[2020] UKFTT 0017 (TC)

TC07523

VAT – assessment under section 73(1) VAT Act 1992 - whether best judgment assessment- whether taxpayer discharged the burden of proof -whether assessment out of time under section 76(1) VAT Act –whether taxpayer behaviour deliberate – appeal allowed in part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06881

BETWEEN

WEI XIAN PENG AND QIAN HONG PENG
T/A ZHU GUANG RESTAURANT **Appellant**

-and-

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

TRIBUNAL: JUDGE GETHING

Sitting in public at Taylor House, London on 11 December 2019 at 10.30

Mr Michael Firth, counsel for the Appellant

Mr Thomas Nicholson, counsel for the Respondents

DECISION

INTRODUCTION

1. The issues in this case arise out of best judgment assessments for VAT purposes issued on 1 August 2016 under section 73(6) Value Added Tax Act 1992 ("**VAT Act**") to the Appellants in respect of a restaurant business carried on by them. The assessments were in respect of the 16 quarter periods ended 30/06/2011 to 31/03/2015. The Appellants' restaurant was based in Boston Lincolnshire. HMRC conducted an investigation into the Appellants' business prompted by a suspicion of supressed turnover. In the absence of adequate records HMRC made best judgment assessments.

2. The issues are whether:

(1) the assessments made by HMRC in respect of the periods ended prior to 30/09/14 are out of time per section 73(6) - the two year time limit;

(2) the assessments made by HMRC in respect of the periods ending on or before 09/12 are in time under section 77(4) and (4A) VAT Act. These provisions require deliberate conduct on the part of the Appellants which lead to an under payment of VAT and the burden of proof is on HMRC. The Statement of Case was silent on the issue of deliberate behaviour, and

(3) the assessments raised are to the best of HMRC's judgment in accordance with section 73(1) VAT Act. The burden of proof to show that the assessments are best judgment assessments rests on HMRC.

3. We heard evidence from the Investigating Officer Mrs Jackson. Mrs Jackson worked in VAT from 1997 to 2018.

THE FACTS

4. We find the following facts from the evidence given and the witness statements and documents in the bundle and those not in the bundle but presented to the Tribunal at the hearing:

(1) The Appellants ran a Chinese restaurant in partnership which was based in Boston Lincolnshire. The premises from which the business was conducted were a former jobcentre with two frontages. The restaurant occupied half of those premises. The other half was let to a person also carrying on a restaurant business. The Appellants had not elected to tax the premises for the purposes of VAT.

(2) In 2014 HMRC decided to target the restaurant to verify its turnover. This lead to a number of under-cover visits to the restaurant in preparation for an unannounced visit at the time of cashing up. During each such visit two officers of HMRC were in attendance, one of whom was Mrs Jackson. The unannounced visits occurred on three Saturdays and one Friday.

(3) During each under-cover visit the officers sat close to the till in the hope of being able to see each occasion on which payments by card and cash were made. Mrs Jackson always sat opposite her fellow officer and always faced in the direction of the till. Mrs Jackson admitted she could not in fact see all that occurred at the till. She could hear the till and she observed the unwinding of the till roll.

(4) Mrs Jackson also admitted that observations made at the restaurant during under-cover visits were recorded in note books during the course of the evening at the restaurant, in the toilet.

(5) On the first visit on 28 November 2014 the officers arrived at 19.45 and left at 22.00. Mrs Jackson recorded that she witnessed 3 card purchases and 9 cash purchases.

The list of transactions observed by her fellow officer (3 card transactions between 20.05 and 21.30) as set out in that officer's handwritten notes does not correspond to the actual card transactions for which copies of records are available. These records show that during the time the officers were in the restaurant there were nine card transactions. Mrs Jackson accepted that HMRC's records did not show a complete picture.

(6) On the second under-cover visit on 31 January 2015 the officers arrived at 18.00 and left at 22.00. The running of the restaurant and the cash and card purchases were monitored and four twenty pound notes were used to make payment for the officers' meal. The notes were planted for future verification. The visit was followed by another unannounced visit at cashing up time. The twenty pound notes were in the till. The card transactions that evening represented 46% and the cash sales represented 54% of the turnover. It was noted on this visit that the till had no battery so that when the mains were switched off the memory was erased. Otherwise a report called a Z read report could be produced of the prior days' transactions. The bundle contained a handwritten note of the meeting which refers to Mr Peng saying the Z read was unreliable and he threw them away. Mrs Jackson's typed note of the meeting refers to Mr Peng destroying the Z read reports from the till. Under cross examination Mrs Jackson was unable to confirm that Mr Peng had used the word destroyed. I find that he had not done so.

(7) By letter on 3 February 2015 Mrs Jackson asked for records going back to January 2012 including bank statements, VAT summary sheets, daily gross takings sheets, purchase day book and Z readings. The Appellants accountant provided some information and the meal slips recording items ordered were also provided by the Appellants.

(8) The third visit occurred on 25 April 2015, it was an unannounced visit at cashing up time and HMRC recorded card sales of 35% and cash sales on 65%.

(9) Also on 25 April the Appellants were asked to self-invigilate for a period of 30 days. During this period three further tests were carried out:

(a) An officer ordered a take-away meal on 7 May 2015

(b) On 15 May there was an unannounced visit at cashing up time and card sales were at 29% and cash sales at 71%.

(c) On 23 May 2015 there was another unannounced visit at cashing up time. The card to cash sales ratio was 63%: 37%.

(10) A meeting took place on 22 February 2016 and correspondence ensued thereafter:

(a) HMRC's position as set out in a pre-assessment letter of 24 February 2016 broadly was that the Appellants' declared ratio of card to cash sales of 66%:34% was called into question by the takings on the days of the unannounced visits, three of which recorded some of the highest takings for a period.

(b) The Appellants' position was broadly that the sample HMRC had taken was too small and put forward an alternative basis drawn from the business records. These representations were rejected by Mrs Jackson who alleged that the business records were incomplete and the increase in sales could not be accounted for.

(11) Mrs Jackson made enquiries about the rental income from the adjoining premises. She indicates in her second witness statement at paragraph 7 that she had all the facts relevant to the rental payments on 23 March 2016 when she received a letter from the Appellants' Agent. The paragraph confirms that on 29 July 2016 she raised the

assessments in relation to the rental income. The assessments were enclosed in a letter dated 1 August 2016.

(12) In cross-examination:

(a) Mrs Jackson confirmed she was aware that the default position in relation to rent is that it is exempt unless the taxpayer has opted to tax. She explained that she considered she had to investigate the rental income received on the adjoining premises. Mrs Jackson considered that there can be circumstances where a person will be treated as if an option to tax has been made if the person conducts him/herself as if an option had been made. She assessed the rent notwithstanding that there was no evidence that an option to tax had been exercised and no evidence that VAT had been charged on the rent; and

(b) Mrs Jackson explained that the Appellants had assets which could not have been acquired with the declared takings and she was in touch with other colleagues to assist her assessment of the situation.

(13) The VAT assessments on the rent and the turnover of the business were sent by letter of 1 August 2016. The assessments of the VAT on the turnover are set out in a table annexed to the letter and are based on a split of card and cash sales of 37%:63%. Also attached to the assessments are tables showing the percentages of card to cash sales on the four unannounced visits which were as follows:

		Cash	Card
(a)	Saturday 31/1/15	54%	46%
(b)	Saturday 25/4/2015	65.44%	34.56%
(c)	Friday 15/05/15	70.88%	29.12%
(d)	Saturday 23/05/15	62.7%	37.3%

(14) Also attached to the 1 August 2016 letter was a schedule of results from the 23 day period of self-invigilation. The average for the period was 49.13% cash : 50.87% card.

(15) All of this information was available to Mrs Jackson in real time.

(16) Mrs Jackson considered that the card to cash split in the Appellants' business 66% card to 34% cash as reflected in the Appellants' VAT returns was inconsistent with what she considered the norm of about 50/50 for buffet style restaurant businesses such as this and in her view inconsistent with the demographic in Boston where there are a lot of people in and out of work and where cash is used more readily. Mrs Jackson considered any indication that is outside the norm is an indication of suppression of turnover. That is why the decision was made to investigate and undertake four under-cover visits followed by attendance at the restaurant at cashing up time. This in Mrs Jackson's view is the best source of information. She considers that where there has been suppression, the turnover on the night of a visit is usually the best night ever or one of the best nights ever.

(17) During cross examination Mrs Jackson admitted that:

(a) On the four nights of undercover visits, the highest card to cash ratio was 54.1% cash:45.69% card

(b) The sample was not a very representative sample given its size and that it comprised only Friday and Saturday nights but HMRC chose similar nights to be able to make a comparison.

(c) In raising the best judgment assessments she had dismissed the 66:34 card to cash ratio said to have been the historic position of the business and substituted a 33:67 ratio thereby increasing the cash from 33% to 65% of turnover. This equates to roughly one in every two cash sales being supressed and would likely mean extra daily sales of between 27 to 43 in the period in question and would suggest that £3,500 cash had been extracted every week. This was justified in Mrs Jackson's view because the Appellants and their family members owned properties and their wealth was unexplained. She had been involved in many investigations into restaurant businesses and there is in her experience a lot of criminal conduct.

(d) On the four nights of spot checks there was no evidence of suppression of turnover. Mrs Jackson said that the spot checks do not always uncover a discrepancy.

(e) The best judgment assessment contained no mention of the sales observed during the 23 day period of invigilation during which the till was not switched off.

(f) In response to the suggestion that the best judgment assessment had been made not as a result of evidence found but as a result of inference from other cases, Mrs Jackson said that the evidence she had relied on is the "destruction" of records. Till records had not been kept because there had been no battery in the till. The meal slips (which record the food ordered by the customers) were the only evidence of turnover and they can easily be manipulated by omission, especially in a buffet style restaurant. Also the unexplained wealth of the appellants given the limited profit arising from the restaurant was a factor.

(18) The original best judgment assessments based upon the average card to cash ratios on the four unannounced visits were for £158,953.

(19) This decision was the subject of a review and as a result on 3 August 2016 the Reviewing Officer reduced the assessment by £50,820.00 to £102,042.00. This was achieved by applying a different ratio. This ratio was found by aggregating the average card to cash ratio on the 4 unannounced visits with the average of the ratio during the 23 day period of self-invigilation and diving the figure by two.

(20) On 22 November 2017 HMRC reduced the assessments further to £95,365.00 as a result of removing the assessments in respect of rent.

(21) On 12 June 2018 a further reduction was made to £78,364.00 due to arithmetical errors.

(22) The Appellants had explained that on the four under-cover visits a number of local restaurants were closed and that had resulted in exceptional turnover. HMRC had asked for evidence of the closure. This was. so far as I am aware, not supplied.

THE LEGISLATION

5. The relevant statutory provisions are set out below.

Section 73 Value Added Tax Act 1994 (VAT Act)

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

"(6) An assessment under subsection (1)… above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following-

(a) 2 years after the end of the prescribed accounting period;

(b) One year after the evidence of the facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

But (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsections(1)…, another assessment may be made under that subsection, in addition to any earlier assessment."

Section 77 VAT Act

"*(1) Subject to the following provisions of this section, an assessment under section 73,75 or 76, shall not be made-*

(a) More than 4 years after the end of the prescribed accounting period …., or

(b) …."

"(4) In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P may be made at any time not more than 20 years after the end of the prescribed accounting period ……(subject to subsection(5)).

"(4A) Those cases are-

(a) A case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf);

(b) A case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT;

(c) A case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and

(d) A case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A or an obligation under paragraph 17(2) or 18(2) of Schedule 17 FA 2017.

"(4B) In subsection (4A) the reference to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue & Customs by that person.

"(4C) In subsection(4A) (c) "notification obligation" means an obligation under –

(a) …

(e)… "

Respondents' Submissions

6. The Respondents' case is that:

(1) The assessments were raised within the time limits imposed by sections 73 and 77 VATA, and

(2) The assessments were made to the best of HMRC's judgment in compliance with section 73(1) VATA.

Time limits Issue

7. The correct approach was set out in *Pegasus Birds Ltd v Customs & Excise* [1999] STC 95 where Dyson J set out a number of legal principles of which the following are key:

> (1) The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (i).
>
> (2) The burden is on the taxpayer to show that the assessment was made outside the time limit specified in section 73(6)(b) of the 1994 Act.

8. The pre-assessment letter issued by Mrs Jackson in February 2016 raised the issue of rental income from the adjoining restaurant. Evidence of the rents was received from the Appellants' agent in March 2016. Email correspondence followed concerning whether an option to tax had been made. The rental information was the final piece of evidence needed to make the assessments. The assessments were dated 29 July 2016 and were issued by letter dated 1 August. But correspondence between the Appellants' agent and Mrs Jackson was still ongoing on 24 August 2016. Information was still outstanding a year later. All of the 16 periods for which assessments were raised ended within the four year period prior to the date of the assessments.

Issue of suppression of turnover – deliberate conduct

9. The evidence of suppression identified by the officer was the Appellants' use of a card to cash ratio of 66:34 and the lack of records which does not result in the creation of a complete audit trail.

10. The evidence of deliberate conduct relied on by Mrs Jackson was that she considered the Appellants ought to have known that he had to retain records. The correct test is whether the Appellants knew the returns were inaccurate and brought about the loss of tax. The Respondents rely on a penalty case *Auxilium Project Management Limited v HMRC* [2016] 249. The FTT found at [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 on it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."*

In the case of *Salin Miah v HMRC* [2016] UK FTT 644, the Tribunal said:

> "*To our minds something is deliberate if it had been thought about. The penalty at the 70% level is dependent on the inaccuracy having been deliberate. In other words if Mr Miah knew that the sale should have been reported on the June VAT return but decided that it should not be, the inaccuracy in the return was deliberate."*

11. The use of 66%:34% card to cash ratio means that the Appellants have demonstrated that they had thought about it and would have known the returns were inaccurate.

12. The facts show that during the 23 day self-invigilation period the average card to cash ratio was 50.87 card and 49.13 cash. HMRC say the Appellants must have known returns were inaccurate. Further Mrs Jackson considered that the Appellants had deliberately removed the battery from the till to ensure the records were incomplete. In consequence assessments may

be made in respect of accounting periods ended in the four year period prior to the date of the assessment.

13. The respondents say that, as there is evidence of deliberate conduct, the assessments in respect of the 16 periods ended in the four year period prior to 1 April 2016 were raised in time and are valid..

Best judgment assessments

14. The Respondents say that the process should satisfy the test laid down by Woolf J in *Van Boeckel v Customs & Excise Commissioners* [1981] HCEW STC 290 ("**Van Boeckel**"). The Commissioners are required to come to a judgment honestly and bona fide, based upon all of the information, which decision must be reasonable and non-arbitrary.

15. Mrs Jackson's decision to make assessments was based upon the Appellants' use of the card to cash ratio of 66:34. The use of this ratio was evidence of suppression.

16. The assessments actually made by Mrs Jackson were based upon the ratios of card to cash transactions on the four unannounced visits. The ratios on those four days were 36.67: 63.33. The four days were one Friday and three Saturdays to be able to compare. The assessments were later adjusted following a review when the ratio adopted was the aggregated ratios of the four day period and the 23 day period divided by two.

17. The decision in Van *Boeckel* was followed in *Rahman Trading as Khayam Restaurant v The Commissioners of Customs & Excise* [1998] HCEW STC 826 in which Mr Justice Carnwath said that he was concerned that it was possible to take Woolf J's judgment out of context. He said at [25]

> "*The Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required for example that the assessment has been reached dishonestly or vindictively or capriciously", or is a "spurious estimate or guess in which all elements of judgment are missing"; or is "wholly unreasonable". In substance those tests are indistinguishable from the familiar Wednesbury principles ([1948] 1KB 223). Short of such a finding, there is no justification for setting aside the assessment.*"

18. The Respondents assert that Mrs Jackson had not acted capriciously, dishonestly or in a spurious fashion. She had based her judgment on the evidence gathered.

19. Further in relation to the common sense check required as set out in HMRC guidance, as to whether the business could have generated sales equal to the turnover found by applying a revised card to cash ratio of 35%:65%, Officer Jackson said she had considered it. The burden then is on the Appellants to show that the assessments were not best judgment assessments.

20. The Respondents pointed out that as the Appellants had not given evidence in person to the tribunal the Respondents were unable to question them about the ability of the business to achieve those sales. The Respondents conclude that the assessments were best judgments assessments and must be upheld.

21. If the time limits were not met, the respondents acknowledged that some periods would fall out of account. The Appeal should otherwise be dismissed.

The Appellant's Submissions

22. The Appellants submit that there are three issues, namely whether:

(1) All of HMRC's assessments for the periods prior to 09/14 are out of time on the basis of section 73(6)(b). Section 73(6)(b) imposes a "short stop" restriction on HMRC. No assessment may be made later than: (a) two years after the end of a prescribed

accounting period or (b) more than one year after the facts sufficient to justify making the assessment first come to the attention of HMRC officer.

(2) HMRC's assessments for the period 09/12 are out of time on the basis of the VATA 1994 section 77. Section 77 imposes a "long stop" restriction on HMRC's ability to raise assessments. No assessment can be made in relation to a prescribed accounting 4 years after the end of that prescribed accounting period unless there has been evidence of loss of VAT brought about by deliberate conduct.

(3) The assessments were not made to best judgment and/or are wrong.

Issue 1: short stop limitation- section 73(6)(b) VATA

23. In relation to section 73(6)(b) the Appellants contended that the position is straight forward. The assessment was first issued by letter dated 1 August 2016 and therefore any assessment in respect of an accounting period ended prior to 09/14 is automatically out of time as being outside of the two year period specified within section 73(6)(b).

24. The evidence relied upon by HMRC to make the assessments using the cash:card ratio of 63% : 37% can be seen in the letter of 1 August itself. This evidence is received immediately after the fourth visit on 23 May 2015. The 63%:37% ratio is an average of the cash to card sales on those four days. Mrs Jackson applied that ratio to every period from 06/09 to 03/15. Nothing referred to in her letter of 1 August 2016 pertaining to her decision concerning the suppression of turnover is received after 31 May 2015. More specifically:

(1) The occasion when alleged evidence of errors relating to the card:cash ratio of sales in the Appellants' restaurant first comes to HMRC's attention is in 2015 after the four separate visits.

(2) The last day of the period of invigilation was 22 May 2015. That is the day on which HMRC had all the raw data.

(3) On 18 June 2015 Mrs Jackson sent an email of the information in table format to the Appellants for information.

(4) On 24 February 2016 Mrs Jackson sent the Appellants a pre-assessment letter indicating she had found errors and attaching tables showing the Appellants' historical card to cash ratios, the card to cash ratios for the four separate visits, and the card to cash ratios for the period of invigilation. Included in the attachment to the letter is a query relating to commercial rent received and the potential application of the capital goods scheme. The attachment concludes that the cash sales should be uplifted from 34% to 63%. Mrs Jackson concluded that if she receives no further information to support an amendment to this figure of 63% she will raise VAT assessments.

25. HMRC say that because in the 24 February letter 2016 Mrs Jackson asked for information about the rent on the adjoining property to complete her enquiries fully, the assessments are in time, notwithstanding that the rental issue had nothing to do with the suppression of turnover and that HMRC had the information about rental values in March 2016.

26. The Appellants rely on *DCM Optical Holdings v HMRC*, [2018] UKUT 409 TCC. One issue in the case was a time-bar issue and whether HMRC could rely on the fact that absence of information concerning input tax which affected only some earlier periods could be used to justify delay in assessing other periods where the issue concerned output tax only. In that case HMRC argued that an assessment is a unitary demand for tax and therefore the reference in section 73(6) to "the assessment" is to the particular total one net-amount brought out at the end of the calculation as due by the taxpayer. The Upper Tribunal said at paragraph [79]:

"In our opinion this proposition is unsound. It is inconsistent with section 73(4) which states as follows:

' Where a person is assessed under subsections(1) ***and*** *(2) above in respect of the same prescribed accounting period the assessments may be combined* ***and*** *notified to him as one assessment.*'"

The UT considered that the word assessment can mean a component part of an overall assessment or an aggregation which produces the total of the net due.

" *In any event, it could not, in our view, be said as a matter of ordinary language that evidence of facts coming to the knowledge of the commissioners in relation to one matter can be utilised to justify the whole of an assessment that also seeks to recover VAT due as a consequence of another or other matters to which those facts have no reference. Indeed we would regard that as a somewhat startling proposition.*"

27. If HMRC are precluded from raising an assessment under section 73(6)(b) they are also precluded from raising an assessment within 2 years. Accordingly, the Tribunal should discharge the assessments relating to periods prior to 09/12 in any event.

Issue 2: the long stop limitation –section 77 VATA

28. For HMRC to rely on section 77 to extend the period for making an assessment beyond 4 years after the end of the prescribed accounting period, HMRC must show that the Appellants deliberately brought about the loss of VAT. In order to establish whether HMRC has discharged this burden it is necessary for the issue to be properly pleaded in the statement of case they must identify the evidence to justify it.

29. HMRC's statement of case refers to the unannounced visits made to the premises at cashing up time and records that "*The till was not being operated properly. No Z readings were retained. The till had no battery, therefore when it was unplugged every evening the memory was erased.*"

30. HMRC's skeleton argument refers to a passage in the document which refers to a penalty explanation letter. It refers to HMRC having evidence that the Appellants manipulated the cash sales to produce a card to cash sales ratio of 2/3rds. It goes on to say that,

" *Up to 31/1/2015 you destroyed the x readings and did not keep any records of sales other than meal slips which could easily be omitted. These actions are indicative of suppression and provided you with the opportunity to reduce your sales by maintaining an incomplete audit trail.*"

31. The Appellants consider that this is not close to proving "deliberateness". The evidence HMRC rely on is insufficient to show that the Appellants knew they ought to keep the records and deliberately failed. It is a subjective test and HMRC acknowledge that. HMRC has insufficiently pleaded or proved the issue. In consequence the Tribunal should dismiss the assessments for periods prior to 09/12.

Issue 3 – whether the assessments are best judgment

32. The Appellants consider that the assessments cannot be best judgment assessments, because although there may have been grounds of suspicion of suppression there has been no reliable evidence of suppression, and rely on the case of *Hamid Forati & Patricia Forati (trading as Emilio's) v HMRC* [2001] FTT at [34] and [35] and invite the Tribunal to discharge the assessments in full.

33. In *Forati*, at [34] the Tribunal accepted that the officer of HMRC had grounds for suspicion of deliberate suppression of turnover. There was an admitted history of poor record

keeping and consequential under declarations. The officer acted in good faith in observing the restaurant, carrying out those observations and subsequent calculation. The burden is on the appellant to show the Tribunal that the observations cannot stand. Tribunal found that the Appellants had discharged the burden. Judge Bishopp said at [35]:

> " *For the reasons we have already given, we cannot accept that the records of observation have the degree of reliability properly to be expected if they are to form the basis of an assessment. On the contrary, we have real doubts whether what the officers observed was accurately recorded. The limited or even sketchy amount of information the logs contained, the heavy reliance of memory to determine whether callers had remained on the premises for a long or short period, the absence of any annotations regarding staff members and the fact that the officers were simultaneously observing another restaurant, all give rise to significant misgivings about the reliability of the records. ... This is not a case in which we are satisfied that there was suppression, but of a lesser amount than that assessed, and in which we should endeavour to determine the correct amount ourselves. Rather we are satisfied that there is no reliable evidence of any suppression.*"

34. The totality of the HMRC's case involves:

(1) A comparison of the card to cash ratio of sales on a very small sample of days with the same ratio in a prior period, and

(2) Their own imperfect observations whilst dining in the restaurant.

35. The changed ratio is not evidence of anything other than sales ratios change. It is not evidence of suppression. To treat that as a basis to assess over £87,000 of under-declared VAT is absurd and would result, if taken to its ultimate conclusion, in every business with varying sales, to be guilty of suppression.

36. Mrs Jackson sought to supplement HMRC's stated case with statements of typical ratios of card and cash sales. Her view was 50:50 was the norm. But again this would be a ground for suspicion not evidence of suppression.

37. Mrs Jackson's observed data was incomplete and totally unreliable. In the period she and fellow officers were in the restaurant she failed to record the card sales that could be proved from bank and other records.

38. Officer Jackson set tests for the Appellant during the investigation by paying for meals eaten in the restaurant with specific £20 notes and arranging for takeaways to be purchased and when the notes were in the till at cashing up and when the take away meals are found in the records these findings ought but do not counter balance the suspicions.

39. Further there was no common sense test applied to the resulting figures after applying Officer Jackson's ratio of cash to card sales of 63:37. Applying such a test is recommended by HMRC Manual because if the resultant turnover is not credible the assessment may not be to the best of HMRC's judgment. It may be deemed to be invalid and cannot be maintained. In legal terms an invalid assessment is treated as never having existed.

40. The natural implications of applying Officer Jackson's ratio is that the turnover would have been suppressed by some £143,000 per year, or £3,000 per week. In defence of HMRC's position, Mrs Jackson pointed to properties that were owned by the Appellants and their family. But this is not pleaded in the Statement of Case or the Skeleton. But the Appellants say it misses the point. How can a small buffet Chinese restaurant generate such sales? The position here is the same as in Forati. There is no reasonable evidence of suppression although there may have been evidence to justify suspicion.

41. The Appellants rely on *Van Boekel v Customs & Excise Commissioners* [1981] STC 290 at 292-293 that grounds of suspicion are not evidence of suppression.

42. Further the four day sample period was unreasonably short, and covered only one Friday and four Saturdays. The assessments were reduced to take into account the period of self-invigilation but the samples were given equal weight. A more realistic figure would have been achieved by taking the entire period for which the restaurant was under observation in 2015 which would have given a card to card ratio of 57: 43. Or simply taking the ratio given by the 23 day period which would give a cash to card ratio of 49:51.

43. The ratio adopted by Mrs Jackson and applied for all of the 16 prior periods is based on spurious logic. The ratio cannot reasonably be used to raise best judgment assessments. If the longer period is used to arrive at a ratio and applied for the periods in respect of which an assessment could be made, the card to cash ratio would be 57:43 and not 37:63 as asserted by HMRC. The VAT due would be as follows compared to the unrealistic estimates arrived at by HMRC

Period	Value of Actual card transactions	Gross takings if 57% card transactions	VAT @16.5%	VAT declared	VAT Due	HMRC assessment of VAT due
30/09/14	21,466	37,659.94	6,213.84	4,836	1,141	4,833
31/12/14	30,140	52,877.19	8,724.73	5,2875.73	2,875.73	7,728
31/03/15	27,913	48,970	8,080.07	6,415	1,665.07	6,159

The assessments are not therefore best judgement assessments and the appeal should be allowed.

Discussion

Time Limit issues- 4 years

44. The assessments made by Officer Jackson were made on 1 August 2016 in respect of the 16 periods ending on 31 March 2015, the first of which ends on 09/06/11.

45. Only if there has been loss of VAT brought about deliberately by the Appellants' conduct would the assessment stand in respect of all 16 periods.

46. The correct test is whether the Appellants knew the returns were inaccurate and brought about the loss of tax. The Respondents rely on a penalty case *Auxilium Project Management Limited v HMRC* [2016] 249. The FTT found at [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 on it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.*"

In the case of Salin Miah v HMRC [2016] UK FTT 644, the Tribunal said:

> *"To our minds something is deliberate if it had been thought about. The penalty at the 70% level is dependent on the inaccuracy having been deliberate. In other words if Mr*

Miah knew that the sale should have been reported on the June VAT return but decided that it should not be, the inaccuracy in the return was deliberate."

47. The burden of proof as to the Appellant's deliberate conduct rests with HMRC. It is accepted by both parties that the test is a subjective test. HMRC have failed to demonstrate that the Appellants had the necessary intent to bring about a loss of VAT.

48. The Respondents case is based on two things:

(1) The Appellants had consistently reported average card to cash ratios of between 62/66% : 38/34%. But during four unannounced visits each on a Friday or Saturday the average card to cash ratio was 36.7:63.33.

In my opinion the unexpectedly high card to cash ratio relative to other restaurants would justify a suspicion of suppression but the four unannounced visits did not provide any proof of suppression. It proved only that the ratio of card to cash sales varied. The Appellants were not caught in the traps laid for them on those occasions. This fact ought to have countered the suspicions but Mrs Jackson's view was unchanged.

Further the records of the under-cover visits to the restaurant were deeply flawed reporting only three card sales when the electronic records show there were nine in the period in which the officers were at the restaurant.

The card to cash ratios were different on the sample days but the sample days comprised a Friday and three Saturdays which was not a representative sample. One can imagine that trade on a Saturday evening might be locals only whereas weekdays trade may comprise more business customers and payment methods may well be different. Further during the 23 days of self-invigilation I note that the card component was as high as 88.32% and as low as 30% but the average during that 23 day period was 50.87%. All that this proves is that the percentages of card and cash sales vary.

(2) The Appellants did not have a battery in the till which meant that Z records were not retained when the till was switched off at night. In correspondence the Appellant had explained that the till records were unreliable which is why he did not bother with a battery. HMRC never challenged this explanation or disproved it. HMRC 's case was the Appellant ought to have kept records as the law requires and this failure was a deliberate action to avoid an audit trail. The officer considered it was therefore deliberate destruction of records.

49. In my opinion the test Mrs Jackson was applying is an objective test but the authorities require that there should be proof of the Appellants subjective intention to avoid the creation of an audit trail by failing to create Z records. HMRC made a point that the Appellants' did not give evidence before the Tribunal. But HMRC could have required that the Appellants give evidence to the Tribunal. At its highest, the decision of the appellants not to give evidence might in an appropriate case be regarded as supporting HMRC's case. I do not consider that this is such a case.

50. In view of the above, I conclude there was no evidence of the necessary subjective intention to provide inaccurate returns and the assessments for the prescribed accounting periods ended before 09/12 are invalid.

Time Limit Issues –short stop 12 months or 2 years

51. In relation to whether the assessments must have been made within one year after evidence of the facts, sufficient in the opinion of the Commissioners, to justify making the assessment, comes to their knowledge, in my opinion,

(1) the enquiries about the taxation of rent, whether an option to tax had been made and the possible input tax implications is unrelated and separate from the issue of suppressed turnover and that should be disregarded; and

(2) the basic information of the card to cash ratios that were ultimately used by Mrs Jackson to make the assessments was available by the end of May 2015 however the facts were being contested by the appellants as late as 5 April 2016 as shown by a letter from the Appellant's advisers to HMRC.

I conclude that the relevant period in the present case is the period of two years, and not the period of one year from the end of May 2015. The assessments for the periods ended before 20/09/2014 are invalid.

Best judgment assessments

52. The legal principles the Tribunal must follow in determining whether an assessment is a best judgment assessment, are based upon *Wednesbury* reasonableness. That the Tribunal disagrees with how the judgment has been exercised is insufficient. There must be evidence of dishonesty or capricious or spurious behaviour or the decision must be wholly unreasonable.

53. The burden of showing that the assessments were not best judgment rests with the Appellants. I am satisfied that the Appellants discharged that burden. There were two elements in particular which indicated that Mrs Jackson's decision was not a best judgment decision:

(1) The ratio of card to cash applied by Officer Jackson (37% card : 63% cash) was not representative of either the evidence obtained during the 23 day period of HMRC's imposed self-invigilation (51: 49) or a weighted rate for the days between 1 February to 18 April (the period the restaurant was being watched by HMRC) (57: 43) or indeed reflective of what Officer Jackson considered was the norm for such a business (50:50). It is so out of line with any of these ratios that it is impossible to consider the decision to apply that ratio to be reasonable.

(2) The ratio adopted also produced an irrational result. The ratio implied that the turnover had been suppressed by £143.000 per year or £3,000 per week and that between 27 to 43 extra daily sales would be required. It is in my view difficult to see how Mrs Jackson could have subjected the assessment to the common sense test as required by HMRC Guidance.

(3) The reasonable result would be that proposed by Mr Firth, to use the actual ratio found during the entire period when the business was being observed by HMRC of 57:43 card to cash sales.

Decision

54. I allow the appeal in part:

(1) The assessments for the periods ended prior to 30/09/2014 are discharged.

(2) The remaining assessments are reduced to the amounts shown below:

30/09/2014 £1,141.00

31/12/2014 £2,875.73

31/03/2015 £1.665.07

The figures in this table are my calculations. Mr Firth's were slightly different – he considered the VAT due would be £2,964 for 31/12/14 and £1,747 for 31/03/15.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. 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.

JUDGE GETHING
TRIBUNAL JUDGE

Release date: 9 January 2020