[2015] UKFTT 0352 (TC)

TC04536

Appeal number: TC/2011/04620

VAT – assessment – dishonest evasion penalty – alleged suppression of takings in relation to appellant's off-licence business- appeal against assessment and penalty dismissed subject to further consideration of whether certain VAT periods within relevant time limits

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR SHAHZADA RASUL **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
CHRISTOPHER JENKINS

Sitting in public at 45 Bedford Square, London on 29, 30 and 31 October 2014

Mr Martyn Arthur of Martyn Arthur Forensic Accountants and Mr Munir of Yussouf & Co accountants for the Appellant

Bernard Haley, HMRC Officer, for the Respondents

DECISION

Introduction

1. The appellant was the sole proprietor of two off-licences (O2 Food & Wines and A1 Food & Wines) in central London.

2. Following various inspections and on reviewing transaction records in a diary which was found under the counter at one of the stores HMRC came to the view that the appellant had been under declaring his takings. HMRC issued assessments for under-declared VAT of £102,950.00 for the periods 1 February 2006 to 30 November 2010 and a dishonest evasion penalty of £67,565.00 for the period 1 February 2006 to 28 February 2009.

3. The appellant appeals against those assessments and the penalty.

Complaint made by appellant to HMRC in relation to illegal searches / use of third party information

4. Shortly before the hearing on 25 October 2014, the appellant copied the Tribunal in on a formal complaint it had made to HMRC in relation to the legality of HMRC's visits and the taking away of materials in particular a diary found under the counter at one of the shops which the appellant says did not belong to him and did not form part of his business records. The appellant also maintained that a letter HMRC wrote to the appellant on 13 February 2012 unlawfully disclosed the sales information of a third party.

5. HMRC did not accede to the appellant's invitation to withdraw HMRC's resistance to the appeal and lodged an objection to the appellant amending its grounds of appeal (the appellant clarified however it was not seeking to amend its grounds of appeal). At the beginning of the hearing the appellant was asked by the Tribunal to clarify what submissions it was making in relation to impact of the complaint it had made to HMRC in relation to the proceedings before the Tribunal. The appellant asked the Tribunal to take his complaints into account in evaluating the evidence. We deal with the relevance of the complaint to the appeal below at [66] onwards.

Evidence

6. Witness statements had been served in advance in relation to each witness and we had before us a bundle containing notes of the various visits and meetings which had taken place, the correspondence between the parties and copies of till receipts and analysis schedules. All the witnesses were cross-examined by the other party and assisted the Tribunal with its further questions.

7. We were also able to inspect the original of the diary which had been taken away from the appellant's shop and which formed the basis for HMRC's assessment. We were satisfied that the copies of the relevant entries that appeared in the bundles correctly reflected the original document. On behalf of the Respondents we heard oral

8. evidence from HMRC Officer Brendan Spranklen. Mr Spranklen was the officer who made the assessment and raised the penalty. He had also visited O2. We also heard evidence from HMRC Officer Chris Nowak. He also visited the O2 store and examined the tills there. We found both Mr Spranklen and Mr Nowak to be credible witnesses.

9. We then heard the oral evidence of the appellant and on his behalf the oral evidence of his friend, Mr Atta Abbas who helped out on occasions at the O2 store and was present for some of HMRC's visits.

10. In relation to the appellant and Mr Abbas it was clear to us from their facility in English that the witness statements were not written in their own words and that the statements could not safely be relied on as a fair reflection of their evidence. Both witnesses gave extensive oral evidence however and we were grateful for the parties' representatives assistance in the pacing and clarification of their questions and in allowing Mr Rasoul and Mr Abbas ample opportunity to clarify the answers they gave. We were satisfied Mr Rasoul and Mr Abbas understood the questions being put to them and the meaning of the answers that they gave.

11. Mid-way through the examination-in-chief of the appellant, the appellant's representative raised the issue as to whether it would be possible for the appellant's accountant Mr Munir to interpret into the appellant's first language, Urdu. We understand the appellant had been asked prior to the hearing by his agent whether he had wanted an interpreter but that the appellant had thought he did not need one. Although HMRC did not object to Mr Munir providing interpretation we explained that we thought if there was to be an interpreter this ought to be a court appointed one. Mr Munir had already asked some questions in his capacity as a representative of the appellant and the hearing bundle contained correspondence relating to the appeal which related to correspondence and meetings with Mr Munir. We did not feel it appropriate for Mr Munir to act as the appellant's interpreter in these circumstances. We explained it would be open to the appellant if he had second thoughts about needing interpretation to seek an adjournment. The appellant preferred to continue but on the understanding that further extra time would be taken to ensure he had understood the question and to putting any questions to him as succinctly as possible.

12. For the reasons set out below we did not find the evidence which the appellant and Mr Abbas gave to be wholly reliable.

13. Several of the explanations put forward by the appellant were simply implausible, or implausible in the light of the other evidence. (These were that the appellant in relation his explanation as to why non duty paid bottles came to be in his store and the entries on the second till were those of his young son who had been playing on the till (see [43] and [81] to [82]). The answer he gave in relation to the use of the "no-sale button" on one of the tills in O2 (the Sharp till) was inconsistent - on the one hand he explained that the "no sale" button was not pressed because people would think he was "fiddling" and then later he said the "no sale" button did not open the till. Also the examination of the till records revealed a number of no sale entries. While the records do not establish whether the till drawer opened when the no sale button was pressed, there is no explanation for why the no sale button presses would have been repeatedly pressed thereby creating those records. Those entries are more consistent than not with the button being pressed intentionally for the purpose of

opening the drawer (whether that purpose was to give change or for some other reason) than for no purpose.

14. Mr Abbas's evidence dealt primarily with his role at O2 and in relation to the diary entries he made in June and November of 2006. He struggled to give any kind of coherent account of what the diary entries signified. This was not altogether surprising given the length of time of (around 8 years) which had since lapsed. The upshot was that we were not able to make any findings from Mr Abbas' evidence as to what the diary entries meant but had instead to interpret the diary entries as best we could taking account of the other documentary evidence. Mr Abbas' evidence was unsatisfactory, in that on some matters the evidence he gave was not consistent with what he would have known at the relevant time but had become imbued we think with what he had been learned of later from others. For example Mr Abbas's evidence was that it was in September 2006 that the accountant had instructed that takings in relation to telephone top ups were to be kept separate. However, his evidence was that he was not working at the shop at that time – his first period of cover finished in mid-August - so it seems to us unlikely that he would have come to know at the time about any change in practice having happened in September. His evidence was also confused e.g. he insisted that takings were never above £1000 and that he would have remembered if they were but he had no credible explanation for what a £1000 plus amount (£1070.64) which he had written next to a "Z" in the diary represented.)

Background facts

15. From the evidence before us we were able to make the following findings of fact.

16. The appellant carried on business as a sole proprietor as "O2 Food and Wine" ("O2") in Fulham, London. He was registered for VAT from 1 February 2006. He had experience of being involved in retail business as before he became the owner of O2 he was involved with a green grocer business in Croydon (JS Super Store) which later became licensed and a company called Bestin Ltd.

17. O2 is a grocery store and off-licence open seven days a week from 9/10 am to around midnight to 1am. It is situated on a busy road in a parade of shops with a bus stop outside used by 4-5 different bus routes. The shop is about 2 and half to 3 metres wide and 7 metres deep.

18. Between 1 December 2006 and 30 November 2009 the appellant owned a second grocery store and off licence shop on the Edgeware Road, London. This traded under the name "A1 Food and Wine" ("A1") and was open from 9/10 am to around midnight 7 days a week.

19. VAT returns for both businesses were made under the same VAT number. The appellant said he gave them to his accountant. He told us he signed the quarterly VAT returns and returned them to his accountant to submit. Both businesses sold food, cigarettes, and alcohol as well as international calling cards and mobile phone top ups.

20. The appellant worked at O2 sometimes and he operated the till. He kept the till rolls in shop and then gave them to his accountant. From 2006 this was Mr Ijaz Ahmed and from 2011 he gave them to Mr Youssof.

21. He also did the cashing up when he was there. He signed the VAT returns and then returned them to his accountant. When the appellant was not in the country then his friend Mr Abbas did the cashing up and took the money to the bank.

22. In relation to how the telephone top up payments were recorded, the appellant says that from September 2006 his accountant (Mr Ahmed) told him not to put card and top up payments through the till but to keep those payments separate as they had no VAT.

23. In the summer of 2006 the appellant's brother, who lived in Pakistan, died. Because the appellant had to stay in Pakistan a while he asked Mr Abbas to help out in running O2. Mr Abbas was at the shop for an 8 to 9 week period starting in the middle of June and ending in the middle of August. Mr Abbas knew he had to take a "Z" reading (a function which shows a cumulative total from the time the last Z reading was taken) from the till (which he understood to be an end of day total) and to keep the till record to give to the accountant. Mr Abbas was a close friend of the appellant whom he had known for a while. He did not have much experience of running shops; he was not paid by the appellant but was able to take money out for himself whenever he needed it as long as he told the appellant what he was taking. Apart from taking the Z readings Mr Abbas was not instructed by the appellant to keep any other records. The appellant trusted Mr Abbas to "get on with it". Mr Abbas normally worked Monday to Thursday during the 8-9 week period he was there. He would not tend to go in on the weekends as the appellant's wife was there on Saturday and Sunday.

24. Mr Abbas said he kept the Z print outs in a book on a shelf under the till. When the appellant returned Mr Abbas said he gave the appellant a whole bundle of papers including the Z readings.

The diary

25. Mr Abbas accepts he was not instructed to keep a record of Z totals but explained that he decided to keep it himself to show the appellant what he was doing in the shop and so he could tell the appellant about the cash flow. Mr Abbas was not a bookkeeper and did not have training in keeping records.

26. The appellant recognised the handwriting in the diary as Mr Abbas's. Mr Abbas's evidence was that he had found the book under shelf when he was in the shop– he had been looking for something to write on. He kept it openly under shelf. He says that when the appellant came back he showed it to him and the appellant said "ok fine". When asked about the diary in cross examination the appellant said he did not check by the till and did not see the diary until recently when HMRC showed it to him.

27. The diary entries are considered in more detail at [84] below.

Second till

28. The appellant says he got the second till at O2 (a Casio 240) because the first one got stuck on "standby" – it would stop suddenly. This was bought second hand for £80 on 28 March 2009. The appellant also said that when he brought his son who was 3 and half / 4 years old at the time into the shop his son would sit on a stool and

want to press buttons on the till. The appellant also says he used to print receipts from the Casio till for customers when the Sharp till was "hung up".

29. The appellant also needed help and he says the till was also need to train staff one of whom was an individual called Asif. He seemed unclear on who did the training. He used the Casio if the Sharp was not working and customers wanted a receipt. His evidence was that mostly customers did want a receipt.

30. Mr Abbas, in response to a question from the Tribunal, said he was told by the appellant not to use the second till but he was unclear about when he was told this.

31. There were two tills at A1 (both Casios) but one had been broken a long time ago.

Pattern of trade

32. There are 4-5 bus routes passing by O2. The appellant estimated that in a busy period there would be 5-6 people in the shop and when it was quiet only 1-2 people.

33. When HMRC visited late on a Friday evening date they had observed that there were 16 people in the shop. The appellant explained that Friday evenings were busy what with people getting drink to take home after going for meals. He did not think having 16 people in the shop was an everyday occurrence.

34. When asked in cross-examination to comment on the long gaps between transactions noted in the till records the appellant said there were times when there would only be one customer in an hour.

No sale presses and 1p presses

35. The appellant's evidence was that customers mostly came from the bus stop. If the bus stop was busy then O2 was busy if not they were quiet. Customers came in asking for change. The appellant's evidence was that the Sharp could not be opened without pressing the 1p button. His explanation for not pressing the No Sale button to give change was that "then people think we're doing fiddling". He then said that if the No Sale button on the Sharp till was pressed the till was not going to be open. This evidence is at odds with Mr Nowak's evidence which was that there were groupings of no sale entries on 24 June, 25 June and 6 June 2009. If it was the case that the no sale button was not used (because it was thought people would think the appellant "was fiddling" or that the till would not open) then it seems unlikely that the "no sale" button would be repeatedly pressed to the extent that it was. The appellant's evidence is also inconsistent with Mr Abbas' evidence which was that he opened the till with the no sale button in order to give change. There were no products priced at 1p in either store.

HMRC visits

36. From the evidence of Mr Spranklen we were able to make the following findings related to the visits undertaken by HMRC officers to the appellant's shops.

37. On 21 April 2009 HMRC Officers Manjit Somal and Nilesh Parekh made an unannounced visit to A1 Food and Wine to establish whether Khat was was being sold. They interviewed Mr Ijaz Pervez the previous owner of A1. Mr Spranklen was

advised by the officers that there were two tills. The officers were told that only one of the tills was working.

38. On 15 May 2009 Officers Somal and Parekh made a pre-arranged follow up visit. They advised Mr Spranklen that they were surprised to note the stock levels on the shelves had been greatly reduced since their initial visit. They interviewed Mr Afaq Pervez who was Mr Ijaz's Pervez's brother.

39. On 29 May 2009 the officers made an unannounced visit. They saw that the shelves were full with stock and that there was a new till in the shop.

40. On the morning (11.30am) of 29 June 2009 HMRC carried out unannounced visits to both A1 and O2. Officers Nowak and Lamb went O2 and Officers Sleight and Gajjar and Spranklen went to A1. They were at A1 for about an hour.

41. At O2 there were two cash registers which worked, one was a Sharp the other was a Casio. Mr Nowak started by interrogating the Sharp register. At 11.45am he examined the Casio. He found the till roll in it had previously been used in the Sharp till and had been put into the machine in such a way that the journal was printed on its reverse unused face. He took away a journal roll containing program settings made from the Casio, a journal roll with Sharp printing ending 6 June 2009 with Casio printing dated 28 June 2009 on the reverse face which had been found in the Casio register, Sharp printing ending 7 June 2009 with Casio printing dated 28 June 2009 on the reverse, a Sharp journal roll ending on 29 June 2009 and a journal with Sharp printing ending on 6 June 2009 with undated Casio printing on the reverse. He made a cash count of monies stored out of the till. There was no money in the Casio till. On 19 August 2009 he made a report after having examined the cash register print outs and forwarded this to Mr Spranklen.

42. At A1 Mr Ijaz Pervez was interviewed. He confirmed that he was Mr Rasul's employee and that Afaq Pervez was the manager of the branch. Officer Sleight carried out an interrogation of the till and cash-up while Officer Gajjar inspected the stock.

43. Mr Spranklen's evidence was that Officer Sleight inspected 22 Z reports. She noticed that on average there were approximately 30 no sales a day. She asked Mr Pervez how many no sales there were and he said around 5 to 10.

44. Officer Gajjar inspected the stock and found on the shelves a handful of bottles of alcohol which did not display the duty paid sticker. The appellant was cross-examined on what he knew of these bottles. He said he could not remember but then went on to say that he thought there had been an occasion where there were two bottles which a customer had left in a bag after returning abroad – he told us the customer just lived down the road and had asked the store to keep it. We find it implausible that a customer who lived down the road would want to leave bottles which were not duty paid in an off-licence.

45. At O2 officers Nowak and Lamb performed a till interrogation and cash-up. Mr Nowak found a red and black book under the counter ("the diary"). The diary entries covered the period June 2006 to August 2006 with some later entries from mid-November 2006 to early December 2006. The interpretation of the diary entries is a matter of dispute between the parties and this issue is discussed further at [84] onwards below. Mr Spranklen was told by the appellant's accountant Mr Ahmed that some of the records had been destroyed during a flood of the basement at Edgware

Road in February 2008. Mr Ahmed did however provide quarterly VAT summaries which with the exception of period 08/06 showed monthly breakdowns. Mr Spranklen thought there was a disparity between the declared takings and those set out in the diary and decided that further unannounced visits were justified.

46. On 4 September 2009 HMRC carried out further unannounced visits on both O2 and A1 in the morning and late in the evening. On 9 September 2009 Mr Spranklen visited Ahmed & Co to examine further bank statements and to return some records.

Chronology of meetings

47. After further checks of the all the records which had been taken Mr Spranklen issued a "PN160" opening meeting invitation on 13 November 2009. The term "PN160" refers to HMRC's civil evasion penalty procedures the purpose of which is to enable an appellant to make disclosures which would, if a penalty were imposed, enable mitigation to be made. The meeting was repeatedly put off by the appellant. The reasons given by Mr Ahmed were variously that Mr Rasul was on holiday (in a letter from Mr Ahmed dated 4 December 2009), that he had left unexpectedly to go to Pakistan due to his mother's illness (a response given following Mr Spranklen initiating contact on 18 January 2010). On 5 March 2010 Mr Spranklen issued a further PN160 meeting invitation to Mr Rasul having been told by Mr Ahmed that Mr Rasul had returned from Pakistan. A day before the meeting which was to take place on 14 April 2010 Mr Rasul telephoned to say he was unwell due to food poisoning and could not attend. The meeting was rescheduled and took place on 20 April 2010. Mr Rasul did not make any disclosure of dishonesty and Mr Spranklen felt Mr Rasul should be given a further opportunity to gain mitigation against any proposed action. He issued a further meeting invitation on 10 November 2010. On 23 November 2010 he received a letter from Mr Ahmed asking for copies of the documents which had been taken away before another meeting was considered. Mr Spranklen contacted Mr Ahmed on 26 November 2010 to discuss the matter. Mr Ahmed reiterated his concerns that a meeting should only take place once he could see what records HMRC held. On 10 December 2010 Mr Spranklen wrote to Mr Ahmed to indicate that he would proceed to issue assessments and "reporting" for the evasion penalty. The letter indicated that mitigation in respect of the penalty could still be earned by providing information.

48. On 7 March 2011 Mr Spranklen wrote to Mr Rasul to tell him that he would be issuing an assessment for VAT covering periods 05/06 to 11/10 in the amount of £102,950. The letter included a table setting out the relevant periods, and the amounts of net understated output tax. The assessment was based on information which was gleaned as a result of announced visits to the appellant's premises and inspection of records and recorded that Mr Spranklen's opinion was that the appellant had suppressed his gross takings as a result of which the correct amount of VAT had been under declared.

49. He explained that the records included:

> "…a diary found at your Fulham premises and various journal rolls. It is my opinion that these records reveal irregularities in the level of gross takings declared and these issues may have been discussed at the meeting which was arranged for 02/12/10. In the event you decided not to attend that meeting, however copies of all documents removed were subsequently submitted to your agent Mr Ahmed on 10/12/10. You

> were clearly aware that my suspicions of dishonest behaviour were based on records taken up, as pointed out in my letter of 10/11/10 and in the three months since the return of records, you have not made any representations in terms of explaining the relevance of those records to address my suspicions."

50. Mr Spranklen had calculated the under-declaration "primarily on the basis of a suspected 40% suppression of true gross takings." He had reached this estimation by comparing the takings declared in the VAT return for period 08/06 with what he felt were the true takings noted for the same period in the diary found at O2.

51. Mr Spranklen raised an assessment in the sum of £102,950. This was issued on 9 March 2011.

52. On 4 April 2011 Mr Spranklen issued a penalty in the sum of £67,565.

53. On 20 June 2011 the appellant's agent sent in further documents (Z reports, daily takings analysis for period 08/06 and other items of information) Mr Spranklen reviewed these and responded on 6 July 2011.

54. On 6 April 2011, the appellant's accountant, Yussouf & Co wrote in to appeal against the assessment and to ask for a review. On 8 April 2011, Mr Spranklen, following a request for more detailed information enclosed a more detailed breakdown of the apparent quarterly discrepancies.

55. HMRC's review concluded the assessment was correct and the conclusions of the review were set out to the appellant in a letter dated 18 May 2011.

56. On 23 November 2011 a meeting took place between Mr Spranklen and Mr Yossouf and Mr Munir of Youssouf & Co. Mr Munir maintained Mr Rasul's stance that no suppression had taken place and that phone card monies were included in 'Z' reports up to and including Period 08/06 and that that practice ceased following a robbery when money and phone cards were taken from the till. Mr Spranklen's notes reports that he was told by the representative that Mr Ahmed, the then accountant, had advised them to henceforth keep monies separate from the till which the appellant says he continues to do.

57. On 13 February 2012 Mr Spranklen drew the appellant's attention to the apparently significant drop in gross takings at A1 following the appellant buying it.

HMRC's methodology for calculating assessment

58. In his letter dated 7 March 2011 Mr Spranklen in setting out the proposed assessment amount of £102,950 explained that he had calculated the under-declaration primarily on the basis of a suspected 40% suppression of the true gross takings and that he arrived at this estimation on the basis of a comparison of the takings declared in the VAT return for the period 08/06 with what he felt to be the true takings noted for the same period in the diary found at O2. He set out his calculation for each period in more detail in his letter of 8 April 2011. As an example for period 05/06 this was as follows:

> Gross Takings - £42,154 (60% of true take)
>
> Vat inc S/R Sales - £37,878 = 89.85% of GT

£42,154 divided by 60%= £70,256 (True GT)

Difference £28,102 x 89.85% = £25,249 (S/R element of difference) x 7/47 = £3760 u/declaration

59. Mr Spranklen explained that using the diary entries he prepared a schedule of the daily gross takings ("DGT") amounts for 47 days (Sunday to Thursday) for the period 15 June 2006 to 17 August 2006. The total was £28,285. Using seven entries for Saturdays and Fridays over the period 18 November 2006 to 2 December 2006 the total for those days plus a total for a Friday figure of 30 June 2006 and 7 July 2006 (£845 and £954) he derived a Friday / Saturday DGT figure of £1004 per day. Plugging that average into the "missing" Fridays and Saturdays for the June – August period gave a gross takings ("GT") figure of £44,349 over 63 days and therefore an average DGT of £703. Applying that to the 92 day period for 08/06 the comparison between declared GT of £38,749 and expected GT of £64,676 gave an estimated suppression rate of 40%. He then applied this rate to the total of O2 and A1 takings.

Law

60. The assessments under appeal were made under s73 VATA 1994 which provide 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."

Appellant's arguments

61. HMRC's evidence was unreliable due to the length of time (three years) that had passed after the relevant events. Their oral evidence was speculative. It needed to be taken into account that HMRC had conducted its inspections unlawfully.

62. The diary was nothing to do with the appellant, and he had an explanation for the no sales, 1 p entries, and for the use of the other till. The no sales and 1 p entries were to give change to bus customers and traders. The other till was used when the Sharp was "hung up" (something which Mr Nowak observed when he was at the shop), it was used for training purposes and also the appellant's young son had made random entries on it when playing with it.

63. The GPR (gross profit ratio) attributable to the claimed suppression was "so incredible it was difficult to see how any logically minded human being with relevant experience could possibly suggest it".

64. The assessment was not made in best judgment. There was no objective basis for it and HMRC had been determined to justify their initial concerns. HMRC could have used numerous other tests, business economics, wealth, personal means, mark up. There were no discrepancies between cash in hand and the till reports and there was no cash found in the tills that HMRC suspected were being used without the transactions being declared.

65. The sales in the shops dropped for various reasons: competition from other stores and supermarkets, and due to the move of the bus stop outside which was key to the shop's ability to attract passing trade. Due to the stress of HMRC investigation the appellant was unable to concentrate on his business and sold O2 for £10,000. If its turnover was around £700,000 as HMRC appeared to be suggesting then he would not have sold it for this amount. Also the appellant would not have been in debt / overdrawn to the extent he was if he had a business which had been generating the kind of turnover that HMRC thought he was.

HMRC's arguments

66. The VAT return amounts were incorrect for various reasons:

(1) The diary taken from 02 Food and Wine on 29 June 2006 is evidence of suppression of the true takings of that branch during 2006 – it shows sales greater than those declared on the VAT returns.

(2) A1's turnover fell after it was acquired even though there was no break in trade or change in staff.

(3) There were indicators of suppression at both branches – the higher numbers of no sales and 1 p entries (when there were no 1p products).

Discussion

Relevance of lawfulness of visit / material taken away

67. The appellant's complaint was that the requirements of paragraph 12 Schedule 36 Finance Act 2008 had not been met in that none of the witness statements or meeting notes indicated that the inspections had been carried out by suitably authorised staff. Further the appellant maintained that no written notice, as required by s12(3) Finance Act 2008 had been provided. These points were said to have arisen in relation to unannounced visits in 2009 on 21 April, 15 May, 29 May, 29 June, 17 July and 4 September.

68. In relation to the diary the appellant refers to the fact that while paragraph 11(2) of Schedule 36 enables HMRC to inspect documents that appear to relate to goods on the premises, the document was not a possession of the taxpayer and it was therefore inappropriate for its case to be based on it.

69. From a procedural fairness point of view it was unsatisfactory that the appellant's complaint and its relevance were raised so late in the day and that the appellant's grounds of appeal were not sought to be amended in good time. It would have been clear from the expiry of the time limit of HMRC serving its witness statement well in advance of the hearing what evidence it was relying on. If the point had been raised sooner and the grounds of appeal had been amended sufficiently in advance of the hearing then it would have been open for HMRC to have addressed the legality of the inspections and disclosure in their submissions and in the evidence they led.

70. In any case from the evidence before us and the relevant law, it did not appear to us that the appellant had established that the inspections and disclosure were improper.

71. The appellant queried whether HMRC had complied with its own guidance in form CC/FS4 on unannounced visits for inspections, and in particular whether the factsheets had been given to the persons at the premises. The appellant also takes issue with HMRC taking away the diary on the basis that Mr Abbas had kept entries in it for his own purposes that it was not a business record and Mr Abbas had not given authorisation for it to be taken away.

72. We have indicated above that we did not find the appellant's or Mr Abbas' evidence to be wholly reliable but in any case it seems unlikely to us that the appellant or Mr Abbas could reliably remember that they did not receive a notice some years later. In relation to whether the unannounced visits were authorised, we accept Mr Spranklen's evidence that the correct procedures would have been followed. His evidence did not, understandably given the length of time that had passed, go as far as specifically saying that he recalled giving the notice to the taxpayer. There was insufficient evidence in our view to support a finding that the requisite notice had not been given.

73. In relation to the appellant's reliance on paragraph 11(2) of Schedule 36 Finance Act 2008 and the appellant's argument that the document was not a possession of the appellant we note that the wording changed with effect from 21 July 2009. The version that applied post 21 July 2009 and therefore which applied to the 4 September 2009 visit referred to:

> "any documents on the premises that appear to the officer to relate to the supply of goods under taxable supplies…"

74. The wording of paragraph 11(2)(c) which applied to the previous visits allowed inspection of documents that appeared to the officer to relate to "such goods" which in turn meant "any goods that are on the premises." However neither provision drew any distinction as to whom the documents belonged to so if it was the case that the diary did not belong to the appellant but to Mr Abbas then that would be irrelevant.

75. Paragraph 16 of Schedule 36 provides a power for the HMRC officer to remove and retain a document which has been produced to or inspected by the officer if it appears necessary to the officer to do so.

76. In relation to the appellant's complaint that there had been an unauthorised disclosure of third party information through HMRC disclosing the turnover figures of A1 when it was under the ownership of a third party (the previous owners) the relevant provision is set out in the confidentiality provisions of s18 Commissioners for Revenue and Customs Act 2005. A criminal offence is provided for wrongful disclosure at s19. The prohibition on disclosure is subject to exceptions e.g. at 18(2) to a disclosure which is:

> "i) is made for the purposes of a function of the Revenue and Customs…"

77. The disclosure the appellant complains of would on the face of it appear to fall within this exception being a disclosure which it was necessary to put to the appellant in order to get their explanation on why the turnover of a similar business had fallen significantly.

78. There is then insufficient evidence upon which to make a finding that HMRC carried out its inspections improperly or that it obtained or disclosed documents improperly.

79. In any event even if there had been shown to be issues with improper inspections, obtaining of document and disclosures this would not necessarily mean the documents would be excluded from the Tribunal's consideration. Under Rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 the Tribunal may admit evidence whether or not it would be admissible in a civil trial. It may, under Rule 15(2)(b) exclude evidence if "iii) it would otherwise be unfair to admit the evidence". The Tribunal would be guided by the overriding objective in dealing with the case fairly and justly.

80. The Court of Appeal in *Jean F Jones v Warwick University* [2003] EWCA Civ 151 highlighted the need to balance of achieving justice in the particular case and the public concern in promoting the observance of the law by those engaged or about to be engaged in legal proceedings. Given the lack of findings above as to the improper obtaining and disclosure of documents it is not necessary to reach a view on the extent to which such a balancing exercise would play out in the context of the Tribunal's procedure rules and overriding objective. The point remains that it would in principle be open to the Tribunal to admit and have regard to documents which were relevant but which had been improperly obtained.

Factual issues

81. There are a number of disputed factual issues in relation to which we need to reach a conclusion in order to determine whether the assessments and penalties under appeal should be upheld or varied.

In relation to O2 were sales rung up on the Casio and not declared or was the Casio used for training purposes / child's play?

82. We reject the explanations as to the entries for the two tills given by the appellant.

83. Mr Spranklen prepared a schedule comparing sales on 28 June 2009. We accept this as accurate. We note the pattern does suggest the tills were being used at the same time. We note the amounts taken on the Casio frequently correspond to figures taken on the Sharp which would tend to suggest they are not random but correspond to actual product transactions that were run through the Sharp till. We agree with HMRC's argument that the pattern is not consistent with use for training or with a child playing on the till. In answering the Tribunal's questions as to who was trained and when the appellant struggled to give any kind of coherent account. We also agree the close proximity and sometime simultaneous transactions on the two tills suggest the Casio was not used only when the Sharp till was broken.

84. The appellant asks us to note that there was no evidence that cash was found in the Casio till. However the absence of cash in the till is not necessarily inconsistent with the till being used. If the second till was being used to process unreported transactions there would be no need to keep cash in the till. It could be kept somewhere else.

Diary entries: Do the June 2006 "total" entries include or exclude telephone top ups?

85. Mr Munir referred to the diary entry for 11 July 2006 which was as follows:

Date	Day	Mony out	Total out	Top up	Card Sale	Till Sale	Total Sale	Total In
11/07/06	Tusday	Bill £100 Drink £200 Paper Folder £4.50 Najeeb £150.00	£454.50	£65	£29.92	£533.15	£563.07	£78

86. He asked us to note the following points. The Till sale (£533.15) plus card sale (£29.92) came to a total sale of £563.07. He maintained that if it was correct that the top up amount was not included then one would not come to the cash in hand amount. The amount of £563 (total sale) minus £454.50 (total out – which totalled the "mony out" column)) left £108 cash. Taking out the card sale (£29.72) which went straight to bank left £78 (total in figure). The £563 reflected the Z reading and appeared in the accountant's (Mr Ahmed's) schedule. In his cross-examination of Mr Spranklen Mr Munir sought to demonstrate that the tops ups/ phone card were included in the summer 2006 totals.

87. In giving his evidence Mr Abbas was taken to page 5 of the diary and went through column headings. He explained that the "cash sale" column was "cash sale not Z reading – not including credit and debit card" and that the total at the end was approximate. He said the "£15, £35 top up figures all goes to till" and explained that was why he wrote the value separately. The "Total In" figure was the £539 plus card sales less expenses.

88. HMRC do not accept that the Z totals shown on the diary include cash taken for phone top-up and international calling cards. All that can be concluded from the entries is that the "Total Sale" column is a sum of the columns headed "Card Sale" and "Till sale". To the extent the "Total Sale" matches the Z reports the above does not demonstrate that the "Z" / "Total Sale" included income from the sale of top-ups and international calling cards. Although Mr Abbas gave evidence as to his understanding of what the figures meant we were unable to make finding of fact that this was his understanding at the time he made the entries taking into account the length of time that had passed since June 2006 and also given our concerns as to the reliability of his evidence as explained above. There was then no reliable evidence put

forward by the appellant that the figures in the "top up" column were included in the "Total Sale" figure which was the amount declared.

89. In fact HMRC point to the fact that when the ratio of sales achieved per unit sold for the period July /August 2006 on the assumption top ups were excluded (1:246) was compared with the ratio for the sales over the period September to November 2006 (1.220) (when it was agreed top-ups were separate and not in the Z total), there was very little difference. In contrast the ratio for July / August 2006 prepared on an assumption that top-ups were included (1:0094) was very different when compared with the later period.

90. The assumptions underlying the above calculations were set out in a letter we were referred to in Mr Spranklen's evidence. He explained that using the Z prints for Department DO1 (which recorded the vast majority of sales and given the values in other departments could not support the average value of phone card sales) he had calculated a value of £23,790 and 19040 units sold for 45 days over July / August (giving the ratio of 1:246) and a value of £39,215 and 32121 units sold (giving a ratio of 1:220) for 77 days in the period September to November. The assumed value of the phone cards used to derive an approximate average daily value of phone cards sold was taken from information provided by the agents (£12,688) for the period. This was divided by the number of days (92) giving £138 average sales per day and then assuming an average sale of £10 per unit this then gave an average number of 14 cards sold per day. The ratio on the assumption top ups were included was calculated by subtracting £6210 (45 x £138) and 630 units (45 x 14units) from the July / August sale and unit figures to give £17,580 sales and 18,410 units.

91. HMRC point to the fact that when he was interviewed on 20 April 2010 the appellant has said that phone cards were kept separate. However we do not think we can draw too much against the appellant from this point as when he was interviewed on 20 April 2010 – he was asked "do you enter these sales into the till…?". It was not explored whether the practice had been different earlier.

92. But, we would agree with HMRC that beyond the appellant maintaining that phone cards would have been included in the figure at the time, there is no actual evidence that the top ups were included. HMRC's ratio analysis described above seems to us to have been prepared using reasonable assumptions. The comparison of ratios is more consistent with top-ups not being included than with them being included. On balance and in the absence of evidence to the contrary from the appellant it seems more likely than not that the top up and international phone card figures were not included in the declared figures.

93. The appellant maintains that there was a change in practice in September 2006 and that their accountant, Mr Ahmed told them from that point on to keep top ups separate. There was insufficient evidence to make a finding of fact on this point but even if were correct it would not necessarily be inconsistent with the top ups being handled separately before Mr Ahmed gave that advice, or point against Mr Abbas deciding to keep a separate record of the top up payments in June 2006.

94. Our conclusion is that the "total" figures in the June diary entries excluded phone top ups and international phone cards.

Diary entries: Do the November 2006 entries which refer to second figures refer to additional takings or phone card top ups / cash carried forward?

95. The November diary entries cover entries for 18-21, 23 November to 3 December 2006. While the entries were not made consistently there were in broad terms three sorts of formulation recorded.

96. An example of an entry which had two figures but only one "z" was the entry for 18 November 2006 was recorded as follows:

£389.40 Beer

£92.97 Visa

_____

£432.37

Z 631.63

449.24 = 1080.87 655 Banking

97. An example of a "z" followed by a cash figure was the entry for 19 November 2006 as follows:

£49.96 Cigarette

£10.97 Visa

___

55.75

___

Z – 454.75

Cash - £400 – for cigarette

98. An example of an entry with 2 "z"s was the one for 22 November 2006:

Visa 29.91

Z1 552.03

Z2 95.94

___

647.97

___

[illegible figure and text]

99. For Saturday 18 November 2006 and Friday 24 November 2006 where there are two "Z" readings in the diary one of the entries corresponds to the declared Z reading. On other occasions where there is only one z reading in the diary this corresponds to the declared "Z" reading.

Mr Abbas' evidence and appellant's arguments on November entries

100. In giving evidence Mr Abbas went through the entries for 18 November 2006. He thought the amount of £449.24 below the "z" was the remaining balance from previous day. He was not able to explain where that figure came from.

101. Mr Munir submits that the figure for 18 November of £1080.87 was not sale income. The sales figure for that date was £631.63 supported by a Z reading. The balance of £449.24 he maintained probably related to cash in hand brought forward from the previous day. The amount of £655 was he says banked into the business account. The figures for 22 November follow a similar pattern.

102. The entries for 23 November 2006 were written as follows:

£47.85 VISA
£198 pay ATA
22.50 Milk
_____
268.55
Z -131.37
523.36
654.73
-268.35
386.38 - CASH

103. In relation to the entry for 23 November 2006 and the cash figure of £386.38 Mr Abbas was asked how that fitted with figure for 24 November 2006 which appeared below the "Z" of £448.69? He thought the figure was made up of cash plus money from calling card / top up. He said sales never went over £1000 but did not accept the "Z" on the entry for 25 November 2006 (£1078.64) represented sales. He was asked what that figure was and said "something wrong with that – whole cash I collected and write it down there."

Tribunal's observations

104. For the same reasons as applied in relation to the June diary entries we were not satisfied that Mr Abbas's evidence as to his understanding of what the November diary entries meant at the time he wrote them was reliable.

105. In relation to the November diary entries and the two amounts next to the 'Z' – the amounts are not round figures and therefore seem unlikely to relate as the appellant suggested to phonecard top ups (given in later entries these were always round figures of £5).

106. Nor were we persuaded that the appellant's explanation that the second figures represent cash carried over was correct. There was no evidence supporting this view and we noted that elsewhere Mr Abbas had taken the trouble to specifically write the word cash next to certain figures so it would seem more likely than not that he would have written "cash" in those situations where he had meant to refer to cash being carried over.

107. The conclusion that a second "Z" noted derived from a second "Z" reading from a till was more likely than the explanation that Mr Abbas had written down a "Z2" next to a separate record of phone card top ups or cash carried forward.

108. On balance therefore it is more likely than not that the additional figures in the November entries either written as a "Z2" figure or an additional figure under a "Z" represented additional takings.

Was there an alternative explanation for the reduced turnover of A1 when the appellant took over: competition, strong beer license, basement no longer part of shop?

109. The appellant sought to explain the reduction in turnover by reference to increased competition from other stores. He maintained there were at first one to three shops around A1. Now there was a large number of shops, a Tescos has opened and just opposite there was a Metro hotel and "a very big shop" which had opened when he took the shop over. The appellant also referred to a change in Westminster council's policy in relation to the selling "strong" beers and suggested that sales of such beers made up a large part of his business.

110. As discussed above we did not find the appellant and Mr Abbas to be a reliable witnesses and were not able to make findings of fact in relation to which stores opened and when. Even if it were correct that the stores the appellant referred to did open when they did there was insufficient evidence before us to whether those stores were in direct competition with the appellant and did in fact take away a significant numbers of customers away from the appellant.

111. In relation to the change in licensing policy in strong beers we note that while the e-mail from a named member of staff at Westminster council Policy licensing team which the appellant exhibited to his witness statement confirms that it was Westminster's policy not to sell beers, ciders and lagers or more than 5.5% volume the e-mail did not provide evidence of when that policy came in to force. Further while there may have been a change in licensing policy we did not have any reliable evidence on what proportion of sales was made up by strong beers, ciders and lagers.

112. The appellant also sought to explain the drop in turnover in terms of the shop area becoming decreased (the basement which was part of the shop before was no longer part of the shop when the appellant took over.) We did not receive any reliable evidence on this point and were unable to make a finding of fact that this was the case. In any case it seems unlikely that a food and wine store which we think by its nature would be reliant on passing trade from customers popping in to buy things would be so reliant on food and wine items being sold from its basement as opposed to the ground floor.

113. Absent another credible explanation for the drop in turnover it is therefore relevant that the declared gross takings decreased greatly upon handover to the appellant. Even if the diary entries in relation to O2 did not indicate suppression for A1 the decrease in turnover does. The decrease in turnover in A1 upon transfer to the appellant is broadly consistent with HMRC's suggested suppression rate of 40%. (The declared gross takings for the 10 weeks preceding 10 December 2006 was £64,113, the declared gross takings upon takeover for 02/07 (11 weeks) fell to £40,325. The average gross takings for A1 over the period 03/04 to 09/06 (to 10/12/06) was £73,010 – for the period 02/07 to 02/09 it was £42,755- meaning the turnover was 41.4% higher under the previous owners.)

Was HMRC's assessment to best judgment?

114. As expressed by Carnwath LJ in *Rahman 1*, in order to come to the conclusion that the assessment was not in best judgment we would need to be satisfied that:

> "… the assessment has been reached "dishonestly or vindictively or capriciously"; or is a "spurious estimate or guess in which all elements of judgment are missing"; or is "wholly unreasonable" …"

115. Mr Spranklen provided his explanation of how he calculated the assessment. There was sufficient material before him to reach the view that the declared takings did not represent actual takings and to make an assessment to recover the shortfall. In particular there was evidence that two tills were being used at O2 but that the takings from only one were being declared and in relation to A1 there was evidence that an unusually high amount of no sales were being made as compared with the estimate given by the person answering HMRC's questions at the shop had said. In these circumstances we cannot say that the assessment failed to meet the above test in relation to best judgment. In relation to the appellant's argument that Mr Spranklen ought to have considered a variety of other tests (wealth, personal means mark up, "business economics") before making the assessment this would require too high a standard and in our view would not be consistent with the test as expressed above which admits the possibility that the officer's judgment may not be exhaustive of all the possible avenues which could be explored. The fact Mr Spranklen did not consider such matters at all or at that point does not mean his assessment was not in best judgment.

116. In coming to this conclusion we have specifically considered whether Mr Spranklen's decision to read across the suppression rate (which was based on the diary taken from 02) to the declared turnover of A1. There did not appear to be any evidence that the second till in A1 was being used or that there had been two tills being used there. The suppression indicator at A1 was the amount of no sales. It does on the face of it in those circumstances seem counter intuitive to read across the suppression rate from 02 to A1 but given the appellant had an instrumental role and oversight in both we cannot say Mr Spranklen's approach meant that the assessment that was reached was one that was wholly unreasonable, or lacking in all elements of judgment, or that it was reached dishonestly, vindictively or capriciously.

117. In any event even if the assessment was not in best judgment that would not preclude the Tribunal reaching the view that it should nevertheless determine the amount of the assessment. At [29] of *Pegasus Birds* Carnwarth LJ discussed the approach where it had been determined an assessment was not in best judgment:

> "…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 to be 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 a nullity, but should amend it accordingly."

118. Even if the read across of suppression rate from 02 to A1 was not in best judgment it is not so serious or fundamental a defect that would require the whole assessment to be set aside.

Has appellant shown the assessment is incorrect?

119. The 40% suppression rate was based on a review of the diary entries for transactions in 2006. There are two dimensions to explore. First was it correct to extrapolate that rate to different time periods? Second was it correct to extrapolate the rate in relation to transactions from diary entries for O2 to the turnover of A1?

120. On the issue of extrapolating rates to a later time period we note that the 2009 inspections undertaken by HMRC indicated that there was under declaration through use of the second till in 2009. Even if it is correct that a second till was bought on 28 March 2009 (a receipt was exhibited to the appellant's witness statement) there was no reliable evidence that the second till which was present in the O2 shop was not working. The diary entries for November 2006 which referred to a "Z2" are consistent with till readings being taken from a second till. There is no evidence to suggest that use of a second till stopped in the intervening period.

121. The application of the 40% rate to periods after 2006 was reasonable in our view. There was no evidence of a significant change in circumstances as between how the business was run in 2006 to how it was run in later periods covered by the assessment.

122. According to the appellant the bus stop which was directly outside the shop moved in around 2008. However Mr Nowak's evidence from his inspection was that there was bus stop outside the shop and that he had to pass through people to get to it. Even if there was, as the appellant suggested, a move of the bus stop which affected passing trade we do not accept that it resulted in a significant drop in sales. To the extent the bus stop had any effect in reduced sales we would also have expected to see a corresponding reduction in change requests and a corresponding reduction in the use of the "no sale" and 1 p button.

123. Although HMRC do not seek to argue that the assessment should be determined in a higher figure there are two features of the evidence which would tend to suggest the amount was under-estimated. First, in relation to use of no sales button / 1 p button presses this was not something that was factored into HMRC's calculation.

124. While we accept that some proportion of these button presses were legitimate (in that they were used to give change rather to enable unrecorded transactions to take place –it is inherently plausible that some bus passengers would ask for change and in fact a change request by a market trader was observed at A1 on one of HMRC's visits) the high number of 20 to 30 "No sale" (in particular given Mr Pervez's estimate of 5 to 10 presses per day) and 1 p button presses cannot all be accounted for in this way.

125. Second, we noted that from the analysis comparing the sales recorded on 28 June 2009 on the Sharp till and the Casio till that if the totals on each are added up (£48.89 on the Sharp and £54.69 on the Casio) then the level of suppression (112%) in this sample period far exceeds the 40% figure used by HMRC to calculate the assessment.

126. In relation to the appellant's evidence on the pattern of trade across the day we have difficulty accepting that having 16 people in the shop was atypical as he made out. There was no evidence as to why the particular Friday night when the visit was conducted would have been especially busy. We also think it unlikely that if it was the

case that there were 4 to 5 bus routes using the bus stop outside and also that bus passengers were the principal type of customer that there were would be periods of time with only 1 customer an hour. The appellant's depiction of the pattern of trade therefore seems prone to underestimate the level of trade.

127. We have considered the appellant's evidence in relation to competition as regards A1 above (at [108] onwards). In relation to O2 the appellant's evidence was that a Tescos opened around 2006-7 and that a Union Market store opened around 2008 and then closed about a year and a half later.

128. There was however insufficient reliable evidence to make findings of fact on which shops opened and when. Further there was no evidence to suggest that even if these shops had opened when it was said they had that this had a detrimental effect on the appellant's business. Even if the competition had a detrimental effect there is no evidence to suggest the rate of suppression as opposed to the absolute amount would have changed.

129. As regards the extrapolation of the 40% rate to A1 there are on face of it some difficulties as discussed above at [115] with this approach. There were different persons working at A1 and there was no issue there of a second till being used. On the other hand there did appear to be unaccounted for "no sales". Although there was no bus stop outside of A1 there was a market outside whose stall holders were observed by HMRC to come in and ask for change but the level of "no sales" observed from the till records was far greater than the estimate of no sales the staff gave.

130. However the fact there was a significant drop in turnover which we have found was not explained by extraneous factors such as competition, upon the appellant taking A1 over (and with no change in business model or staff) is supportive of there being a higher turnover at A1 which was not declared. As discussed above the drop in turnover indicates a suppression rate (41.4%) that is broadly in line with the rate of 40% which HMRC used.

131. In relation to the arguments the appellant made in relation to gross profit percentages, the appellant's means, and the amount he was able later to sell the business for these do not take his case any further in our view. We did not have any reliable evidence before us upon which we could make findings of fact on any of these matters. There was no evidence to suggest the level of suppression suggested by HMRC was implausible (in fact in the case of A1 it was consistent with the takings that had been achieved previously). Even if we were to accept evidence of the appellant's limited financial means it cannot be ruled out that his circumstances would have been worse but for the suppression. As for the significance of the low amount the appellant says he sold the A1 business for the argument is flawed in that if the real turnover was high because of suppression there would be no reason to think an honest purchaser who was not intending to continue the suppression would want to pay anything other than a price which reflected the declared turnover. Equally if a purchaser was aware of the suppression and wanted to continue operating in that way it seems unlikely they would want to attract attention from HMRC by disclosing payment of a price which was at odds with the price that would be expected from a shop with lower declared turnover.

132. The appellant has not demonstrated that the amount of the assessments was excessive and subject to the reservation as to the extent to which the assessment

periods are within the relevant time limits (discussed further at [145] onwards below) we uphold the amount.

133. We have considered whether the fact that the reasoning underpinning the quantification for A1 (turnover) is different from that used by Mr Spranklen at the time he made the assessment raises any issue of whether the assessment was in best judgment. There is an analogy here with the situation where a Tribunal determines the assessment in a different amount and the issue of whether that fact necessitates a finding that the assessment was not to best judgment in the first place. This issue was considered in *Pegasus Birds Ltd v HMCE* [2004] EWCA Civ 1015 where Carnwath LJ as he then was noted the following formulation of Chadwick LJ in *Rahman (No 2)* [2003] STC 150 as binding on the Court of Appeal and on the Tribunal in future cases:

> "..the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was indeed arbitrary."

134. In applying across the suppression rate to A1's figures, we think this was a genuine attempt to make a reasoned assessment of the VAT payable. (From [22] of Carnwarth LJ's decision it is not appropriate to establish whether Mr Spranklen in fact looked at all the available material.) The conclusion therefore that the assessment was made in best judgment remains undisturbed.

135. Subject to the issue of time limits which affects assessments for the periods set out below, the assessments under appeal are therefore upheld.

Dishonest evasion penalty

136. The parties agreed at the outset of the hearing that although the appellant had not made a formal appeal against HMRC's notice of penalty assessment of 4 April 2011 in the amount of £67,565 they were content for the Tribunal to proceed on the basis that an appeal had been made.

137. The penalty was imposed under s60 VATA 1994 which states as follows where relevant:

> "60 VAT evasion: conduct involving dishonesty
>
> (1) In any case where—
>
> (a) for the purpose of evading VAT, a person does any act or omits to take any action, and
>
> (b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),
>
> he shall be liable, subject to subsection (6) below, to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.
>
> …

> (7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners."

138. Mitigation of s60 VATA penalties is dealt with in s70 VATA. Under s70(1) HMRC may reduce the penalty as they think proper. Subsection (1) also empowers the Tribunal on appeal:

> "…to reduce the penalty to such amount (including nil) as [it] thinks proper".

139. HMRC maintain that the appellant deliberately and systematically under-declared his takings. This act was for the purpose of evading VAT. The appellant's conduct in under-declaring his takings involved dishonesty.

140. We were referred by HMRC to the Lord Chief Justice's judgment in *R v Ghosh* [1982] EWCA Crim 2 which considered how to approach the question of dishonesty. The judgement set out that it was necessary first to consider "whether according to the ordinary standards of reasonable and honest people what was done was dishonest" and if it was to then consider whether the person whose conduct was alleged to be dishonest "must have realised that what he was doing was by those standards dishonest."

Discussion on penalty

141. The appellant worked at O2 and regularly checked in with the running of the business at A1. We have found that the declared takings were less than they ought to have been variously because the takings from a second till at O2 were not being declared, amounts in respect of top ups and telephone cards were included in total amounts put onto the VAT return when they ought to have been excluded and through sales being rung through using no sale button and 1p button presses and therefore not recorded. He was running the business as a sole trader and he had oversight and awareness of how both businesses were being run by those working or assisting him. He knew that the VAT figures being recorded on the VAT returns did not therefore represent the totality of the business. He gave the till "Z" readings to the accountant. He signed the VAT returns and gave these to his accountant to submit. There was no suggestion that the appellant had also included "Z" readings from the Casio till at 02.

142. Throughout the period under appeal, the appellant allowed VAT returns to be submitted in his name which he knew did not reflect the true takings of the business because the information submitted to the accountant was incomplete. We infer from the means by which takings were under-recorded (in particular taking sales on a second till, and through 1p and "no sale" button presses, and the absence of any evidence that the under-declaration occurred through lack of reasonable care or an innocent mistake on the part of the appellant) that the under declaration of the true amount of turnover was an act of the appellant done for the purpose of evading VAT. The appellant deliberately under-declared his turnover and we reject his denial to the contrary given in cross-examination. We therefore find the requirement in s60(1)(a) VATA to be satisfied.

143. It is also clear to us that in deliberately submitting a VAT return which under-declared the true takings of the business for the purpose of evading VAT the appellant

was carrying out an act which was dishonest according to the standards of reasonable and honest people. It was also an act which the appellant must have realised was dishonest by the standards of reasonable and honest people. We therefore find s60(1)(b) VATA to be satisfied.

144. In relation to mitigation of the penalty, as explained in HMRC's notice of 4 April 2011 a 10% reduction was given in relation to co-operation. Mr Haley explained that no mitigation had been give for disclosure as the appellant had made no disclosure of the irregularities in his business records. He only attended one meeting and then declined all subsequent invitations from HMRC to discuss their findings. We did not receive any arguments from the appellant in relation to the level of reduction. It did not appear to us that the level of reduction was inappropriate.

145. We therefore confirm that the penalty was correctly imposed and that the level of mitigation was appropriate. Given the amount of the VAT under-declared is still to be determined pending the outcome of consideration of the extent to which the assessments are in time (discussed below) we do not make a final determination of the amount of the penalty. If the implications of the eventual determination of the assessment amount on the penalty amount cannot be agreed by the parties they are at liberty to revert to the Tribunal.

Assessment time limits

146. The assessments to VAT under appeal were made on 9 March 2011.

147. Under s77 VATA the normal time limit for making assessments is four years. But under s77(4A) the time limit is 20 years if the loss of VAT is brought about deliberately by "P" or a person acting on "P's" behalf.

148. Given our conclusion above in relation to the dishonest evasion penalty we consider the loss of VAT was brought about deliberately. Subject to the further provisions on time limits below the pre March 2007 accounting periods therefore remain in time.

149. Under s73(6) VATA periods ending within the two years prior to 9 March 2011 (March 2009) are within time. The appellant's appeals fail in relation to the assessments for periods ending after 9 March 2009 and those assessment amounts are upheld. But, for periods before those ending after 9 March 2009 it needs to be shown under s73(6)(b) that the assessment was made no longer than:

> "one year after evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment came to their knowledge".

150. While there are some findings of fact in relation to the correspondence from the officer imposing the assessment, Mr Spranklen, which (see [47] to [49]) which throw light on what facts were sufficient in his opinion to justify the making of the assessment, neither party made legal submissions or factual contentions on the question of whether, given those facts, (the evidence for which appears to derive from the diary and till rolls taken from visits the last of which took place in September 2009) HMRC had sufficient evidence of the facts upon which the assessment was based to have made the assessments at an earlier point in time. (The imposition of the penalty and concerns about mitigation opportunities being provided to appellant in

relation to the penalty would not necessarily explain why an assessment could not have been made.)

151. In these circumstances we invite the parties to consider the extent if any to which the assessments are out of time under s73(6)(b) VATA and to revert to the Tribunal for further directions for a hearing on the issue if the matter cannot be agreed.

Conclusion

152. The assessments in relation to VAT periods ending after 9 March 2009 (periods 05/09 through to 11/10) are upheld in the total amount of £27,873. The remaining assessments (periods 05/06 to 02/09 totalling £75,077) are upheld subject to determination of the issue of whether, and if so to what extent the periods ending before 9 March 2009 are in time. The imposition of the penalty and the level of its mitigation are confirmed. The parties are at liberty to revert to the Tribunal if the issue of whether the assessments for the periods preceding 9 March 2009 are in time and/or the ensuing amount of penalty cannot be agreed. The parties are directed to provide an update to the Tribunal on the resolution or otherwise of the outstanding matters within three months of the date this decision is released.

153. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 16 JULY 2015