr Arenstein said in his skeleton argument:

> "We contend that there is no statutory basis for issuing new penalty assessments and, in particular, no statutory basis for issuing a new CT PLN to PG. To issue these HMRC would need to have made a new discovery, but no new discovery was made. Indeed, it was the same HMRC officer raising the new penalty assessments on exactly the same information. There was no new information, no change of view and no change of officer. Therefore there was no discovery."

80. Ms Donnelly, who drafted HMRC's skeleton argument, took this as a submission about staleness, and rejected it, saying:

> "In the case of *HMRC v Tooth* [2021] UKSC 17, the Supreme Court unanimously and comprehensively upheld the view that there is no statutory basis for the concept of staleness, and that, once an officer has discovered a loss of tax, the legislation allows that officer to make an assessment at any time, subject only to the time-limits. All these time-limits run from the end of the year of assessment, not from the date of the discovery."

81. At the hearing, Mr Arenstein clarified that he was not relying on staleness, but on the fact that the same officer, Mrs Patton, had made a second identical discovery.

82. However, when the Tribunal pointed out that there had only been a single discovery assessment for both years, albeit in the same amounts as the earlier closure notice amendments, Mr Arenstein did not seek to argue that the closure notice amendments were discoveries. He also did not put forward any other basis on which these two assessments were invalid.

83. As there was only a single discovery assessment for each of the two years, we reject this ground of appeal.

GROUND 3: THE CORPORATION TAX ASSESSMENTS

84. Mr Arenstein challenged the corporation tax assessments on the basis that they were too high, because:

(1) they had been based on the VAT figures for turnover which were also too high; and

(2) they included s 455 liabilities which were incorrect.

The VAT figures

85. We have already considered and dismissed Mr Arenstein's submissions as to the basis for the VAT assessments. Mr Arenstein did not make any separate challenge to the calculation of the profits for each of the years, and we therefore reject the submission that the corporation tax figures were too high because they were based on the VAT assessments.

Section 455

86. Section 455 is headed "Charge to tax in case of loan to participator" and so far as relevant to this case, reads as follows:

> "(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."

87. The underlined passage in subsection [2] was amended by FA 2016 s 50(1) in relation to a loan or advance made on or after 6 April 2016. However, both before and after the change, the charge was calculated at 25% of the loan, so has no effect on Mr Gopaul's appeal.

Findings of fact about the s 455 assessments

88. In Mrs Mealyer's letter to the Company of 22 January 2018 explaining the corporation tax assessments which she was about to issue, she included this paragraph:

> "It will be my intention to consider the impact of the uplift to the accounts on the Directors Loan Accounts. The omitted sales will be treated as company funds misappropriated by the directors of the company and are regarded as loans or advances to them. This gives rise to liability under CTA10/S455. Relief under CTA10/S458 is available if these misappropriated funds are repaid (or released or written off on or after 6 April 1999) during the period covered by the enquiry or subsequently. Computations of S455 duties will be submitted and further discovery assessments raised if no additional evidence is supplied."

89. Mrs Mealyer set out a schedule of her calculations, which were based on Mr Gopaul's director's current account together with adjustments taken from the Company's bank account. As a result of her calculations, Mrs Mealyer decided that Mr Gopaul had received a loan of £130,326 in the year ended 30 September 2015 and of £147,310 in the following year, making the s 455 charges £32,581.50 and £36,827.50 respectively. Those figures were included in the corporation tax assessments.

Submissions

90. Mr Arenstein submitted that the figures for the s 455 liabilities totalled £227,936, and HMRC had not provided any supporting evidence of Mr Gopaul's lifestyle or assets which would support their case that he had withdrawn that much money from the Company.

91. Ms Brown responded by saying that Mr Gopaul had been asked to provide his and Mrs Gopaul's personal bank statements, but had refused to do so. The only third party evidence available to Mrs Mealyer was the Company's bank statements, and much of Mr Gopaul's oral evidence, both in this hearing and in earlier correspondence, had lacked credibility. It was for the appellant to displace the closure notice amendments, and Mr Gopaul had not provided any reliable evidence to show that the figures calculated by Mrs Mealyer were incorrect.

The Tribunal's view and our conclusion

92. We agree with Ms Brown. The burden of showing that the corporation tax amendments were incorrect rested on Mr Gopaul. As she said, he had provided no independent third party evidence (and in particular, had not provided his or Mrs Gopaul's bank statements) to support his case that these funds had not been withdrawn by him, and he was also not a credible witness. We refuse this ground of appeal.

GROUND 4: DELIBERATE BEHAVIOUR IN RELATION TO SUPPRESSION

93. The VAT penalty was charged on the basis that the Company had deliberately understated its turnover, and part of the corporation tax penalty was similarly charged on the basis that the Company had deliberately underreported its profits. It was common ground that the burden of proof on these matters rested on HMRC.

The penalty legislation

94. FA 2007, s 97 is headed "penalties for errors", and reads:

> "(1) Schedule 24 contains provisions imposing penalties on taxpayers who
>
> (a) make errors in certain documents sent to HMRC…"

95. Sch 24, para 1 reads:

> "(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 a liability to tax…
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part."

96. A VAT return and a corporation tax return are both included in the documents listed in the Table below that paragraph.

97. Para 3 is headed "degrees of culpability" and subpara 1 reads:

> "For the purposes of a penalty under paragraph 1, an 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, and

> (c) 'deliberate and concealed' if 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)."

98. Para 4 provides that penalties which are in "category 1" namely those with no offshore element, are 30% of the "potential lost revenue" or "PLR" for careless action; 70% of the PLR for deliberate action, and 100% of the PLR where the action is both deliberate and concealed.

99. Para 5 defines the PLR as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

100. Para 9(1B) provides for a penalty for deliberate behaviour to be reduced where a person "discloses the matter" by:

(1) telling HMRC about it,

(2) giving HMRC reasonable help in quantifying the inaccuracy; and/or

(3) allowing HMRC access to records to ensure the inaccuracy is fully corrected.

101. Para 10 sets at 35% the minimum penalty for a prompted disclosure of a deliberate inaccuracy.

102. Para 19(1) provides that:

> "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."

The meaning of "deliberate"

103. In *Tooth v HMRC* [2021] UKSC 17 at [43], in the context of the Taxes Management Act 1970 ("TMA"), the Supreme Court said:

> "Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely 'inaccuracy'."

104. The Court added at [47], with reference to the relevant section of the TMA:

> "for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement."

105. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) ("*Auxilium*") the Tribunal (Judge Greenbank and Mr Bell) considered penalties charged under Sch 24, and similarly held at [63] that "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".

106. There was no dispute that the meaning of "deliberate" to be applied in Mr Gopaul's case should follow the principles established by *Tooth* and *Auxilium.*

The VAT penalty assessed on the Company

107. It was common ground that the Company's disclosure was "prompted" because HMRC only became aware of the VAT under-declaration as the result of the till data obtained at the Visit. HMRC decided that the behaviour had been deliberate but not concealed, and Mr Arenstein submitted that the Company had not acted deliberately.

HMRC's case

108. HMRC's case that the Company had acted deliberately was based on the following:

(1) The very significant difference of some 80% between (a) the sales as shown by the till analysis and (b) the turnover declared on the Company's VAT returns. In HMRC's submission, this was far more than could be accounted for by the overring explanations given by Mr Gopaul.

(2) There is also no evidence to back up Mr Gopaul's explanations, in other words, no record of cancelled orders, orders not collected, other overrings, staff training or other errors.

(3) It was not credible that Mr Gopaul, given his earlier experience at Ladbrokes, would have trained staff using the live mode on the till.

(4) Mr Gopaul had provided HMRC with no business records other than the bank statements: no Z readings, no purchase information, and no cash book.

Mr Gopaul's case

109. Mr Arenstein said HMRC had put forward "no facts or evidence…to support HMRC's assertion that either the Company or Mr Gopaul acted deliberately". He submitted that, as in *Cresswell v HMRC* [2017] UKFTT (TC), "HMRC's case on deliberateness is inherently improbable" and the necessary "cogent evidence" had not been provided.

110. He also submitted that the Company and Mr Gopaul had relied on Mr Haria of Cromwell Accounting, and that the position was similar to that of the appellant in *Cannon v HMRC* [2017] UKFTT 0859 (TC) ("*Cannon*"), who had also relied on professional advice.

Discussion and decision

111. We have no hesitation in finding that HMRC have met their burden of showing that the Company, acting through Mr Gopaul, acted deliberately in suppressing sales for VAT purposes. We reject Mr Arenstein's submission that this was merely a matter of carelessness, or that Mr Gopaul had relied on Mr Haria.

112. We come to that conclusion for the following reasons:

(1) This is not a case where the appellant mislaid one or two documents, or failed to follow some minor procedural requirement. Mr Gopaul provided HMRC with no business records: no Z readings, no day books, no cash books, no sales or purchase invoices, no till rolls, and no records of daily gross takings. We have already found that the Company had a cash book and purchase invoices, but failed to provide these to HMRC and we agree that this is because they would undermine Mr Gopaul's case.

(2) Mr Gopaul failed to retain Z readings, till rolls and daily gross takings records. In a pizza business, these are core business records. Mr Gopaul was experienced in the records which are created by tills, and in reconciling those records. His failure to retain them cannot be ascribed to carelessness.

(3) There was an 80% difference between the figures shown by the till data and those on the Company's VAT returns. This is not a case of minor discrepancies at the margin, caused by occasional oversights.

(4) Mr Gopaul's position is nowhere close to that of the appellant in *Cannon.* Mr Cannon took professional advice on a specific technical area of tax law, and reasonably relied on that advice. Mr Gopaul paid Mr Haria to complete the VAT returns on the basis of the bank account plus a cash figure which was provided by Mr Gopaul.

113. We find that the Company acted deliberately and we reject Mr Arenstein's arguments to the contrary

The corporation tax penalty relating to understated profits

114. The corporation tax penalty was similarly issued on the basis that the Company's behaviour had been prompted and deliberate, but not concealed. The part which related to understated profits was issued for the same reasons as the VAT penalties, namely Mr Gopaul's failure to retain and/or provide HMRC with the underlying records together with his knowledge of the correct procedures and the size of the shortfalls.

115. Mr Arenstein essentially repeated the submissions he had made in relation to the VAT penalties, and we have rejected those submissions for the same reasons. We find that the Company acted deliberately in suppressing its profits and uphold HMRC's decision to issue the Company with penalties on the basis that the suppression was deliberate.

GROUND 5: THE PART OF THE CORPORATION TAX PENALTIES RELATING TO S 455

116. As set out at §58, part of the penalty related to the s 455 liabilities assessed for 2015 and 2016. The burden of proving that the Company acted deliberately in understating those liabilities rested with HMRC.

The submissions and the documents

117. Mr Arenstein submitted that HMRC had failed to meet that burden, because it had not proved that the Company had acted deliberately in relation to the s 455 liabilities.

118. We reviewed the documents in the Bundle, and noted that there were only two references to s 455. One was in Mrs Mealyer's letter to the Company of 22 January 2018 explaining the corporation tax assessments she was about to issue, together with the related calculation spreadsheet, and we have set out that text at §88. It was sent out before the assessments were made, and makes no reference to the s 455 omission being deliberate.

119. The other reference was in a letter from HMRC to the Company's liquidator, stating that "as a result of Mr Gopaul's actions or inactions", the Company:

> "…failed to keep records sales sufficient to challenge a claim by HMRC in respect of underpaid VAT, Corporation Tax and liability arising under Section 455 Corporation Taxes Act 2010 and as a result did not register for VAT timeously and that Mr Gopaul knew, or reasonably ought to have known, of his duties by virtue of employment with Ladbrokes PLC."

120. The statement that Mr Gopaul "knew or ought reasonably to have known" about his "duties" is not the same as saying he knew that the Company had s 455 liabilities and "intended to mislead" HMRC by filing corporation tax returns which excluded those liabilities.

121. Nothing in HMRC's Statement of Case set out why HMRC had decided that the Company had deliberately omitted the s 455 liabilities, and Mrs Mealyer's witness statement only explained why she considered the Company had deliberately understated its profits. When the Tribunal asked Mrs Brown to respond to Mr Arenstein's challenge on this issue, she said Mr Gopaul had taken money from the Company's bank account and "this had to be deliberate".

Discussion and decision

122. Section 455 is an anti-avoidance section, the purpose of which is to discourage the owners of small companies and other "participators" from disguising distributions as loans, see *RKW Ltd v HMRC* [2014] UKFTT 151 at [199].

123. We reject Ms Brown's submission that HMRC could meet their burden of proof on this issue by relying on the fact that Mr Gopaul knew he had taken money from the Company. Instead, HMRC needed to prove that Mr Gopaul knew that the Company had a s 455 liability and intentionally omitted it from the Company's corporation tax return.

124. However, there is no evidence that Mr Gopaul even knew at the time the returns were made, that the extraction of money from his own company could trigger a corporation tax charge: nothing in the correspondence discusses his knowledge or understanding, and he was not cross-examined on this point.

125. We agree with Mr Arenstein that HMRC have failed to meet their burden of showing that the Company acted deliberately in omitting the s 455 liabilities from its corporation tax returns, and we allow this ground of appeal.

GROUND 6: MITIGATION

126. The penalty for a prompted disclosure where the behaviour was "deliberate but not concealed" is between 35% and 70%. HMRC's Compliance Handbook ("CH") gives guidance as to how officers are to apply mitigation within the statutory parameters. Although that guidance is not binding on us, it provides an appropriate methodology and also allows taxpayers to be treated in a consistent manner. Mr Arenstein did not suggest otherwise.

127. HMRC's guidance at CH94850 (for VAT) and CH82430 (for corporation tax) gives up to 30% mitigation for telling and for giving, and up to 40% for helping, and for each adds that "what is important are the timing, nature and extent" of the disclosure. .

128. Mrs Patton and Mrs Mealyer concurred on the appropriate level of mitigation to be applied to the Company's penalties, and we set out their reasoning below. Taking all those factors into account, they charged the penalties at 56% of the PLR.

Telling

129. HMRC's guidance (at CH95000 for VAT and at CH82440 for corporation tax) says that "telling" includes:

(1) admitting the inaccuracy;

(2) disclosing the inaccuracy in full; and

(3) explaining how and why the inaccuracy arose.

130. Of the available 30% for "telling", Mrs Patton and Mrs Mealyer gave the Company 10%, on the basis that Mr Gopaul's offer to settle on 4 August 2017 was in terms a partial admission that there had been under-declarations.

Helping

131. HMRC's guidance (at CH95050 for VAT and at CH2450 for corporation tax) says that "helping" encompasses:

(1) giving reasonable help in quantifying the amount due;

(2) positive assistance as opposed to passive acceptance or obstruction;

(3) actively engaging in the work to accurately quantify the amount due; and

(4) volunteering any information relevant to the disclosure.

132. Of the available 40%, Mrs Patton and Mrs Mealyer gave the Company 15% on the basis that Mr and Mrs Gopaul had provided assistance at the Visit, and Mr Gopaul had offered some explanations for the shortfalls.

Giving

133. HMRC's guidance (at CH95100 for VAT and at CH82460 for corporation tax) says that "giving" includes "a person responding positively to requests for information and documents and allowing access to their business and other records and other relevant documents" which

in turn allows HMRC to make sure that the amount due is fully quantified. The guidance adds that "giving" is "more than simply complying with requests for information".

134. Mrs Patton and Mrs Mealyer allowed 15% out of a maximum of 30%, on the basis that the Company had "allowed HMRC access to copy the till data, bank statements and equipment lease documentation". However, no further mitigation was due, because the Company did not provide "records to support turnover and profit and loss expenditure".

Mr Arenstein's submissions and discussion

135. Mr Arenstein submitted that HMRC had failed to take into account that the Company could not provide any records as it had not kept them. We disagree. We have found as facts that the Company had a cash book, and other documents such as purchase invoices, but failed to provide them. In addition, a business which fails to keep core business records should not receive a higher level of mitigation as a result: that would be to reward non-compliance.

136. Mr Arenstein also submitted that HMRC had failed to take into account that some of the documents were in the liquidator's possession. However, the liquidation took place at the beginning of 2018, some eighteen months after the Visit, and around a year after Mrs Patton first asked the Company to explain why the till data gave a much higher figure for turnover. We do not accept that the liquidation provided Mr Gopaul with a good reason for failing to provide business records.

137. Finally, Mr Arenstein said that the level of mitigation given did not reflect the assistance given to HMRC by Mr Gopaul, but he did not particularise that submission. HMRC gave 15% mitigation for helping, and 15% for giving. Having reviewed the history of the interactions between Mr and Mrs Gopaul of the one part, and HMRC of the other, in our judgment the mitigation fairly reflect the level of assistance provided. We take into account in particular that Mrs Patton had to issue a Sch 36 Notice; that the meeting arranged with Mr and Mrs Gopaul was cancelled; that the cash book and other records which were in Mr Gopaul's possession were not provided, and neither were the personal bank statements.

Conclusion on mitigation

138. We therefore confirm the mitigation given by HMRC.

THE PLNS, OVERALL CONCLUSION AND APPEAL RIGHTS

139. The PLNs were issued under Sch 24, para 19(1) on the basis that the penalties had been charged for a deliberate inaccuracy which was entirely attributable to Mr Gopaul, the only director. This was not in dispute and we confirm it to be correct.

140. We uphold the PLN of £9,128.56, being the same sum as the VAT penalties.

141. We have rejected Mr Arenstein's challenges to the corporation tax penalties to the extent they relate to undeclared profits, but have agreed with him to the extent that they relate to the s 455 liabilities. The revised figures are as follows:

Year	CT on profits	PLR	Penalty/PLN
2013	1,516.20	1,516.20	849.07
2014	11,219.20	11,219.20	6,282.75
2015	20,517.20	20,517.20	11,489.63
2016	22,817.60	22,817.60	12,777.86
Total			**£31,399.31**

142. As a result of the foregoing, the total amount due from Mr Gopaul under the PLNs has reduced from £80,666.31 to £40,527.87 (VAT PLN of £9,128.56 plus corporation tax PLN of £31,399.31).

Appeal rights

143. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 23rd AUGUST 2023