



TC05327

Appeals numbers: TC/2015/4744 & 4884

VAT & INCOME TAX – restaurant - back duty investigation – VAT assessments and penalties, income tax assessments and penalties – transfer of trade as going concern – whether transferee liable for deliberate inaccuracies of transferor – s 49 VATA 1994 – whether deliberate inaccuracies – basis of calculations – mitigation of penalties

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**BALTI HUT (GLOUCESTER) LIMITED
Mr ABDUL GHANE ALI**

Appellants

-and-

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mrs Shameem Akhtar**

Sitting in public at City Centre Tower, Birmingham on 27 & 28 June 2016

Mr Graham Wildin (Wildin & Co) for the Appellants

Mr John Corbett & Mrs Sharon Spence (HMRC Appeals Unit) for the Respondents

DECISION

Introduction

1. Balti Hut (Gloucester) Limited (“the Company”) appeals against (a) VAT assessments for the quarterly VAT periods 03/08 to 12/12 inclusive; (b) VAT civil evasion penalties (s 60 VAT Act 1994 refers) for the quarterly VAT periods 03/08 to 12/08 inclusive; and (c) deliberate inaccuracy penalties (sch 24 Finance Act 2007 refers) for the quarterly VAT periods 03/09 to 12/12 inclusive.
2. Mr Ali appeals against (a) income tax assessments for the tax years 2009-10 to 2011-12 inclusive (being discovery assessments pursuant to s 29 Taxes Management Act 1970 for the first two years, and a closure notice pursuant to s 28A TMA 1970 for the final year); and (b) deliberate inaccuracy penalties (sch 24 FA 2007 refers) for all three years.
3. All the appealed decisions arise out of a back duty investigation conducted by the Respondents (“HMRC”), as described below, where HMRC concluded that business turnover had been deliberately understated.
4. The business is a restaurant in Gloucester. Mr Ali registered the business for VAT in his own name in 2007. In October 2011 Mr Ali transferred the business as a going concern to the Company (of which he is the main director and shareholder) and the Company took over the existing VAT registration number of the business.

Legal Submissions and Decision on the Issue of the Penalties to the Company

5. When the restaurant business and the VAT registration number were transferred to the Company in October 2011, that constituted a transfer of a going concern within s 49 VATA 1994. One of the implications of that was provided by s 49(3):
 - “Regulations under subsection (2) above may, in particular, provide—
 - (a) for liabilities and duties under this Act (excluding sections 59 to 70) of the transferor (other than the duties mentioned in subsection (2A) above) to become, to such extent as may be provided by the regulations, liabilities and duties of the transferee; and
 - (b) for any right of either of them to repayment or credit in respect of VAT to be satisfied by making a repayment or allowing a credit to the other;but no such provision as is mentioned in paragraph (a) or (b) of this subsection shall have effect in relation to any transferor and transferee unless an application in that behalf has been made by them under the regulations.”

6. The relevant regulation was reg 6 of the VAT Regulations 1995 (SI 1995/2518). It is on that basis that the disputed VAT *assessments* ([1] above) covering periods

preceding the transfer have been raised on the Company as successor to the transferred business.

5 7. At the hearing we questioned whether the *penalties* issued to the Company had been correctly assessed, given that the Company took over the business in October 2011 but the penalties related to VAT periods going back to 03/08. We took oral submissions from Mrs Spence at the hearing and invited written submissions from both parties after the hearing. Our particular concerns were: (a) s 49(3)(a) appeared to exclude assessment of s 60 penalties on a successor; and (b) although sch 24 penalties were not specifically mentioned in s 49, as s49(3)(a) excluded penalties under ss 59 to 10 70 – and thus s 59 Default Surcharges (being relatively minor penalties) were excluded – it was arguable that a purposive interpretation of s 49 might be to exclude also assessment of sch 24 deliberate inaccuracy penalties on a successor.

15 8. At the hearing, after consideration, HMRC accepted that the specific exclusion of s 60 liabilities in s 49(3)(a) prevented HMRC from assessing s 60 civil evasion penalties on the Company (all the relevant periods being before the transfer of the business to the Company). Therefore, HMRC withdrew those penalties entirely (being the VAT civil evasion penalties for the quarterly VAT periods 03/08 to 12/08 inclusive).

20 9. After the hearing, HMRC accepted that, although sch 24 penalties were not specifically mentioned in s 49, sch 24 deliberate inaccuracy penalties should not be assessed on a successor in relation to periods preceding the transfer of the business. Therefore, HMRC withdrew those penalties for the quarterly VAT periods 03/09 to 09/11 inclusive.

25 10. In relation to the s 60 penalties and sch 24 penalties assessed on the Company and withdrawn under [8 & 9] above, HMRC reserved the right to assess those on Mr Ali to the extent that they are permitted to do so by the relevant statutory time limits.

Remaining matters before the Tribunal

11. Following the withdrawal of certain penalty assessments as described above, the disputed matters remaining before the Tribunal are:

30 (1) The Company's appeals against (a) VAT assessments for the quarterly VAT periods 03/08 to 12/12 inclusive; and (b) sch 24 deliberate inaccuracy penalties for the quarterly VAT periods 12/11 to 12/12 inclusive.

35 (2) Mr Ali's appeals against the income tax assessments and sch 24 penalties as described at [2] above.

The Investigation

12. In 2012 HMRC were advised by UK Border Force that a visit to the restaurant had found two illegal workers on the premises. HMRC made two unannounced visits on

Thursday 20 September 2012 and Friday 16 November 2012 at the end of trading hours, and undertook “cashing up” exercises.

13. We took evidence from Mr Shaun Foster, who was the investigating VAT officer, as follows:

5 (1) At the visits he and colleagues studied the level of takings and the ratio of cash sales to card (credit and debit) sales. For both evenings the cash sales were significantly higher than those declared for other evenings, as was the ratio of cash to card sales.

10 (2) At the first visit (a) the meal slips were incomplete, especially in relation to takeaway orders; (b) takeaways were recorded as a total on a single slip, with no breakdown of the amount; (c) the till was being used only as a cash drawer; and (d) the bookings diary had papers stapled to future dates showing bookings additional to those written in the diary but these appeared to have been removed from past dates, leaving staple holes in the pages. Mr Ali was warned of the necessity for adequate record keeping and was handed written information.

15 (3) At the second visit (a) there was a significant discrepancy (over £400) between the aggregate of the meal slips and the total takings (cash and card); (b) the total takings were significantly higher (around £700) than declared on previous Friday evenings; and (c) the number of delivery orders was 52 compared to only 15-20 for previous Friday evenings.

20 (4) Business records were uplifted. Mr Ali provided further records subsequently. Meetings had been held with Mr Ali and his accountant (Mr Wildin). The investigation was widened to include the direct tax implications of the suspected underdeclarations. Mr Ali was invited to make a full disclosure of inaccuracies but maintained that there was no problem.

25 (5) In the VAT return following the visits the declared turnover increased significantly from earlier periods.

30 (6) Analysis of the records revealed further concerns. The food cost for the 12/12 period had reduced despite the increased turnover. Almost all the additional turnover appeared to be in cash sales. Employee costs appeared to have fallen rather than risen. The purchases of after-dinner chocolate had increased by significantly less than the increase in declared turnover.

35 (7) Mr Foster and his colleagues had considered that Mr Ali’s explanations were not credible, and that takings had been deliberately understated. Assessments for both VAT and direct tax were considered justified, as were appropriate penalties.

5 (8) The method used to estimate the underdeclarations of turnover was that cash takings should be 50% of total takings – ie that the declared cash sales should be raised to equal the card sales. That was probably favourable to the taxpayer, given the type of business – Mr Foster’s experience on other restaurant cases was that cash sales were usually 60-80% of turnover.

10 (9) In calculating the appropriate level of sch 24 penalties: (a) the inaccuracies were considered deliberate but not concealed; (b) disclosure was prompted; (c) no mitigation was given for “telling”, 15% mitigation was given for “helping”, and 30% mitigation was given for “giving”; (d) the resulting penalty level was 54.25%.

(10) In response to questions in cross-examination by Mr Wildin:

15 (a) He had not concentrated on the gross profit percentage figures. He and his colleagues had considered whether to examine if there could have been unrecorded purchases or staff payments funded out of undeclared cash receipts, but in view of the amounts involved they had decided not to broaden the enquiry.

20 (b) The records provided by Mr Ali were considered carefully but were regarded as obviously incomplete. Meal slips were missing. Border Force had discovered two illegal workers on the premises. The premises had a till but this was not being used, except as a cash drawer.

25 (c) He accepted that customers varied in their propensity to pay by cash or card, and that the split might vary from night to night. However, the observed visits showed cash sales that were significantly (more than double) higher than the average declared by the business.

30 (d) In relation to the later increase in turnover, he acknowledged the explanation that there had been a leafletting exercise. He did not consider that the explanation of Cheltenham race days was convincing, although he had looked at the race meet calendar. He had referred to the lack of any corresponding increase in purchases of after-dinner chocolates but that was only a small element of the overall exercise and did not unduly influence his decisions.

35 (e) He was aware of the suggestion that Mr Ali had received loans from family and friends. That had not been pursued because it would have expanded the scope of the enquiry significantly. He believed it had been considered by his colleagues handling the income tax side of the enquiry.

40 (f) It was correct that Mr Ali had maintained that there were no problems with the business records. One consequence of that

5 was that there was no room for a negotiation of a settlement, which might have included consideration of matters such as extra staff costs or materials purchases. He felt HMRC had a robust case and was disappointed that there had been no disclosure.

(g) The level of penalties had been discussed between himself and his colleague Mr Elliott. They had taken the same approach to mitigation allowed.

10 (h) It was denied that deliberately excessive assessments had been raised in order to force a settlement. The trader's records were obviously deliberately wrong and it would be unfair to honest traders to ignore the situation.

14. We took evidence from Ms Lesley Herbert, who was the direct taxes compliance officer, as follows:

15 (1) Ms Herbert had also attended the two visits.

(2) At a meeting with Mr Ali and his accountant she had requested the completion of a schedule of household income and expenditure. Mr Wildin returned this on behalf of Mr Ali some six weeks later. Ms Herbert had also studied Mr Ali's personal bank statements and those of the business.

20 (3) Mr Ali's explanations described annual income of £28,000 and expenditure of £14,000 for a family of six, including £30-40 per week on groceries. £4,300 had been declared as drawings from the business. Tax credits were being claimed. In a four month period there were banked deposits of £25,000 and cheque payments of over £20,000, including some large deposits and withdrawals. Ms Herbert could not reconcile the stated income and expenditure figures to the evidence provided.

25 (4) Mr Ali appeared to own a property portfolio, one asset having been purchased in the period under investigation. She had requested prime records for the rental business but these were denied on the basis that the business bank account was in the name of Mr Ali's wife. Mr Ali had provided a list of friends and contacts who he said had loaned him money for a property purchase. The dates and amounts did not reconcile to the bank statements. She had managed to trace most of the individuals in HMRC's records; some were overseas. Some had not declared income sufficient to support loans of the size claimed; however, she had not pursued further work on this aspect, and accepted there could be other explanations for availability of the funds.

30 (5) A review of the business records for July 2011 showed (a) no card sales for the period 7 to 19 July; (b) no takeaways on 2, 23 or 30 July – all of which were Saturdays; and (c) three days (Fridays and Saturdays) had an extra slip for a large amount marked "plus". There was also concern

over the bookings diary which had markings indicating that strips of paper had been removed; Mr Ali's explanation had been that this was done to keep the book neat. She had no particular concerns about the gross profit percentages but the findings at the cash-up visits clearly suggested serious problems with suppression.

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(6) On her transfer to another role she had passed the case to her colleague Mr Andrew Elliott.

(7) In response to questions in cross-examination by Mr Wildin:

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(a) Although she had concerns arising from the private side review because of numerous discrepancies, those were not the basis of the income tax assessments – the assessments stemmed from the work done by her colleagues on the business review.

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(b) It was correct that Mr Ali had completed the questionnaire as requested, but the answers contained numerous discrepancies, as already described.

15. We took evidence from Mr Andrew Elliott, who was the direct taxes compliance officer who took over from Ms Herbert, as follows:

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(1) His task had been to check the validity of Mr Ali's self-assessment returns. He used the material collected by his colleagues. He had been told by Mr Wildin that no further records were available. His own work led him to agree with his colleagues that the business had unrecorded cash sales; in particular, he noticed anomalies in the records including (i) on one day, recorded cash takings that were lower than one meal slip showing a cash sale; (ii) on another day, negative cash takings; and (iii) discrepancies between the cash book and the meal slips. Although some of the discrepancies were small in amount, they all pointed to unreliability of the business records.

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(2) He had reviewed the business's PAYE record, which demonstrated wide fluctuations in wage costs. He was aware that Border Force had discovered illegal workers on the premises, and that the business had been fined. At a subsequent meeting Mr Ali maintained that the individuals were visitors rather than staff, and he had considered an appeal but had not pursued this on legal advice.

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(3) He had concerns about Mr Ali's private means but decided, after discussion with his manager, not to pursue that aspect.

(4) The income tax assessments were raised on the basis of the undeclared turnover calculations made in the course of the business side investigation. He decided that deliberate understatement penalties were appropriate, and to follow the same penalty mitigation as adopted on the VAT side.

(5) After the internal review of the assessments, Mr Wildin had sent him further calculations and information. Mr Elliott conducted a further examination of the PDQ records (ie the credit card account) but remained satisfied that there were discrepancies in the declared cash sales.

5 (6) In response to questions in cross-examination by Mr Wildin:

(a) He accepted there need not necessarily be a direct correlation between wage costs and turnover. He had noted Mr Ali's statement that Mr Ali's son worked unpaid in the business.

10 (b) He did not accept that HMRC's calculations were full of errors. He accepted that the records demonstrated large variations in cash versus card takings. He considered the approximation of true cash sales as 50% of turnover was fair in the circumstances.

15 (c) He accepted that with the assessed level of additional turnover there were likely to be additional associated costs. That was a matter that he had hoped to explore in the meeting with Mr Ali and Mr Wildin, but Mr Ali had maintained that there was no problem with the business records. Accordingly,
20 no adjustment had been made to costs of sales.

16. We took evidence from Mr Ali (speaking through a court appointed interpreter) as follows:

(1) The business was small, with ten employees (most part-time). Business records were kept on-site by Mr Ali, assisted by one employee.
25 Daily sales records were maintained and he cashed up and recorded the daily sales (both restaurant and takeaway) properly in the accounting records each and every day. Until the first HMRC visit the meal slips were not kept, as these were seen as just notes to the kitchen. Sometimes
30 customers failed to collect takeaway orders, and sometimes refused to accept deliveries if they were late; previously the slips for these cases had not been kept but after the record-keeping information was provided by Mr Foster they were kept and reconciled. It was not true that his records were inaccurate. The accounts and tax returns submitted showed his true income for each year.

35 (2) As could be seen from photographs provided to the Tribunal, the restaurant held 55-60 covers and the function room 25 covers. The restaurant did not sell alcohol but customers could bring their own drinks.

(3) Sometime before 2012 the premises were extended by creation of a function room and party area. In 2011 some former employees left to set
40 up a rival restaurant nearby, which resulted in competition and some bad will; that business had since failed. The new facilities and return of previous customers accounted for some of the increased turnover in 2012.

Also, there had been a door-to-door leafletting campaign. Significant trade resulted from race meetings (both for the restaurant and takeaways to hotels) and rugby matches; Irish racegoers tended to pay in cash. Menu prices were increased only every four to five years but had been done in 2012; prices were set by reference to local competition.

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(4) Much of the food supplies were purchased frozen in bulk; therefore there was not an exact correlation between purchases and sales in any particular period. There was a deliberate building of stock in the run-up to the Christmas period. Mr Foster had asked many questions about the purchases of after-dinner chocolates but there was no reason why these should reflect sales, as some customers did not take them and any unused items were returned to stock.

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(5) Over time, more customers were choosing to pay by card. The mix of cash and card sales varied from day to day, without any particular explanation. For example, during August 2015 daily takings varied from £303 to £1,789; the percentage of cash sales varied from 14% to 45% (on days with similar total takings).

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(6) He had purchased a property in Gloucester using mainly a mortgage loan but also money borrowed from more than twenty people he knew through his local mosque. He had provided to HMRC bank statements and confirmation letters from the lenders.

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(7) He was a simple man working hard and struggling to bring up a family and make ends meet. He received Working Family Tax Credits to give him a living wage. The idea that he had received £365,000 over 4¾ years was implausible – earning £90,000 p.a. would be a dream come true.

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(8) The people present in the restaurant when Border Force visited were not staff; they were Mr Ali's brother and his friend. He had paid a fine and not appealed, on legal advice.

(9) In response to questions in cross-examination by Mrs Spence:

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(a) The reason for lower wages in later periods, despite increased turnover, was that Mr Ali's son had helped unpaid, also Mr Ali's nephew. Also, friends sometimes helped for short periods at very busy times, without payment but for a free meal at the end of the evening. He had never used any illegal workers.

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(b) He accepted that the HMRC income and expenditure form may have had some omissions but that was because he could not remember everything. He had treated it as a draft with rough figures. If his household expenditure appeared low then it may be because much of the food was leftovers he took home from the restaurant. He and his wife had owned a number of

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different cars and some had been in his business rather than owned personally, so there may have been some confusion on that.

5 (c) He accepted that the function room extension was probably in full operation before the first HMRC visit.

(d) He could not answer off the top of his head the source of funds for the deposit for the property purchase, or for the car purchases. His accountant should have a schedule. It was not true that the money had come through undeclared earnings.

10 17. We took evidence from Mr Wildin, who supported various statements made by Mr Ali in his evidence.

Submissions of the Appellants

18. For the Company and Mr Ali, Mr Wildin submitted as follows.

15 19. The business is a small restaurant in a suburb of Gloucester. The total assessments raised by HMRC suggest additional untaxed profits of around £365,000 over less than five years, which was absurd. It resulted in a gross profit margin of around 82%, which was not achievable by a restaurant of this size and type. Mr Ali had a modest standard of living, as borne out by HMRC's own lifestyle review. HMRC should have appreciated that there was nothing to find, and moved on.

20 20. HMRC had not demonstrated that Mr Ali had been dishonest. Accordingly, they were not entitled to assess for the earlier years. Mr Ali was clearly not fluent in English – he had required an interpreter for these proceedings – and so his answers in meetings may have been subject to some misinterpretation.

25 21. HMRC had taken the results of two isolated visits and extrapolated those to cover a period of around 1,700 days trading. No account had been taken of the fact that sales levels, and the split of sales between cash and cards, varied widely from night to night – as demonstrated by HMRC's own schedules. With a relatively small number of covers, even a small change in the number of customers paying by card rather than cash could change the sales proportion significantly. HMRC had been sidetracked by
30 irrelevant issues such as the level of after-dinner chocolates purchases. HMRC had ignored credible explanations that did not fit their own preconceptions – such as the distortion of trade occasioned by Cheltenham race meetings. HMRC had demonstrated a misunderstanding of how the PDQ card system operated in practice.

35 22. The same figures had been used for the VAT assessments and the income tax assessments – so that no allowance had been given for additional costs in arriving at the alleged profits. That was inconsistent with HMRC's claimed approach, and did not represent best judgement.

40 23. HMRC's calculation assumed cash takings should be increased to equal the card sales – ie that cash sales constituted 50% of adjusted turnover. However, that was not even in accordance with the analysis prepared, apparently, by Mr Elliott which

showed, year by year, that the cash sales proportion was lower than that – down to 38% in one year. Even the figures produced by HMRC showed that a cash sales proportion of 40% was more realistic, but that had been ignored by HMRC. That did not constitute best judgement.

5 24. Previously HMRC had accepted the explanation provided concerning the private loans taken by Mr Ali – he had gone to the trouble of obtaining confirmation letters from all available individuals – but now HMRC seemed to resile from that and cast aspersions on the explanation already accepted.

10 25. It was accepted that there were some minor anomalies in relation to the meal slips but these had been explained, and Mr Ali had been prompt to implement the record-keeping advice given to him by Mr Foster at the first visit.

15 26. The reported gross profit percentage of the business had been consistent from year to year. HMRC's adjusted figures were not realistic but this had been ignored by HMRC. Again, that did not constitute best judgement. HMRC had assessed unrealistic figures in an unsuccessful attempt to bully Mr Ali into offering an unwarranted settlement.

27. There was no lack of co-operation by Mr Ali. He had taken away the income and expenditure statement rather than complete it at the meeting, and had submitted it in good time.

20 28. HMRC had accepted that further reductions in the assessments should be made but had not produced anything to explain their revised figures, so Mr Wildin could not comment on those or take instructions from Mr Ali.

Submissions of the Respondents

29. For HMRC, Mr Corbett and Mrs Spence submitted as follows.

25 30. As a result of the visits, the interviews, the review of records, and subsequent analysis, HMRC were satisfied that the business had been under-declaring sales. In particular, the anomalies in declared cash sales discovered at the visits were supported by the subsequent significant increase in declared cash sales but without any matching increase in purchases or staff costs. The VAT assessments and income tax
30 assessments were to rectify those underdeclarations. The calculations had, of necessity, been an exercise of estimation but the relevant officers had explained their methodology. The assessments had been upheld, with certain minor adjustments to reflect correct accounting periods, by a formal internal review. Having considered the evidence advanced at the hearing, HMRC proposed to reduce the assessments for the
35 period from 1 July 2008 to 21 October 2011 – revised figures would be provided to the Tribunal and Appellants in due course.

40 31. The underdeclarations represented a deliberate misstatement of turnover and, accordingly, profits. That constituted dishonest behaviour by Mr Ali. Penalties had been properly raised both on the Company in relation to the VAT matters and on Mr Ali in relation to the income tax matters. The relevant officers had explained the basis

of calculation of the penalties. The penalties had been upheld, with certain minor adjustments to reflect changes to the assessments, by a formal internal review. The penalties would be further adjusted to reflect the reduced assessments described at [30] above.

5 32. Mr Ali had been running the restaurant for many years and retained the services of professional advisers. He also ran a property letting business. It was not credible that he did not appreciate the importance of maintaining accurate and verifiable business records. He had displayed a cavalier approach to completion of the income and expenditure statement, despite being aware of the importance that HMRC expected
10 him to attach to the task, and being given ample time to complete the form. He had effectively admitted that the statement was materially inaccurate.

15 33. Mr Ali's explanations had been contradictory in a number of regards. He had accepted a fine for illegal employment of workers but then claimed they were just friends and family who were visiting. He put forward the function room extension as a reason for increased turnover from 2012 but then accepted that it was in full operation before HMRC even conducted their first visit.

20 34. The discrepancies in the business records were too extreme to be explicable as simple mistakes. The true takings revealed during the two cashing up exercises performed by HMRC were dramatically different from those reported by the business for earlier periods. After the visits there was a marked increase in reported cash sales. Mr Ali handled all the cash in the business and so he must have been aware of what was happening. Mr Ali's dishonest behaviour permitted the making of discovery assessments for past periods, and also justified the raising of sch 24 penalties. Mitigation of the penalties had been granted in appropriate amounts.

25 35. It was clear from the evidence of the three HMRC officers that considerable effort and care had been taken to arrive at a best judgement of the undeclared turnover. In *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290 Woolf J stated (at 292):

30 "... it should be recognised, particularly bearing in mind the primary obligation ... of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will
35 be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the
40 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
45 result in further material being placed before them."

36. If the Tribunal took a different view from HMRC then it was open to the Tribunal to adjust the figures, rather than dismiss the assessments. In *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 Carnwath LJ stated (at [38]):

5 “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.”

10 **Consideration and Conclusions**

Preliminary

37. There was a procedural dispute over the evidence concerning the property purchase monies which Mr Ali maintains he obtained by loans from a number of individuals. Mr Wildin submitted witness statements from many of those individuals and requested that they be admitted late. HMRC objected to that, saying they challenged the statements but did not intend to call on any of the individuals to attend the hearing. We decided that the statements should be admitted into evidence but noted that HMRC objected to the contents, and if those contents were sufficiently material to our considerations then we would decide whether it was appropriate to deal with the contents in the absence of the witnesses. In the event, we have been able to determine these appeals without placing any weight either way on the points in dispute in relation to the purported loans.

Determination

38. Having considered all the evidence carefully, we agree with HMRC that there have been underdeclarations of sales, and that those inaccuracies were deliberate.

39. We do not accept Mr Ali's explanation that the results of the two separate cashing-up visits showing hugely increased cash sales were just coincidences. We accept there were variations from day to day both in the volume of sales and the split between cash and card sales, but we find that the scale of the discrepancies was too large to brush aside as normal variation, and it is relevant that the differences were only discovered when HMRC themselves did the cash-up. We find that HMRC were entitled to suspect undeclared sales. HMRC then conducted further work to test those suspicions; Mr Ali was given full opportunity to explain the anomalies and provide records. We find that HMRC gave proper consideration to all the information provided to them (both as records and in meetings, at which Mr Ali's accountant was present), however such information did not give a satisfactory explanation but only confirmed their suspicions of record-keeping inaccuracies and deliberate under-recording of turnover.

40. We find that, on the basis of the information available to them, HMRC were entitled to treat the card sales figures as acceptable and then make an estimate of the true cash sales. We also find that such an approach gave a best judgement estimate of

the missing turnover. However, from all the evidence, we consider that HMRC's estimate that cash sales comprised 50% of total true turnover is too high. At the hearing HMRC stated that they had decided to revise downwards the assessments for some years and it may be that they had come to a similar conclusion as the Tribunal.
5 (After the hearing HMRC supplied revised calculations but we have chosen to set out our own conclusions rather than analyse the detail of the revisions.) We consider that taking cash sales as being 40% of total turnover is a better estimate. That is more in accordance with the schedules provided in the hearing bundles (at pp 69-70 of Trial Bundle 6) and so we would adjust the assessments to reflect that 40% proportion.

10 41. The income tax assessments reflect the increased turnover but without any allowance for costs. HMRC explained why that had been done but we feel that in order to reflect a realistic profit there should be allowed a 35% deduction for costs, giving revised profits for income tax purposes of 65% of the (revised) additional sales figures.

15 42. Turning to the penalties, we agree with HMRC that deliberate inaccuracy penalties should be charged to both the Company and Mr Ali. We agree that the inaccuracies were not concealed, and that disclosure was prompted. We agree with the mitigation granted in relation to "telling" (nil) and "giving" (30%). However, we consider that the mitigation allowed by HMRC should be increased in relation to
20 "helping"; although Mr Ali denied any inaccuracies, he and his advisers did provide information as requested in the investigation. We determine the mitigation for "helping" should be increased from 15% to 30%. That results in a revised aggregate mitigation of 60% (rather than 45%) and thus a penalty percentage of 49% (being the minimum 35% plus discretionary element of 14% (being 40% of 35%)) (rather than
25 54.25%).

43. To summarise, we uphold the VAT assessments, income tax assessments, and penalties on both the Company and Mr Ali but with three adjustments:

- (1) The adjusted sales should be calculated assuming that cash sales represent 40% (rather than 50%) of total turnover;
- 30 (2) The adjusted profits should be calculated after a 35% (rather than nil) deduction for costs and expenses; and
- (3) The penalties (for both Mr Ali and the Company) should be calculated at 49% (rather than 54.25%) of the inaccuracies.

Decision

35 44. We give this decision as a decision in principle with leave to the parties to apply for determination of exact figures if they are unable to agree such figures.

45. The appeals are ALLOWED IN PART as follows:

- (1) The VAT assessments against the Company are varied so as to reduce the additional turnover to reflect cash sales as 40% of total sales.

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(2) The sch 24 FA 2007 penalties against the Company for the quarterly VAT periods 12/11 to 12/12 inclusive are varied so as (i) to reduce the potential lost revenue calculations to reflect the reduced VAT assessments (above); and (ii) to be in the amount of 49% of the revised potential lost revenue.

(3) The income tax assessments against Mr Ali are varied so as to reduce them to reflect (i) the reduced turnover (above); and (ii) a 35% deduction for costs and expenses.

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(4) The sch 24 FA 2007 penalties against Mr Ali are varied so as (i) to reduce the potential lost revenue calculations to reflect the reduced income tax assessments (above); and (ii) to be in the amount of 49% of the revised potential lost revenue.

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46. 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.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

RELEASE DATE: 25 AUGUST 2016