Neutral Citation: [2024] UKFTT 001124 (TC)

Case Number: TC09384

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2021/00997

VAT – best judgment assessment under section 73 of the Value Added Tax Act 1994 – unannounced visits to the business premises including the undertaking of test eats/purchases and observation of the cashing up procedure by the Appellant – alleged suppression of cash sales – method of calculation of cash sales suppressed based on cash to card split – Merchant Acquirer data – whether Assessment displaced by Appellant – no – deliberate inaccuracy penalty under Schedule 24 of the Finance Act 2007 for inaccuracies in VAT returns – whether the Penalty was correctly applied – yes – quality of disclosure – further reduction given for "Helping" – Appeal against the Assessment dismissed and appeal against the Penalty allowed in part

Heard on: 11 & 12 November 2024
Judgment date: 16 December 2024

Before

JUDGE NATSAI MANYARARA
MICHAEL BELL

Between

ABDUL KADIR (T/A SPICE GARDEN INDIAN CUISINE)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Craig Tully, Gilbert Tax

For the Respondents: Ms Olivia Donovan, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant (Abdul Kadir) appeals against an assessment of VAT ("**the Assessment**") in the sum of £176,249, for the periods 04/08 to 01/16 (inclusive), and issued on 6 July 2018. The Assessment was raised pursuant to s 73(1) of the Value Added Tax Act 1994 ("**VATA**"). The Assessment followed an invigilation exercise in which HMRC concluded that the Appellant had been suppressing cash sales.

2. The Appellant is also appealing against an inaccuracy penalty ("**the Penalty**") charged pursuant to Schedule 24 to the Finance Act 2007 ("**Schedule 24**"), in the sum of £90,960.80. The Penalty was notified on 12 June 2019. HMRC have charged the Penalty upon the allegation that the Appellant knowingly submitted inaccurate VAT returns for period 04/08 to 01/16. For the avoidance of doubt, and we address the matter further below, we note that the Penalty is not correctly calculated with reference to the quantum of the Assessment.

3. The documents to which we were referred to were: (i) the Hearing Bundle consisting of 331 pages (within which were the Notice of Appeal dated 18 February 2020 and the Statement of Case dated 4 February 2021); and (ii) the Appellant's Supplementary Bundle consisting of 504 pages.

ISSUES

4. The issues raised in this appeal are:

   (1) whether the Assessment was made to the best of judgment;

   (2) whether the Appellant has adduced sufficient evidence to displace the Assessment; and

   (3) whether the Penalty was correctly applied (which in turn requires consideration of whether the Appellant is liable for a "deliberate" penalty).

BURDEN AND STANDARD OF PROOF

5. HMRC are required to demonstrate that: (i) the Assessment is valid and in time; and (ii) that the Penalty is due and correctly charged.

6. The burden of proof is on the Appellant to establish the correct amount of tax due. This is evident from the case *C & E Coms v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015 ('*Pegasus Birds (2)*'), where Carnwath LJ said this:

> "[14] Generally, the burden lies on the taxpayer to establish the correct amount of tax due:
>
> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right."

7. This was also explained by Mustill LJ in *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, at 642, as follows:

> "The starting point is an ordinary appeal before the [Tribunal]. Here, however unacceptable the idea may be to the ordinary member of the public, it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657"

8. The standard of proof is the civil standard; that of a balance of probabilities.

BACKGROUND FACTS

9. On 3 July 2015 and twice on 8 July 2015, HMRC arranged to undertake three test eat purchases ("**the Test Eat purchases**") at the Appellant's business premises. The purpose of the exercise was to check whether the meals were included in the VAT returns subsequently submitted for the relevant periods.

10. On 9 July 2015, 22 October 2015 and 11 February 2016, HMRC conducted unannounced visits ("**the Visits**") at the Appellant's premises. During those visits, HMRC observed the Appellant cashing up at the close of business and, subsequently, checked the available records. At the first unannounced visit on 9 July 2015, HMRC checked the Appellant's records but were unable to find the meal bills for the Test Eat purchases.

11. On 21 June 2016, following the Test Eat purchases and the checks conducted during the Visits, HMRC requested the production of books and records dating back four years from the end of the most recent VAT return period that had been submitted by the Appellant.

12. On 5 July 2016, HMRC sent a reminder email regarding collection of books and records requested on 21 June 2016.

13. On 2 November 2016, HMRC telephoned the Appellant's agent to request records, but no response was received.

14. On 16 March 2017, as HMRC had not received any of the items requested, an information notice was issued under para. 1 of Schedule 36 to the Finance Act 2008 ("**the Schedule 36 notice**"), including a schedule of documents needed to carry out the check.

15. On 26 May 2017, HMRC issued an initial penalty of £300, under paras. 39 and 46 of Schedule 36, for failure to produce records. Daily penalties in the sum of £20 were issued under paras. 40 and 46 of Schedule 36 to the Finance Act 2008, for the non-production of the remaining records requested in the Schedule 36 notice.

16. On 12 June 2017, SA & Co Chartered Accountants ("the Appellant's previous agents"), wrote to HMRC stating they had provided some documents on 24 April 2017.

17. On 13 June 2017, HMRC confirmed receipt of some of the records requested in the Schedule 36 notice, but had not received the till rolls, "z" readings, meal bills or PAYE records for the Appellant's employees. HMRC also asked for statements for all of the Appellant's bank, building society and credit card accounts to review.

18. On 16 August 2017, the Appellant's previous agents sent the Appellant's bank details, stating that further records would be forwarded as soon as they received them.

19. On 22 November 2017, a meeting was held between the Appellant, his previous agents and HMRC ("**the November 2017 meeting**") The meeting was with a view to discussing HMRC's findings. HMRC advised that the percentage of cash takings during the Visits was 32.09%, 39.98% and 41%. HMRC asked how this could be correct when compared to the information produced by the Appellant. The Appellant could not provide an answer. HMRC asked why the Appellant did not have a record of the meal purchases made during the first Test Eat purchase on 9 March 2017, but the Appellant could not provide an answer.

20. On 4 December 2017, the Appellant's previous agents wrote to HMRC, stating they had conducted a quarterly analysis for the period 3 February 2016 to 30 September 2017, which showed that the highest cash to card ratio was 17:83, the lowest was 13:87 and the average was 15:85.

21. On 7 March 2018, the Appellant's previous agents provided copies of the Appellant's HSBC bank statements for 15 January 2017 to 14 December 2017, including a copy of joint

account bank statements for the Appellant and his wife, covering the period 28 September 2017 to 29 January 2018.

22. On 31 May 2018, HMRC issued a pre-assessment letter (notice of assessment of tax for £170,202 for the period 1 February 2008 to 31 January 2016) to the Appellant setting out the findings of the Visits and the check of VAT returns. Following the Visits, HMRC found the split between cash and card sales to be as follows:

Date	**9 July 2015**	**22 October 2015**	**11 February 2016**
Cards	£497.75	£568.70	£387.45
Cash	£235.25	£278.95	£270.90
Total	£733.00	£947.65	£658.35
Cards %	67.91	60.01	59
Cash %	32.09	39.98	41

23. Based upon the Merchant Acquirer ("**MA data**") data acquired (credit card sales information), HMRC calculated that from VAT periods 05/11 to cessation of registration, card sales accounted for 93.50 % of the Appellant's total sales, on average. HRMC were concerned that the average 6.5% cash sales declared by the Appellant in the VAT returns did not reflect the trading activities of the business when compared to the findings of the Visits and the MA data.

24. On 5 June 2018, HMRC withdrew the assessment issued on 31 May 2018 because they were incorrect.

25. On 6 July 2018, following further exchanges of correspondence, HMRC notified the Assessment, in the sum of £176,249, for the VAT periods 04/08 to 01/16.

26. On 13 September 2018, HMRC provided details of the proposed penalty, and why they considered that the inaccuracies were deliberate.

27. On 11 October 2018, a further meeting was held between HMRC and the Appellant's previous agents ("**the October 2018 meeting**"). During that meeting, it was repeated that the Test Eat purchases were not found in the Appellant's records. It was further explained that during the Visits, end of day procedures had been observed and HMRC had noted the levels of cash held were 32.09%, 39.98% and 41%. In addition to this, HMRC had used the information from the first two unannounced visits in conjunction with the MA data held by HMRC to conclude that the VAT returns submitted were incorrect. HMRC had calculated that for the periods 04/08 to 01/16, the cash sales should account for 36.03% of the sales.

28. On 24 October 2018, the Appellant's previous agents requested further details of the Assessment breakdown, and appealed against the Assessment and the Penalty.

29. On 11 May 2019, HMRC issued the VAT Penalty Explanation letter (NPPS (PEL)). HMRC proposed to issue a penalty assessment in the sum of £90,960.80, for periods 04/08 to 01/16. HMRC considered the inaccuracies to be "prompted" and as a result of "deliberate" behaviour. A 40% reduction was proposed for the quality of the disclosure: "telling", "helping" and "giving". Consequently, a Penalty at 56% of the Potential Lost Revenue ("**PLR**") was proposed.

30. On 12 June 2019, HMRC issued the Penalty, in the sum of £90,960.80, for periods 04/08 to 01/16.

31. On 26 September 2019, and following further exchanges of correspondence, the Appellant's previous agents requested a review of the decisions.

32. On 24 October 2019, HMRC accepted the late request for a review.

33. On 20 January 2020, the review conclusion was issued, with both decisions being upheld.

34. On 10 March 2021, the Appellant's previous agents requested permission to make a late appeal to the First-tier Tribunal ('**FtT**'). HMRC do not object to the late appeal.

35. Since HMRC have stated that they are not objecting to the late notification, we give permission under s 49G(3) or s 49H(3) of the Taxes Management Act 1970 ('**TMA**') for the appeal to be notified late.

RELEVANT LAW

36. The relevant law, so far as is material to the issues in this appeal, is as follows:

37. The provisions of the Sixth VAT Direction (Directive 77/388/EEC of 17 May 1977), as amended by the Invoicing Directive, were replaced by the Principal VAT Directive 2006/112/EC ("**PVD**"). The PVD is the source of legislation concerning VAT. The PVD has been transposed into domestic law by VATA.

38. Section 4 VATA provides, *inter alia*, that:

> "**4 Scope of VAT on taxable supplies**
>
> (1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.
>
> (2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply."

39. Section 24(1)(a) VATA defines "**input tax**" in relation to a taxable person as:

> "VAT on the supply to him of any goods or services ...being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him."

40. Section 24(6)(a) VATA provides that regulations may provide for VAT to be treated as input tax:

> "...only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents [or other information] as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases"

41. Section 25(2) VATA provides that a taxable person shall be:

> "... entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

42. Section 26 VATA, relevantly, provides that:

> "(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies; ...”

The Assessment

43. Section 73(1) VATA allows an assessment to be raised where HMRC consider a VAT return to be incomplete or incorrect, as follows:

> **“73 Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, but (subject to that section) where further such evidence comes to the Commissioners’ knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.
>
> …
>
> **77 Assessments: time limits and supplementary assessments.**
>
> (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 importation or acquisition concerned, or
>
> …
>
> (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 or the importation, acquisition or event giving rise to the penalty, as appropriate (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),
>
> …
>
> (4B) In subsection (4A) the references 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 and Customs by that person.”

44. Schedule 11 VATA provides that:

> “6 (1) Every taxable person shall keep such records as the Commissioners may by regulations require, and every person who, at a time when he is not a taxable person, acquires in the United Kingdom from another member State any goods which are subject to a duty of excise consists in a new means of transport shall keep such records with respect to the acquisition (if it is a taxable acquisition and is not in pursuance of a taxable supply) as the Commissioners may so require.

(2) Regulations under sub-paragraph (1) above make different provision for different cases and may be framed by reference to such records as may be specified in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by a further notice.

(3) The Commissioners may require any records kept in pursuance of this paragraph to be preserved for such period not exceeding 6 years as they may specify in writing (and different periods may be specified for different cases)

(4) The duty under this paragraph to preserve records may be discharged-

(a) by preserving them in any form and by any means, or

(b) by preserving the information contained in them in any form and by any means, subject to any conditions or exceptions specified in writing by the Commissioners for her Majesty's Revenue and Customs."

45. Regulations made under VATA are the VAT Regulations 1995, SI 1995/2518 ("**the VAT Regulations**").

46. Regulation 13(2) of the VAT Regulations provides that the particulars of the VAT chargeable on a supply of goods must be provided on a document containing the particulars prescribed in reg. 14(1).

47. Regulation 14(1) provides, in so far as is material:

"(1) Subject to paragraph (2) below and regulation 16 save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—

…

(d) the name, address and registration number of the supplier,

(e) the name and address of the person to whom the goods or services are supplied,

[...]

(g) a description sufficient to identify the goods or services supplied,

(h) for each description, the quantity of the goods or the extent of the services, and the rate of VAT and the amount payable, excluding VAT, expressed in [any currency]

…

(l) the total amount of VAT chargeable, expressed in sterling, …"

48. Regulation 29 of the VAT Regulations provides that:

"(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-

(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13; …

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)…above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

49. Regulation 31 provides that:

"(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—

(a) his business and accounting records,

(b) his VAT account,

(c) copies of all VAT invoices issued by him,

(d) all VAT invoices received by him,

(e) documentation received by him relating to acquisitions by him of any goods from other member States,

(f) copy documentation issued by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(g) documentation received by him relating to the transfer, dispatch or transportation of goods by him to other member States,

(h) documentation relating to importations and exportations by him, and

(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him."

50. VATA and the VAT Regulations are EU-derived domestic legislation, as defined by s 1B(7) of the European Union (Withdrawal) Act 2018 ('the Withdrawal Act'). Section 2 of the Withdrawal Act provides that EU-derived domestic legislation, as it had effect in domestic law immediately before IP completion day (i.e., 31 December 2020) continues to have effect in domestic law on and after that day.

The Penalty

51. Schedule 24 was introduced by the Finance Act 2007 to provide a more uniform penalty system across a range of taxes. The categories of penalty used in Schedule 24 are "careless" and "deliberate". Schedule 24, materially, provides that:

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

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

(b) Conditions1and 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,

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

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

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

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

…

Degrees of culpability

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

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

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

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

...

Reductions for disclosure

9 (A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an underassessment by-

(a) telling HMRC about it,

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

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

(2) Disclosure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

…

10 (1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

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

…

Special reduction

11 (1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty…"

52. An appeal to the FtT against an assessment imposed in respect of VAT is governed by s 83 VATA. On an appeal against the imposition of a penalty, the FtT has the power, under para. 17(1) of Schedule 24 to: (a) affirm HMRC's decision; or (b) substitute the decision for another decision that HMRC had the power to make.

APPEAL HEARING

53. At the commencement of the appeal hearing, Mr Tully made an application to admit the late evidence (Appellant's Supplementary Bundle) and to rely on the Appellant's Skeleton Argument, both of which had only been submitted on the Thursday before the appeal hearing. Ms Donovan objected to the new arguments being advanced in the Skeleton Argument, but did not object to the admission of the Appellant's Supplementary Bundle.

54. We decided to admit the Appellant's Supplementary Bundle, in light of the reasons advanced for the late service of the bundle, which we considered to be good reasons. The Appellant was recently let down by his previous agents and Mr Tully was only instructed just over a week before the hearing. We considered the competing interests of the parties and were satisfied that the prejudice to the Appellant if the Supplementary Bundle were not admitted far outweighed the prejudice to HMRC if it was admitted. We were further satisfied that some of the documents included in the Supplementary Bundle were relevant to the Appellant's case (such as the case law and the correspondence between the parties). We, therefore, admitted the late evidence; the presumption being that all relevant evidence should be admitted unless there is a compelling reason to the contrary: *Atlantic Electronics Ltd v R & C Comrs* [2013] EWCA Civ 651, at [31].

55. We, however, concluded that the Appellant's Skeleton Argument raised new arguments that had not, hitherto, been advanced. We were satisfied that the Appellant has belatedly raised the issue of the legality of the Visits within that Skeleton Argument. We will give our reasons for the refusal to allow the Appellant to rely on the new arguments in our "Discussion", later.

Appellant's evidence and submissions

56. Mr Tully's submissions can be summarised as follows:

(1) HMRC's methodology is defective. Whilst it is accepted that the Appellant's records were not correct, the records are no longer in existence as they have not been returned by HMRC. There is an expectation that HMRC will follow their own procedures, such as keeping records.

(2) The Assessment was based on confirmation bias and no deliberate behaviour can be suggested. This creates doubts as to the reliability of the data extracted by HMRC for the Assessment. HMRC's approach has not been even-handed. This is relevant to best judgment as consideration must be had to the manner in which the evidence was obtained by HMRC. No witness evidence has been provided from the officers who undertook the Visits.

(3) The Appellant was not given the opportunity to comment on the notes made following the November 2017 meeting, which are unsigned and recorded by HMRC in an irregular format. Furthermore, there is no evidence to suggest that the Appellant had the opportunity to review and/or correct the notes supplied and written by HMRC during the Visits on 9 July 2015, 22 October 2015 (where the Appellant was not present

as he was out of the country), 11 February 2016 (which was not taken into consideration for the Assessments), or the November 2017 meeting.

(4) The Appellant had not previously been investigated and there were no investigations into the Appellant's PAYE system, or his personal tax returns. There has been no deliberate behaviour by the Appellant in respect of any loss of tax which may have occurred. The Penalty should be reduced to nil on that basis. It is the Appellant's position that he did not take cash from the business and fail to declare this. He did not, and does not, enjoy a lavish lifestyle that would clearly be evidenced had he benefited from such behaviour. The Appellant engaged a qualified accountant to prepare VAT returns and had done this for many years. It can be seen from the Visits, the correspondence with HMRC and the attendance at the hearing that the Appellant has tried to engage with HMRC. If he had deliberately incorrectly accounted for VAT, he would have been less forthcoming.

(5) English is not the Appellant's first language and he engaged accountants to assist him. The figure provided for cash sales by the Appellant's accountants is that which should be considered (i.e., 15.85%).

57. The Appellant adopted the contents of his witness statement, dated 5 February 2024, as being true and accurate. In his witness statement, the Appellant states that the notes of first unannounced visit by HMRC on 9 July 2015 were only disclosed to his previous agents on 15 August 2019, and that his previous agents only disclosed them to him recently. He further states that he believes that HMRC should have disclosed the notes shortly after the November 2017 meeting as this would have enabled him to check the accuracy of the notes, make any amendments and/or provide any relevant further information. His evidence is also that he cannot remember everything that took place "*many years ago*". He adds that any information that was provided during the first unannounced visit was provided on "*the spur of the moment*" when the restaurant was open for business and his concerns were his clientele, and not a visit from HMRC.

58. The Appellant's evidence is also that his accountants have always informed him that they have had to adjust the accounts. This is because some purchases were often understated in his absence as staff bought produce and, occasionally, misplaced the receipts. He adds, however, that in relation to the overall cash sales, the numbers would be relatively low. He further adds that in his absence, it would be very easy for staff to remove drinks, spices, and other costs of sales. He adds that staff could have left the cash from Wednesday in the till and HMRC officers included the Wednesday takings in Thursday's count, and that it is simply double-counting that gave rise to incorrect ratios.

59. In response to questions in examination-in-chief from Mr Tully, the Appellant said this:

(1) When customers come in to the restaurant, a waiter takes them to their table and hands them a menu (food and drinks). The customer's order is placed with the waiter. One copy of the order is placed in the kitchen and another is taken to the bar. The original bill and payment method are kept at the bar.

(2) Payment is taken by the waiter while he (the Appellant) is in the kitchen cooking. The waiters and the manager are the ones who would be at "front of house". Every so often, he would come out of the kitchen to greet the customers.

(3) At the end of the night, payments would be totalled up and a note made in a book to reflect the amounts of the cash and card payments. The records might be kept.

(4) He is not sure if his accountants (Wahid Ahmed & Co) at the start of the business were chartered accountants. He believed that they knew what they were doing. The

accountants did not say that he was doing anything wrong in respect of the business and the records.

(5) He cannot remember exactly which documents the HMRC officers gave to him when they came to the business as this was a long time ago. The officers did not tell him that he was doing anything wrong after the first unannounced visit.

(6) He was on holiday during the unannounced visit which took place on 22 October 2015. He told his manager to co-operate with HMRC when he received a call about the visit.

(7) He authorised his accountants to send all of the records that had been requested by HMRC.

(8) He cannot remember which documents the officers gave him during the visit on 11 February 2016 and he did not read everything.

60. Under cross-examination by Ms Donovan, the Appellant accepted that:

(1) As the business was his business, he was responsible for the accountants. He was also responsible for the VAT returns following registration for VAT.

(2) There is an inconsistency in relation to the answer he gave to Mr Tully in respect of his role being confined to the kitchen and the notes from the unannounced visit, where he advised that he did most of the cooking before business opened and would then spend most of his time in front of house (albeit that he stated that he could not remember saying this).

(3) The notes from the first unannounced visit suggest that he had at least five members of staff: three waiters, one person on front of house (normally himself), two chefs, one person doing the washing and possibly two trainees. This is despite the claim that he paid his staff in cash and withdrew £1,000.

(4) He cannot remember what the manager's salary was as he does not have the records.

(5) He gave three separate figures for the percentage of cash sales because he did not have the records and gave figures off the top of his head.

61. In re-examination by Mr Tully, the Appellant stated that the business takings vary according to the season/time of year.

62. In response to question for the purposes of clarification from the panel, the Appellant stated that he gave his accountants an A4 notebook with the total cash and card sales in order for the accountants to prepare the VAT returns. He added that the accountants would scan the records. He added that meals were not always recorded in the books on the same night. He further added that he did not always do the cashing-up, and that Mr Hussain (the manager) would always be present whenever he (the Appellant) was away on holiday. He concluded by saying that he cannot recall when he started to pay his staff by bank transfer, and that contactless payments in the business began during the pandemic.

HMRC's evidence and submissions

63. Ms Donovan's submissions can be summarised as follows:

(1) HMRC have carried out Test Eat purchases and Visits to the business premises and observed the cashing up procedure by the Appellant. There were numerous indicators that the VAT returns rendered by the Appellant were inaccurate. Furthermore, the Test Eat purchases carried out by HMRC officers were missing from

the company records and the Appellant has not provided an explanation as to why all three Test Eat purchases conducted in 2015 were omitted from their VAT records. It is HMRC's position that cash sales were knowingly being suppressed by the Appellant.

(2) HMRC submit that their method of calculation of the level of cash sales which have been suppressed was based on MA data (cash to card split of 36.03:63.97), and not just the Test Eat purchases (as stated in the grounds of appeal). This ratio was applied on the Appellant's VAT returns going back to 30 April 2008. HMRC consider that this is reasonable and made to best judgement, based on the information made available to them. Furthermore, regard was had to seasonality as the Visits were carried out on 9 July 2015 (Summer), 22 October 2015 (Autumn) and 11 February 2016 (Spring). The source of HMRC's information has been made clear.

(3) Officer Addison acted honestly and reasonably. The amount assessed was not reached vindictively or capriciously, was not based on a spurious estimate or guess, and was not wholly unreasonable. The Appellant has been unable to come up with any alternative figures. This is due, in part, to the fact that meal bills were not retained as they were being routinely destroyed. The figure of 15.85% suggested by the Appellant's accountant was based on sales when the business had been taken over by another entity.

(4) The Appellant was a sole proprietor and he prepared the records that went to his accountant. Those records were based on an inaccurate reflection of cash sales as the Appellant routinely destroyed prime documents (i.e., the meal bills).

(5) The Appellant is liable to a penalty, under Schedule 24, for knowingly submitting inaccurate VAT returns for periods 04/08 to 01/16, in which he failed to declare output tax due on all cash sales made within this period. HMRC submit that the Appellant has deliberately suppressed cash sales. The reductions of 40% given for the quality of disclosure, which covers "Telling" (10%), "Helping" (10%) and "Giving" (20%), have resulted in a Penalty at 56% of the Potential Lost Revenue ("**PLR**"). HMRC submit that this is fair and reasonable, and has been calculated in accordance with the legislation. No special circumstances under para. 11 of Schedule 24 exist.

(6) There are no circumstances in which a penalty can be suspended for a deliberate inaccuracy.

64. We heard oral evidence from Officer Addison. He has worked for HMRC for 35 years, and has worked as a VAT Officer for the Small Business and Compliance Team since January 2013. In his oral evidence, he adopted the contents of his witness statement, dated 14 July 2023, as being true and accurate. In his witness statement, Officer Addison states that following the Visits by Officers Kevin Brown and Nicholas Hilton, he was asked to continue the compliance check into the Appellant's restaurant. The Test Eat purchases and the Visits had suggested that there were anomalies in the VAT returns submitted by the Appellant. Following various meetings with the Appellant, Officer Addison believed that the Appellant had made up shortfalls (to pay his staff in cash) with cash sales that had not been declared. His conclusion was that the Appellant was omitting cash from his VAT Returns to HMRC.

65. During his oral evidence, Officer Addison explained that Officer Kevin Brown, who was the original caseworker, had left the team part way through the investigation. He added that he had issued the Schedule 36 notice to the Appellant in order to request outstanding documents. Officer Addison explained the methodology applied in the Assessment, based on the records provided by the Appellant and the MA data. He further explained that the cashing-up procedures had been observed on two of the Visits, and cash sales were shown to

be higher than those declared by the Appellant. He added that he considered the Appellant's claim that staff were paid in cash.

66. Under cross-examination by Mr Tully, Officer Addison stated that:

(1) The Appellant was responsible for any figures or records that he gave to his accountant.

(2) He had no concerns about the conduct of the officers at the Visits and he was satisfied that they introduced themselves and handed over the relevant notices.

(3) He considered the notes made by the officers following the Visits.

(4) He gave the Appellant the opportunity to provide further information.

(5) He presented his findings to the Appellant at the meetings.

(6) Account was taken of seasonal differences as the Visits took place in July, October and February.

67. Mr Tully confirmed that Officer's Addison's integrity was not being questioned.

68. In re-examination, Officer Addison stated that it is not normal practice for meal bills to be destroyed by a business as records are required to be kept for six years.

69. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

70. Whilst the Appellant has recently raised the issue of not having had sight of the notes from the Visits and the meetings, the Appellant has not sought to gainsay the information included in the notes. Furthermore, the Appellant was represented by agents at those meetings. We are satisfied that we can place reliance on the notes. We have also had the benefit of hearing Officer Addison giving oral evidence before us. His integrity as an officer of HMRC was not called into question. We are further satisfied that we can place reliance on the written and oral evidence provided by Officer Addison. The background facts have not been specifically challenged by the Appellant. Furthermore, by his own oral evidence, the Appellant cannot correctly recall events that happened "many years ago". The following facts were either accepted, admitted or proved:

71. The Appellant's VAT registration shows that the Appellant's restaurant exceeded the threshold for VAT on 27 May 2005. The estimated value of taxable supplies in the VAT registration was £185,000.

The Test Eat purchases

72. During the Test Eat purchase on 3 July 2015, Officer Ashdown and Officer Sheikh arrived at the premises at about 19.10hrs. There were eight members of staff present at the restaurant on arrival. Two employees were behind the bar, near the entrance to the premises. The remainder of the staff carried out waiting duties. There were only two other diners seated on the officers' arrival, but a party of 12 arrived shortly afterwards. The party was followed by a further two tables. One party had made a booking, the other had not. Additionally, five customers entered the restaurant to purchase pre-ordered takeaways. The officers only witnessed one customer paying for their takeaway using cash. The rest of the orders were paid for by card. The officers paid in cash and the money was taken to the reception area near the front of the restaurant. The payment was handed to one of the employees behind the bar, who appeared to place it in a tray under cash register. A receipt was not given to the officers.

73. During the Test Eat purchase on 8 July 2015, four members of staff were seen front of house, plus one behind the bar. The bill came to £55.30 and the officers left £60, but did not see where this was taken. The officers were on the premises for two hours from 19.00hrs to 21.00hrs.

The Visits

74. During the unannounced visit on 9 July 2015, Officer Hilton checked the Appellant's records to see whether or not the previous Test Eat purchases were present. He found the records of takings for 3 July 2015 and 8 July 2015, and the meal bills for each night. The Test Eat purchases made by the officers who attended the premises were not amongst the sales for the nights.

75. During the unannounced visit on 22 October 2015, the restaurant was found to still be busy. Officer Hilton introduced himself to the person on front of house, who confirmed he was Mozmil Hussain ("**Mr Hussain**"). Mr Hussain confirmed that he recognised the officers from the previous visit. Officer Hilton asked if the Appellant was available. Mr Hussain advised that the Appellant was out of the country on holiday visiting family. Officer Hilton asked Mr Hussain if he had been left in charge of the business for the duration of the Appellant's time away, which Mr Hussain confirmed he was. Officer Hilton presented Mr Hussain with the information notice and factsheet and requested that Mr Hussain read them through carefully. Mr Hussain asked if they were the same letters/forms presented to the Appellant on the previous visit, which Officer Hilton acknowledged they were.

76. Officer Hilton asked if Mr Hussain was happy to continue with the meeting as he had acknowledged the contents of the letters provided. Mr Hussain said he was uncomfortable with proceeding without the Appellant being present. Officer Hilton confirmed that he would not enter into any discussion with Mr Hussain about the Appellant's business, but did want to note down details of the staff working that night, and the takings as per the cash in the till and the credit card report. Mr Hussain said that he was not paid any extra time once the last customers left, and that he had not eaten all night so wanted to be finished by 11.30pm. Officer Hilton confirmed that he was hoping to be away sooner than that and, at that point, Mr Hussain confirmed he was happy to continue. Details were then taken of the staff on duty that night.

77. There were two further front of house/waiters on duty. They were Mr Sorwal Hussain and Mr Dula Miah. There were three further staff in the kitchen. They were Mr Hassan Mohamad Dobbir, who works 25 hours per week and is paid £6.50 per hour (approx. £700 to £750 per month paid monthly in cash); Mr Jahiru Hoq, who had been employed for approximately two years and was working about 112 hours per month, but did not seem very sure and confirmed that he was also paid monthly (£6.50 per hour, approx. £725 per month); and Mr Abdoulaye Balde, who advised that he had worked at the restaurant for six to seven months. He advised that he was paid monthly (£6.50 per hour and approx. £600 to £650 per month). He was working 22 to 25 hours per week.

78. Mr Hussain confirmed that employees were provided with free food and accommodation.

79. Officer Hilton then asked Mr Hussain if he was happy to go through the meal slips held for that evening takings, and then cash up the till, which Mr Hussain confirmed he was. Officer Hilton asked how much "float" was going to be in the till and Mr Hussain advised would be £46.60. Officer Hilton asked if this was the normal amount of float kept in the till. Mr Hussain advised the float was normally about £50. Officer Hilton asked if any expenses had been taken out of the till since the restaurant opened that day to pay for any expenses. Mr Hussain advised no expenses had been paid from the till that day. Mr Hussain then pointed

out that the credit card machine would show a payment received for £20, but that this had been a customer paying their Christmas Eve deposit and not for a meal/takeaway that night. Officer Hilton confirmed this would be taken into account.

80. During the unannounced visit on 11 February 2016, the business was being run by a different entity. The officers arrived at the restaurant at 22.00hrs but the restaurant was still busy with approximately 12 to 14 people still eating. At 22.20hrs, several couples who had been dining had left. There was a couple left and a table of three men, so the officers decided to enter the premises. The Appellant was front of house and recognised the officers from the previous visit. Officer Hilton presented the Appellant with the letter "Notice of Inspection" and the relevant factsheets. Both officers showed their ID cards. The Appellant read through the notice and then made a call.

81. Officer Hilton asked the Appellant who he had called and the Appellant confirmed he had called his accountant. The Appellant confirmed that he had used the services of Wahid Ahmed & Co, based in London, but had parted ways with them in October/November as he was not happy with their services. The Appellant explained that he was now looked after by Salim & Co based in Luton. Officer Hilton asked what they had advised regarding the previous unannounced visits and the Appellant confirmed that they had said it was fine that the officers were there.

82. The Appellant advised that he had been on holiday in Spain when the last visit took place. When asked if anything had changed regarding the business since the previous visits, the Appellant confirmed that he was no longer a sole trader and had set up a limited company known as "Spice Garden Indian Cuisine Ltd", from 3 February 2018. He explained that he had done this as he had been advised that it would save money. The Appellant confirmed he was the only director appointed in 2015. He did not yet have a certificate of incorporation for the officers to inspect. He further confirmed that the company had been due to start trading on the 1 February 2016, but the new card machines had not been delivered until 3 February 201616, this is why the Ltd Company had not started until 3 February 2016. The Appellant also showed the officers a company cheque book named "Spice Garden Indian Cuisine Ltd" – Nat-West Sort Code 5*-**-** Account No 4******.

83. Officer Hilton wanted to clear up a concern regarding one of the restaurant's employees, Mr Hussain. Officer Hilton asked if his role in the business was just that of an employee as he seemed to have a lot of influence and was in total charge on the date of the last visit when the Appellant was on holiday. Furthermore, the restaurant had a lot of photographs of Mr Hussain with what appeared to be influential people within the community. The Appellant advised that Mr Hussain helps to bring in business, and that this is why he has photos in the restaurant.

84. Officer Hilton then asked the Appellant if he had any takings for January on site as he wanted to look at the takings for the last few Thursdays. The Appellant retrieved a white plastic bag with meal slips and "z" reads, as follows:

(1) 21 January 2016: Total £432.55 – Tips £7.40 (eight meal slips held in total) Credit Card – Grand Total £312.50 (six credit card receipts seen) = representing a 72% card to cash split.

(2) 14 January 2016: Total £638.75 – Tips £18.95 (16 Meal slips held in total) Credit Card £500.00 (Gratuity £6.70) (18 credit card receipts seen) (advised by the Appellant that difference due to people splitting bills or paying for drinks separately) = representing a 78% card to cash split.

(3) 7 January 2016: Total 811.50 – Tips 29.70 (15 Meal Slips held in total) Credit Card 791.15 (17 receipts held one of which was identified as a refund) = representing a 97% card to cash split. Officer Hilton asked if the Appellant felt this was a high percentage of customers paying by card. The Appellant advised that sometimes it was not unusual to find evenings where a 100% payment had been made by card.

85. Due to the arrival of three men, the officers informed the Appellant that neither of them felt safe and were obliged to call the police if we felt in any way under threat before, during or after a visit. This was because the Appellant seemed to encouraging the three men to stay. The Appellant went back to the table and could be overheard then encouraging the men to leave. A taxi was called and the men left without any further interaction with the officers.

Information requested by Officer Addison

86. For the period 6 April 2014 to 2 February 2016, the Appellant was required to provide:

(1) details of how and when capital was introduced into business, together with statements for the accounts from which the money was drawn; and

(2) an analysis of drawings and whether they were taken from cash sales/cheque/bank transfer.

87. Based upon the information gathered during the enquiry, and as a result of the Visits, the daily gross takings figures were found to be incorrect and cash sales had been omitted. Officer Addison gathered information from the Visits and this showed that either the prime takings figures which are transferred on to the daily-takings sheets were either re-written to exclude cash sales, or written up before all cash sales had been properly recorded.

88. On 13 June 2017, Officer Addison wrote to the Appellant's agents requesting the following by 4 July 2017:

(1) Till rolls, "z" reads and meal bills;

(2) PAYE records for the Appellant's employees (which still had not been received); and

(3) Statements for all of the Appellant's bank, building society and credit card accounts to review.

The November 2017 meeting

89. At the meeting between HMRC and the Appellant on 27 November 2017, the Appellant could not explain why the Test Eat purchases were not recorded. The Appellant also told HMRC that the level of cash varied from £1,200, £1,000 to £800. The average of these three amounts is £1,000 in weekly cash sales, which would equate to £13,000 in a VAT quarter. Looking at the Appellant's VAT returns, together with the MA data, the amount of cash takings declared on the Appellant's VAT returns ranged from no cash being declared, to £10,594, and an average of £5,520 a quarter (£424 a week). This is £576 a week less than the Appellant's declared average of cash takings. The meeting was held in order to give the Appellant an opportunity to provide an explanation for the inconsistencies identified by HMRC. The Appellant did not, however, provide any explanations.

90. Officer Addison received a letter, dated 4 December 2017, from the Appellant stating that the cash to card sales ratio should be 15.85%. Officer Addison did not agree and without further evidence to consider, he issued the Assessment on 6 July 2018.

The October 2018 meeting

91. The meeting on 11 October 2018 was with a view to establishing behaviour for the Penalty that was to be imposed. At the meeting, Officer Addison established the following:

(1) No new evidence was offered by the Appellant.

(2) No explanation for the inconsistencies observed was provided.

92. The Appellant stated that the restaurant was busier on the weekend, as opposed to weekdays. Therefore, he considered that it was unfair to use weekdays as a basis for the cash to card split. The Appellant's view was that the employees were managing the restaurant so he only knew what is happening in the restaurant when he went in. This is despite the fact that the Appellant had informed Officer Addison that he did the end of evening cash-up. In the Appellant's absence, Mr Hussain would be permitted to cash-up. The Appellant said that he was in possession of only the current trading documents. In his view, 12% was a more reasonable and realistic cash to card ratio. The information obtained at the unannounced visits had analysed 'Z' read reports and meal slips, and levels of cash were seen higher than 12%.

93. Officer Addison asked if the Appellant had bought in bank statements and meal bills requested in his letter of 31 October 2017. The Appellant replied that he had not read the letter, Officer Alexander reminded the Appellant that this information had been requested in the Schedule 36 notice.

94. Officer Alexander asked whether the Appellant still had the meal bills. The Appellant replied that he no longer had them as they were destroyed after a month. Officer Alexander then asked why that was and the Appellant's response was that he had he never been told that he needed to retain records for six years. The Appellant advised that he now had an EPOS cash register supplied by Chefonline ("**the EPOS till**').

95. Officer Addison asked how orders were taken prior to the purchase of the EPOS till. The Appellant stated that orders were hand written and one copy went to the kitchen, whilst the other copy went to the bar. Meal bills were then counted at the end of night, totalled and written down in a book. The Appellant then handed over a book of Daily Gross Taking ("**DGT**"). Officer Addison asked the Appellant if he wished to make a disclosure about any inaccuracies in his returns to HMRC. The Appellant replied that he believed his returns were accurate, and that he did not owe any tax.

96. The Appellant could not explain why the percentage of cash at the Visits was found to be 32%, 39.98% and 41%, which was far higher than the cash sales declared on the VAT returns (on average 6.5%).

97. We, therefore, make these findings of fact.

DISCUSSION

98. The Appellant appeals against an Assessment, raised to best judgment, for the periods 04/08 to 01/16 (inclusive) upon the allegation that the Appellant suppressed cash sales during the relevant period. The Assessment followed Test Eat purchases, Visits, two meetings and the acquisition of MA data. The Assessment further followed requests for further information from the Appellant.

99. The Appellant further appeals against Penalty for deliberate inaccuracies in the VAT returns for the period 04/08 to 01/16 (inclusive).

Preliminary matter: Appellant's Skeleton Argument

100. At the commencement of the appeal hearing, Mr Tully sought to rely on a Skeleton Argument which raised submissions that have never been made by the Appellant, either in the notice of appeal or any letters of appeal. It is trite law that litigation should not be

conducted by ambush, and that parties have a right to be put in a position where they can properly prepare their cases: *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 792J-793A ('*McPhilemy*') (per Lord Woolf MR). We would endorse the observations made by Lord Woolf in *McPhilemy* and add that it is an important principle of natural justice that every party must have reasonable notice of the case that it has to meet. That is to say, there should be no "trial by ambush". The function of the decisions, the Grounds of Appeal and Statement of Case (collectively known as "the pleadings") is to concisely set out each party's case. This enables the parties to know, in advance, each other's case at the hearing, and to understand the positions adopted. The purpose is to encourage a "cards on the table" approach to litigation. This also allows parties to prepare effectively, and at proportionate cost.

101. Moreover, trial by ambush is not justice. Each party should be able to prepare to meet the other party's case in advance of the hearing to increase the likelihood that the outcome of the appeal will be in accordance with the true facts of the case. Each party must, therefore, state in advance (in summary terms) what is in dispute and why. Pleadings are required to mark out the parameters of the case that is being advanced by each party. In particular, pleadings are critical to identifying the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader, in reference to the words of Lord Woolf MR in *McPhilemy*.

102. The case of *Shinelock Ltd v HMRC* [2023] UKUT 00107 (TCC) ('*Shinelock*') concerned an application for permission to make a late amendment to a case before the hearing. The arguments between the parties had changed, considerably, in the course of their dispute. The Upper Tribunal ('**UT**') said this, at [118]:

> "118. Where a party who wishes to raise a new argument has applied to the FTT for permission to make a late amendment to its case before the hearing, then the FTT should consider that application taking into account the principles set out in *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm)…"

103. The case of *Quah v Goldman Sachs International* [2015] EWHC 759 (Comm) ('*Quah*') also involved an application to make a late amendment to a claim. Carr J (as she then was), summarised the relevant principles, at [37] to [38], thus:

> "37. …the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities...
>
> 38. Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;"

104. The UT in *Shinelock* also considered *Satyam Enterprises v Barton* [2021] EWCA Civ 287, where Nugee LJ set out the position as follows:

"36. The present case however is not one of a party seeking to depart from his pleaded case, but one where the parties addressed in their evidence and submissions the cases that had been pleaded, but the Judge decided the case on a basis that had neither been pleaded nor canvassed before him. In our system of civil litigation that is impermissible, and a misunderstanding of the judge's function which is to try the issues the parties have raised before him. The relevant principles were stated by this Court in Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041...

> "...It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting them in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."

105. We completely agree with those propositions.

106. The differences in *Shinelock* and *Quah*, and in the appeal before us, do not negate the need to ensure a fair hearing. As already stated, the requirement that the pleadings set out a party's position in full is in order to avoid a trial by ambush as the next usual step after the pleadings are lodged with the FtT is a substantive appeal hearing. That is because a party's change of position would run the risk that a hearing date would be lost in circumstances where the parties, and the FtT, have a legitimate expectation that fixtures will be kept. Furthermore, the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2008 ('the Procedure Rules') provide a framework for hearings before the FtT. The overriding objective can be summarised as the requirement to ensure fairness and justice, as follows:

"**Overriding objective and parties' obligation to co-operate with the Tribunal**

2—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly…"

107. We find that allowing the late amendment in circumstances where the Appellant has always been represented and was always aware of the case that he had to meet would result in a trial by ambush. More importantly, the arguments that the Appellant seeks to raise in the Skeleton Argument are matters that are not within the jurisdiction of the FtT to consider, in light of the decisions under appeal and the grounds of appeal. We have already considered that an appeal against an assessment of the nature in this appeal is provided for in s 83 VATA. The grounds of appeal are clear. The challenge being made in the Skeleton Argument

is as to the legality of the investigation by HMRC. In *Marks & Spencer plc v C & E Comrs* [1999] STC 205, at 247, Moses J said this:

> "…in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the Commissioners then it is clear the Tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the Commissioners and it has no jurisdiction in relation to supervision of their conduct."

108. This principle was applied by Warren J in *HMRC v Abdul Noor* [2013] UKUT 071, at [28].

109. We have also considered the case of *R & C Comrs v Hok Ltd* [2012] UKUT 363 (TCC); [2013] STC 255. There, the UT held, at [109], that the FtT has no general supervisory jurisdiction. Applying *Aspin v Estill* [1987] STC 723, the UT found, at [116], that the jurisdiction of the FtT was limited to considering the application of the tax provisions themselves. In *Rotberg v R & C Comrs* [2014] UKFTT 657 (TC), it was accepted that the FtT's jurisdiction went only to determining how much tax was lawfully due and not the question of whether HMRC should, by reason of some act or omission on their part, be prevented from collecting tax otherwise lawfully due.

The Assessment: Best Judgment

110. The power given to HMRC under statute (s 73 VATA) is to make an assessment to their best judgment on such information as is available. Case law has established that this allows for a "margin of error", as opposed to an "educated guess". An assessment requires to be made to best judgment in the sense that it has to be prepared in good faith. This must be balanced against the well-established rule that the primary obligation is on the taxpayer to make a return himself and HMRC are not required to do the work for the taxpayer.

111. The meaning of the phrase "to the best of their judgment" has been the subject of some adjudication. The starting point to the sphere of litigation that has arisen are the principles enunciated in the case of *Van Boeckel v C & E Comrs* [1981] STC 290 ('*Van Boeckel*'), where the classic test was laid down by Woolf J (as he then was), at p. 292, as follows:

> "…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."

112. He added this, at p 296:

> "If they do make investigations then they have got to take into account material disclosed by those investigations."

113. Woolf J drew three conclusions in relation to the obligation that is upon HMRC. Firstly, there must be some material before HMRC on which they can base their judgment. Secondly, HMRC are not required to do the work for the taxpayer in order to form a conclusion as to the amount of tax due. Thirdly, HMRC are required to exercise their powers in such a way that they make a value judgment on the material which is before them.

114. As set out in *Van Boeckel*, there are various underlying principles which must be observed in order for HMRC to arrive at a best judgment assessment. The Commissioners are required to consider all material placed before them and come to a decision which is reasonable. Lord Justice Carnwath cited the same passages in *Rahman v C & E Comrs* [1998] STC 826 ('*Rahman*'). At p 835, he said this:

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

115. The test to be applied in interpreting s 73(1) VATA is now adequately set out in *Pegasus Birds (2)*. At [38], Carnwath LJ provided the following guidance:

> "38. In the light of the above discussion, I would make four points by way of guidance to the tribunal when faced with 'best of their judgment' arguments in future cases:
>
> (i)The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the commissioners' exercise of judgment at the time of the assessment.
>
> (ii)Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins.
>
> (iii)In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.
>
> (iv)There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing."

116. Chadwick LJ explained that the Commissioners are not bound to do more when making an assessment than their honest best:

> "[77] It is important to keep in mind that it does not follow, necessarily, that an assessment which is 'wholly unreasonable, being outside the parameters of the reasonable' is not, nevertheless, the result of an honest and genuine attempt to assess the amount of VAT properly due from the taxpayer. All that can be said is that an assessment may be so far outside the bounds of what would have been reasonable that it calls into question whether there was, indeed, an honest and genuine attempt to assess the amount properly due. It is open to a tribunal to find that it is so unlikely that an experienced officer of Customs and Excise, seeking to make a proper assessment of the VAT properly due, would have made an assessment in the amount that he did that the proper inference to draw is that, in making that assessment, he could not have been doing his honest best. But that is an evidential inference from the facts; it is not a finding that because (although doing his honest best) his assessment fell below an objective standard of reasonableness, he failed to exercise the power to assess to the best of his judgment as a matter of law."

117. Waller LJ agreed with both judgments.

118. The threshold for making a "best judgment" assessment is, therefore, a low one. The correct test is whether there has been an "honest and genuine attempt" to make a reasoned

assessment: see *Pegasus Birds (2)*, at [22] (per Carnwath LJ). This does not translate to meaning that whether an assessment could be said to be "wholly unreasonable" is irrelevant to determining that question: see *Pegasus Birds (2)*, at [77] (per Chadwick LJ). HMRC only need to consider the information before them in a fair way and come to a decision which is reasonable (and not arbitrary) as to the amount of tax due.

119. These principles were reaffirmed by the Supreme Court in *DCM (Optical Holdings) Ltd v HMRC* [2022] UKSC 26 ('*DCM*').

120. In *Rahman v C & E Comrs* [2003] STC 150 ('*Rahman (2)*'), at [45], the Court of Appeal held that if the Commissioners do not exercise their best judgment in making an assessment, the FtT may set it aside. However, the decision of the Court of Appeal in *Pegasus Birds (2)*, at [25] to [29] and [90], establishes that the FtT is not bound to set the whole assessment aside if it is satisfied that justice can be done by correcting the amount of the assessment. Carnwath LJ concluded that the position was as follows:

> "[29] In my view, the tribunal, faced with a "the best of their judgment" challenge, should not automatically treat it as an appeal against the assessment of such, rather than against the amount. Even if the process of assessment is found defective in some respect applying the Rahman (2) test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment is set aside, or whether justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it. In the latter case, the tribunal is not required to treat the assessment as the nullity but should amend it accordingly."

121. VATA requires HMRC to make an assessment only to the best of their judgment and it is implicit in this that HMRC will make that assessment at as early a stage as reasonably practicable. In setting the standard at best judgment, Parliament has recognised that there is no absolute certainty about the amount of the VAT due, or its components, in an assessment under s 73(1). It has also expressly recognised that as other facts become known, or as the matter develops, further assessments may be needed. Moreover, it has given the tribunal powers to direct that an amount of VAT is due, even if HMRC have not followed the correct procedure under s 73(1). There is no express power for HMRC to amend the input and output tax elements of the computation where no alteration is made to the overall amount of VAT due.

122. However, such a power, and likewise a power to take into account by deduction offsets of overclaimed input tax or underdeclared output tax (as the case may be), must follow from, and be implicit in, the best judgment requirement. Those powers are reasonably necessary for carrying out the assessment process. Otherwise, HMRC could find that even though they raised an assessment to the best of their judgment at an appropriate time, that assessment cannot be amended to reflect facts and matters becoming known later in circumstances where it would be proper and reasonable for them to make those changes.

Whether the Assessment was reasonable and carried out to the best of judgment?

123. Officer Addison, who issued the Assessment in this appeal, gave evidence before us. We find that he gave his evidence in a clear and straightforward manner, without equivocation. We are satisfied that he was a truthful witness. The methodology he applied in making the Assessment has been adequately explained to us. HMRC obtained MA card data and used secondary records to calculate the Assessment. HMRC have carried out a card/cash comparison to support their calculations, and the Assessment is not based solely on the Test Eat purchases and the Visits (as alleged by the Appellant).

124. In the VAT period ended 30 April 2015, the Appellant's credit card sales were 101% of declared VAT Turnover, meaning no cash was taken in the period. Furthermore, prior to the investigation, the Appellant declared cash sales of 6.5%. During the unannounced visit of 9 July 2015, HMRC found that the Test Eat purchases were not accounted for in the business records. The average cash sales at two of the unannounced visits were 36.03%. (32.09% + 39.98% / 2 = 36.03%). The average 6.5% cash sales declared by the Appellant did not reflect the trading activities of the business when compared to the findings of the Visits. No reasonable explanation has been provided by the Appellant for the discrepancies which have occurred.

125. At the November 2017 meeting, the Appellant stated that his cash sales ranged from £800 to £1,200 per week. The Appellant's records showed an average of £424 cash taken per week. HMRC noted that the Appellant's declared cash sales for the period 1 August 2014 to 31 July 2015 were £24,535. Cash withdrawals were £34,100. Expenses were £2,174. The amount available to pay staff wages totalled £56,461. The Appellant's staffing costs for the period were £72,503, which is £16,042 more than the Appellant had available to pay his staff. HMRC, therefore, considered that the Appellant used undeclared cash sales to pay the wages. Based upon the MA data acquired covering the period 1 April 2011 to 31 January 2016, HMRC calculated that from VAT periods 05/11 to deregistration, the card sales on average would have accounted for 93.50 % of total sales. HMRC considered this not to be credible.

126. During the November 2017 meeting, Officer Addison established that the Appellant:

(1) had destroyed records of the Test Eat purchases;

(2) had destroyed meal bills; and

(3) could not answer the questions.

127. During the October 2018 meeting, Officer Addison established that:

(1) no new evidence had been offered by the Appellant; and

(2) no explanation for the inconsistencies observed was provided.

128. The Appellant had no explanation as to why the percentage of cash at the Visits was found to be 32%, 39.98% and 41%, which was far higher than his declared cash sales. He had no explanation of why the meal bills were not present in his records. The percentage of cash sales had declined over the five years preceding the meeting. For the year ended 31 July 2015, after subtracting cash expenses of £2,174.54, the amount of cash available to pay his staff totalled £56,463.60. We have found that this is a cash shortfall of £16,039.

129. Officer Addison therefore concluded that the Appellant made up this shortfall with cash sales that had not been declared. Officer Addison then used the information from the first two Visits, in conjunction with the MA data held by HMRC, to conclude that the VAT returns submitted by the Appellant were incorrect. Officer Addison calculated that for the periods 04/08 to 01/16, the cash sales should account for 36.03% of the sales. To the Appellant's benefit, Officer Addison chose to ignore the cash sales of 41% for a particular period covered by the Assessment.

130. We are satisfied that the Assessment issued by Officer Addison, and the methodology underlying it, was reasonable and had been calculated to the best of judgment on the information available. We find that there has been no other competing evidence of sufficient cogency to displace the Assessment. It is clear to us, from all of the evidence, that the Appellant had inadequate systems in place.

131. Accordingly, therefore, we uphold the Assessment. For completeness, we completely reject the suggestion that there was any bad faith on the officers' part during the Visits.

Whether the Assessment is in time

132. Section 73(6) VATA provides that:

> "**73 Failure to make returns etc.**
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge, but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

133. The relevant guidance on how to construe and apply s 73(6)(b) VATA was set out by Dyson J (as he then was) in six propositions in *Pegasus Birds Ltd v C & E Commissioners* [1999] STC 95 ('*Pegasus Birds*') (in an earlier case involving the same taxpayer in *Pegasus Birds (2)*), at p101, thus:

> "1. The Commissioners' opinion referred to in Section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question: *C & E Commissioners v Post Office* [1995] STC 749, 754G.
>
> 3. The knowledge referred to in Section 73(6)(b) is actual, and not constructive knowledge: *C & E Commissioners v Post Office* at p.755D. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. 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 (ii): *Heyfordian Travel Ltd. v C & E Commissioners* [1979] VATTR 139, 151; and *Classicmoor Ltd. v C & E Commissioners* [1995] V & DR 1, 10.1.27.
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury*: *Classicmoor* paras. 27 to 29; and more generally *John Dee Ltd. v C & E Commissioners* [1995] STC 941, 952D-H.
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in Section 73(6)(b) of VATA."

134. Dyson J's approach was approved by Aldous LJ in *Pegasus Birds* in the Court of Appeal: [2000] STC 91, at [11] and [15]:

> "The relevant evidence of facts is that which was considered, in the opinion of the Commissioners, to justify the making of the assessment. The one-year time limit runs from

> the date when the facts constituting the evidence came to the knowledge of the Commissioners.
>
> ...
>
> An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

135. The court further made clear that it is the task of the Tribunal to assess whether, as a matter of fact, the officer held the opinion in question.

136. The leading authority on the application of s 73(6)(b) VATA is now *DCM*, in which the *Pegasus Birds* principles were approved (save for point 6, which was not mentioned as the burden of proof was not an issue in the *DCM* appeal). The Supreme Court in *DCM* also approved what Aldous LJ had said in *Pegasus Birds* in the Court of Appeal.

137. In *Pegasus Birds*, the court concluded that the correct approach for a Tribunal to adopt is:

> (1) 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
>
> (2) to determine when the last piece of evidence of these facts of sufficient weight to justify the making of the assessment was "communicated" to the Commissioners. The period of one year runs from that date; and that
>
> (3) an officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment and, accordingly, his failure to make an earlier assessment, can only be challenged on Wednesbury principles, or principles analogous to Wednesbury; and
>
> (4) the burden is on the taxpayer to show that the assessment was made outside of the time-limit specified.

138. Dyson J held that the test is a subjective, rather than an objective, one. As held by the UT in *Rasul v HMRC* [2017] STC 2261; [2017] UKUT 357 (TCC) ('*Rasul*'), at [10], in reference to the decision in *Pegasus Birds*:

> "10. …The person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question…"

139. In *Lithuanian Beer Ltd v R & C Comrs* [2018] EWCA Civ 1406 ('*Lithuanian Beer*') (in the context of an assessment to excise duty), the Court of Appeal considered the importance of the word "knowledge", finding that "constructive knowledge" was not sufficient. It is not, therefore, enough for the relevant HMRC officer to know that relevant evidence exists, if he does not know what its contents are, as this would amount to constructive knowledge of the facts said to be evidenced by the material in question. Furthermore, the court was satisfied that there is no distinction to be spelled out of the phrase "evidence of the facts" between knowing that evidence exists and knowing what that evidence reveals about the facts of the case.

140. The court further considered that the last piece of evidence is "communicated" to the Commissioners when it is communicated in such a way that the contents of the evidence are,

in fact, known to them. This requires the evidence to be digested by HMRC, and not just made available to HMRC. By analogy, the court considered a situation where an HMRC officer is presented with a room full of documents and told that he can look at anything that he likes. The court found that in this situation, the officer will not have knowledge of the "evidence of facts" contained in each and every document in the room.

141. The court held, at [26] to [30], that:

> "26. …If HMRC make a later assessment to claim underpaid tax, relying on a number of factual building blocks based on evidence they have seen, a shorter limitation period is appropriate if they knew about that evidence and what it revealed earlier on but sat on their hands and failed to take prompt action on the basis of it.
>
> 27. … The phrase, "sufficient in the opinion of the Commissioners to justify the making of the assessment", is a reference to the opinion actually formed by the Commissioners at the time when they issue the assessment which is in dispute in the proceedings…
>
> 28. Sub-paragraph (b) in section 12(4) requires that one identifies the evidence taken into account by the officer who issues the assessment as the justification for issuing it (or, under proposition 5, the evidence of which he was aware which ought rationally to have compelled him to reach the opinion that an assessment would be justified at some earlier stage), and compares that with the "evidence of facts" which it is said the Commissioners knew a year or more before the assessment came to be issued. Both elements in the comparison turn on the subjective state of mind of HMRC officers regarding what they understand the evidence available to them actually shows. If the "evidence of facts" known to the Commissioners previously was the same as the evidence of facts which led them to form the opinion later on that an assessment was justified (or, on a *Wednesbury* approach, should have led them to form that opinion), then it will be clear that the Commissioners have sat on their hands and the special, truncated limitation period in sub-paragraph (b) will apply.
>
> 29. It is this comparative exercise to which Dyson J refers in proposition 4(ii). In my view, it is clear that where he speaks of the last piece of evidence being "communicated" to the Commissioners, he means that it is communicated in such a way that the contents of the evidence are in fact known to them. He does not mean that it is sufficient that the evidence is made available to them, although it is not read and digested by them.
>
> 30. …The officer will only have such knowledge where he reads and digests the contents of particular documents…"

142. The Appellant has not suggested that the Assessment is out of time. The Assessment was raised on 31 May 2018. We are satisfied that the Assessment is in time as it was raised less than one year after the November 2017 meeting between Officer Addison and the Appellant.

Whether the Appellant has displaced the Assessment

143. The Appellant's case is, broadly, that no reliable evidence of suppression of cash has been given or relied on by HMRC. The Appellant further argues that HMRC's methodology is flawed. The Appellant's evidence is that HMRC are contending that understated gross sales are £1,057.494 (176,249/20% = net £881,245 + VAT £176,249), covering the period 1 February 2008 to 31 January 2016. This, he states, equates to:

(1) £132,187 per annum;

(2) £11,016 per month;

(3) 2,542 per week; and

(4) £363 per day.

144. His evidence is that his drawings for some years were as follows:

(1) 5 April 2015: £35,111;

(2) 5 April 2016: £54,121;

(3) 5 April 2017: £63,504; and

(4) 5 April 2018: £76,305.

145. In his view, the Assessment is "*wildly exaggerated*", albeit that he acknowledges that some sales have been understated due to pilfering.

146. Mr Tully submits that Officer Addison based the Assessment on the average of cash takings observed at just two of the three visits (9 July 2015 and 22 October 2015). He further submits that Officer Addison used MA data for just three tax years; 2011-12, 2012-13 and 2013-14, and that it is difficult to see how applying this sampling method to raise assessments from 04/08 to 01/16 constitutes the exercise of HMRC's best judgement.

147. Mr Tully further submits that constraining the sample pool to just two visits in 2015, alongside MA data for the tax years ended 2012 to 2014, has led to a distortion of figures used by HMRC to calculate the Assessments. In further amplification of this, he submits that HMRC's figures have been distorted both by the number of meals that were purchased and a lack of adjustment for fluctuation in trade (seasonal trading). He adds that it needs to be established whether the Test Eat purchases were made using cash or card, or both. If they were all purchased in cash, this would inevitably distort the figures and, indeed, the entire method of calculation.

148. Mr Tully adds that the Assessment is based on reports from Test Eat purchases which were not supplied to the Appellant for the Appellant to consider. He adds that data from UK card associations suggests that the cash/card ratios in December 2015 were 20:80. Based on HMRC's calculations, the margin of error is between 33.33% and 50%. The data extracted during the Visits is unrepresentative of the VAT periods covering the period 30 April 2008 to 31 January 2016. Mr Tully submits that it is unclear whether HMRC accounted for cash withdrawals from just the Appellant's business account, or from his personal and joint account with his wife. Furthermore, it was not clear whether the utilisation of available overdraft facilities may have accounted for these apparent discrepancies and/or shortfalls.

149. Mr Tully's overall submission was that the figure provided for cash sales by the Appellant's accountants is that which should be considered (i.e., 15.85%). He accepted, however, that there were no records to corroborate this.

150. We have found that the Assessment was based on MA data, and not just the Test Eat purchases and the Visits. We are, further, satisfied that the Appellant could not explain why the percentage of cash at the Visits was found to be 32%, 39.98% and 41%, which was far higher than the cash sales declared on the VAT returns (on average 6.5%). The Appellant has not maintained sufficient records to show the cash sales made and some of his explanations for the anomalies found by HMRC have been inconsistent and unsupported by any evidence. We further find that there is nothing to show how the figure of 15.85% had been arrived at by the Appellant's accountants. The burden of proof is, as stated, on the Appellant to displace the Assessment. In this respect, we find that the Appellant has not discharged the burden of proof by the production of cogent evidence.

151. Consequently, we uphold the Assessment.

The Penalty

152. A Penalty was issued under para. 1 of Schedule 24, on the basis of what were considered to be deliberate inaccuracies contained in the Appellant's VAT returns. The statutory scheme at Schedule 24 is set out as follows:

> *"Standard amount*
>
> 4 (1) This paragraph sets out the penalty payable under paragraph 1.
>
> 4A (1) An inaccuracy is in category 1 if—
>
> (a) it involves a domestic matter, …
>
> (2) If the inaccuracy is in category 1, the penalty is—
>
> (a) for careless action, 30% of the potential lost revenue,
>
> (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
>
> (c) for deliberate and concealed action, 100% of the potential lost revenue…
>
> *Potential lost revenue: normal rule*
>
> 5 (1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.
>
> (2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—
>
> (a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and
>
> (b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected."

153. The matters taken into consideration in deciding the apply a deliberate Penalty were that declared cash sales on the Appellant's VAT returns were 6.5%, compared to an average of 36.03% observed at two of the unannounced visits. The Test Eat purchases had not been declared on the Appellant's corresponding VAT returns. Furthermore, the Appellant has not provided an explanation as to why the Test East purchases were omitted from his VAT records. The Appellant stated that his cash sales were, on average, £1,000 per week; compared to an average of £424 declared on his VAT returns. In the VAT period 04/15, no cash sales were declared in the Appellant's VAT return. Furthermore, the Appellant was found to be declaring insufficient cash sales to pay his staff.

154. Officer Addison allowed the following reductions:

(1) 10% for *Telling* as the Appellant had not admitted the under declaration of sales, nor had he explained why the errors arose;

(2) 10% for *Helping* as the Appellant attended a meeting to discuss the findings of the enquiry; and

(3) 20% for *Giving* as the Appellant had supplied some of the records requested and allowed three unannounced visits.

155. Based on the 40% total reduction given for the quality of disclosure, the Penalty was then calculated at 56% of the tax due. Whilst the PLR is £176,000, this does not give rise to the Penalty issued of £90,960.80; which would have been calculated at 56% by reference to HMRC's pleadings. We are somewhat disappointed that HMRC did not significantly review the calculation of the Penalty to ensure that their pleadings referred to the correct position.

156. We have considered all of the information and are satisfied that further reductions can be given for "Helping" (namely 20%). This is because the Appellant engaged with HMRC, despite the fact that the poor record-keeping meant that he was not able to provide the evidence required to displace the Assessment. This means that the Penalty percentage reduces to 52.5%.

157. In arriving at the Penalty issued, HMRC based this on assessable amounts of £162,430 at 56%, which equals £90,960.80. HMRC have not asked us to revisit the quantum of the amounts on which the Penalty should be charged, despite ample opportunity to do so during the course of the hearing. We chose not to revisit the starting quantum used by HMRC in calculating the Penalty. Using HMRC's own quantum, we have recalculated the Penalty as £162,430 by 52.5%; which gives rise to a Penalty of £85,275.75.

Special Circumstances

158. If HMRC find that no special circumstances apply, the FtT can only rely on para. 11 if HMRC's decision in this regard is flawed. "Flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review. In this regard, the principles adumbrated in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 ('*Wednesbury*'), are applicable. That is a high test. HMRC have considered the Appellant's appeal and the conclusion reached is that no special circumstances apply. We do not consider that HMRC's decision in this case in this respect is flawed. Therefore, we have no power to interfere with HMRC's decision in respect of the issue of whether any special circumstances apply.

159. For the reasons set out above, the appeal is dismissed.

CONCLUSIONS

160. We hold that:

(1) The Assessment was reached to the best of judgment on the basis of the evidence that was before HMRC;

(2) The Assessment was in time;

(3) The Assessment is £176,249;

(4) The Appellant has not produced sufficient evidence to displace the Assessment;

(5) The Appellant is liable to the Penalty for inaccuracies in the VAT return, which were deliberate;

(6) Reductions have been given for the quality of disclosure;

(7) We reduce the Penalty amount to £85,275.75;

(8) HMRC's decision in relation to Special Circumstances was not flawed.

161. Accordingly, therefore, the appeal in relation to the Assessment is dismissed and the appeal in respect to the Penalty is allowed, in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

162. 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.

Release date: 16th DECEMBER 2024