



TC05895

Appeal number:TC/2016/01843

VALUE ADDED TAX – assessment of underdeclared output tax on sales – whether assessment excessive – whether assessment to best judgment – Pegasus Birds Ltd v HMRC [2004] EWCA Civ 1015 applied – appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

LA BELLE VIE LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 21 February 2017

Mr Mansour Adl of Adl & Co for the Appellant

Ms Lisa Fletcher of HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

DECISION

Background

1. The Appellant is in business operating two cafes in Manchester. On 18 February
5 2016 HMRC notified an assessment for VAT to the Appellant in the sum of £24,323
covering return periods 04/12 to 10/14 (“the Assessment”). This is an appeal against
the Assessment.

2. The Assessment was made following a compliance visit on 29 January 2015.
The visiting officer, Ms Katie Devine considered that the Appellant had under-
10 declared output tax in VAT returns for periods 04/11 to 10/14. In particular she
considered that the Appellant had incorrectly accounted for certain supplies of food as
zero rated rather than standard rated. She calculated the amount of VAT which had
not been accounted for as £54,197.

3. There was then correspondence between Ms Devine and Mr Adl, the
15 Appellant’s representative. During the course of that correspondence Mr Adl made
various criticisms of the assumptions used by Ms Devine in calculating the amount of
VAT said to have been underdeclared and also as to the way in which she had
conducted her investigation. In June 2015 another officer, Mr Andrew Stokes took
20 over responsibility for the investigation from Ms Devine who had taken on a new
role. There was then correspondence between Mr Adl and Mr Stokes, delayed for a
period whilst a complaint made by Mr Adl was referred to HMRC’s complaints team.
In January 2016 Mr Stokes and Mr Adl resumed their correspondence which
culminated in the Assessment being notified to the Appellant on 18 February 2016.

4. At about the same time that the Assessment was notified, Mr Stokes told the
25 Appellant that he had considered what penalty may be appropriate. He said he had
discussed the matter with Ms Devine and his manager and had decided that as HMRC
were unable to establish either deliberate behaviour or a failure to take reasonable
care, that no penalty would be appropriate. This appeal is therefore only against the
Assessment.

30 5. A notice of appeal was lodged with the tribunal on 23 March 2016. It set out a
history of the correspondence and the criticisms made in correspondence concerning
the way in which the investigation had been handled and the basis of the Assessment.
Essentially Mr Adl contends that the Assessment was so inaccurate and flawed that it
was not made to best judgment.

35 *Approach to this Appeal*

6. The Assessment was made pursuant to section 73 Value Added Tax Act 1994
(“VATA 1994”) which provides as follows:

40 “ Where a person has failed to make any returns required under 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.” (emphasis added)

7. The approach that this tribunal should take when faced with a challenge based on best judgment was described by the Court of Appeal in *Pegasus Birds Ltd v Commissioners of HM Revenue & Customs [2004] EWCA Civ 1015*. It is well established that two distinct questions can arise on a challenge to an assessment under section 73 VATA 1994. First, whether the assessment has properly been made under the power conferred by section 73(1) including the use of best judgement. Second, whether the amount of the assessment is correct. In relation to best judgement, where a tribunal is satisfied that HMRC have made a mistake in the assessment, Carnwarth LJ (as he then was) at [21] re-affirmed the question to be asked in the following terms:

“ ... 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.”

8. Carnwarth LJ also gave guidance to tribunals when faced with a challenge based on best judgment. At [38] he stated as follows:

“... 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.

...

There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing.”

9. The approach I adopted at the hearing was to allow the hearing to proceed on the issue of quantum, although in this case that was bound up with the issue of best judgment. I shall focus initially on the amount of the Assessment and the way in which it was calculated. I shall consider whether there has been any underdeclaration of VAT and if so the amount of that underdeclaration. I shall then go on to consider the question of best judgment in so far as necessary.

10. The burden of establishing that an assessment is excessive lies on the Appellant. In *Khan v Commissioners for HM Revenue & Customs [2006] EWCA Civ 89*, Carnwarth LJ summarised the position as follows:

“ 69. ...The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

5 ‘The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.” (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord
10 Lowry).’”

11. Where the issue of best judgment arises it is to be determined by reference to the material available to HMRC at the time their assessment was made – see *Mithras (Wine Bars) Limited v Commissioners for HM Revenue & Customs* [2010] UKUT 115
15 (TCC).

Findings of Fact

12. Mr M Emami is a director of the Appellant. Mr Adl told me that because of illness Mr Emami was unable to attend the Tribunal. I was also told that Mrs Emami who had some involvement in running the business was unable to attend because of
20 illness. I understand that these are not temporary health issues and therefore Mr Adl did not wish to seek a postponement. Mr Adl himself had some knowledge of the two cafes and I permitted him to give evidence on behalf of the Appellant even though no witness statement had been served in accordance with directions given for the hearing. I also heard evidence on behalf of HMRC from Mr Stokes, the assessing
25 officer. Based on the evidence before me I make the following findings of fact, in all cases by reference to the balance of probabilities.

13. The Appellant operates two cafes in Manchester. One is in Cheetham Hill called Nibbles Café (“Nibbles”). The other is in the city centre at Shudehill called Abergeldie Café (“Abergeldie”). Ms Devine’s visit took place on 29 January 2015 at
30 Nibbles. She did not visit Abergeldie. During the visit she met with Mr Emami. Her visit report was in evidence and she recorded various details about the businesses and the procedures for recording takings.

14. A number of background matters for the periods covered by the Assessment were not in dispute and I find as follows:

35 (1) Both businesses are small cafes situated in working communities. The customers are mainly office employees and local workers. Nibbles has 5 tables each seating 4 people whilst Abergeldie has 4 tables each seating 4 people.

40 (2) Nibbles operated two tills. One till was used to record eat-in sales and the other was used to record takeaway sales. The sales in the eat-in till were treated as standard rated and the sales in the takeaway till were treated as zero-rated. Z readings for both tills were taken once a week.

(3) Abergeldie operated one till. Z readings for the till were taken daily.

(4) Z readings were passed to Mr Adl every quarter from which he prepared the VAT returns.

15. Mr Adl told me that Mr Emami had acknowledged to Ms Devine that some standard rated sales had been incorrectly classified as zero rated. Mr Adl stated that it referred to sales of cold food consumed on the premises. Ms Devine's visit report records the following in relation to Nibbles:

10 "In Nibbles, one till is used for all eat in sales and one till for takeaway sales. VAT is declared on the sales in the 'eat in' till and the takeaway till is zero rated. Trader stated that if hot and cold food was to be taken away then cash would be separated and both tills would be used.

Trader stated that split between eat in and takeaway food was approx. 50/50 and 50% of takeaway sales were cold sandwiches."

16. In relation to Abergeldie, Ms Devine's visit report records the following:

15 "Standard rated and zero rated sales go into the same till in Abergeldie. Z reports do not detail the split between the different VAT liabilities."

17. Ms Devine noted in her report a "risk area" described as "liability of takeaway sales". In relation to that she recorded the following:

"Trader stated that he was under the impression that all cold food was zero rated, whether served in the café or to takeaway."

20 18. Ms Devine must therefore have considered that the Appellant had been incorrectly treating cold food served in the café as zero rated, consistent with what Mr Adl told me during the hearing.

25 19. Ms Devine wrote to the Appellant on 17 March 2015. Under a heading "*Eat in sales*" she stated that "*output tax is due on all 'eat in' sales*" which I infer was a reference to the error accepted by Mr Adl. She also stated under a heading "*Takeaway sales*" that "*you informed me within the interview at your premises there have been instances in which hot takeaway food and cold drinks have been recorded as a sale in the takeaway till at Nibbles café and all sales within this till are treated as zero rated*". Mr Adl did not acknowledge that this second type of error had occurred.

30 20. Ms Devine was therefore concerned with two types of errors in relation to the Appellant's output tax:

- (1) Cold food served in the café treated as zero rated, and
- (2) Some hot food and cold drinks sold takeaway treated as zero rated.

35 21. In relation to the first type of error I am satisfied on the basis of what Mr Adl told me and on the basis of Ms Devine's visit report that the Appellant was wrongly treating sales of cold food to be consumed on the premises as zero rated. The

Appellant incorrectly thought that such supplies were zero rated and therefore it is likely and I find that he applied the same treatment to supplies at Abergeldie.

22. The second type of error was referred to in Ms Devine's letter but it was not recorded in her visit report. However the letter was sent soon after the visit. Following
5 Ms Devine's letter there was a period of correspondence between Mr Adl and Ms Devine. Nowhere in that correspondence did the Appellant challenge the second type of error identified by Ms Devine. I am satisfied therefore that the Appellant had to some extent incorrectly treated hot takeaway food and cold drinks as zero rated. No explanation was given as to the circumstances in which this error was made. In the
10 absence of any evidence from Mr Emami it is likely that the error occurred at both Nibbles and Abergeldie and I find accordingly.

23. It was necessary for Ms Devine to identify the underdeclaration of VAT arising from these errors. She was able to identify the proportion of sales declared between Nibbles and Abergeldie from the till records. Ms Devine's approach was different for
15 each café. For Nibbles she could easily identify the split between eat in sales and takeaway sales because separate tills were maintained. She treated all the eat in sales as standard rated. She estimated that 30% of takeaway sales would have been standard rated. The reason she did this appears in her letter where she stated:

20 " As you informed me within the interview at your premises there have been instances in which hot takeaway food and cold drinks have been recorded as a sale in the takeaway till at Nibbles Café and all sales within this till are treated as zero rated. Taking this into consideration, it was decided that 70% of takeaway sales would be treated as zero rated and the remaining 30% as having a standard rated VAT liability. Output tax is therefore due on 30% of sales from the Nibbles café takeaway till."

25 24. It seems likely that Ms Devine took into account Mr Emami's statement that approximately 50% of takeaway sales at Nibbles were cold sandwiches, and she estimated that cold salads would amount to 20%, leaving 30% of takeaway sales being standard rated.

30 25. On this basis Ms Devine estimated the total output tax due on supplies by the Nibbles café.

26. For Abergeldie Ms Devine analysed the purchase invoices for period 04/13. From the nature of the purchases she estimated that 86.89% of those purchases were likely to relate to standard rated sales. She therefore treated that as the proportion of standard rated sales.

35 27. Ms Devine then estimated the total amount of output tax that the Appellant ought to have accounted for and compared it to the actual output tax accounted for on the VAT returns to give the undeclared VAT. Based on these assumptions Ms Devine went on to provide her estimate of underdeclared VAT in the sum of £54,197.

40 28. In her letter dated 17 March 2015 Ms Devine gave the Appellant an opportunity to provide details of any disagreement to her calculation along with supporting evidence.

29. Mr Adl was very critical of Ms Devine’s approach, although he did not offer an alternative calculation of the underdeclared VAT. Nor has he offered an alternative calculation in the present appeal proceedings. I am mindful that it is the Assessment made by Mr Stokes that is under appeal and whilst Mr Stokes adopted the same approach he made various amendments to Ms Devine’s calculations. I shall therefore focus on the calculations which support the Assessment rather than Ms Devine’s calculations, and on Mr Adl’s criticisms in so far as they apply to the Assessment.

30. I can summarise the methodology adopted by Mr Stokes as follows. For the period 04/11 to 10/14 (“the Four Year Period”) the Appellant had declared total sales of £743,311 including output tax of £38,138. An analysis of the till records showed that 40.32% of turnover came from Nibbles and 59.68% from Abergeldie. Hence over the Four Year Period, £299,703 of turnover came from Nibbles and £443,608 came from Abergeldie.

31. Nibbles till records for the year ended 31 January 2014 showed the following:

	£	%
Eat in Till	26,947	37.49
Takeaway Till	44,928	62.51
Total	71,875	

32. Based on these figures Mr Stokes estimated that in the Four Year Period the turnover of Nibbles was £112,358 eat in, and £187,344 takeaway. The eat in sales were all standard rated with associated output tax of £18,726. He estimated that 20% of the takeaway sales were standard rated, essentially hot takeaway food and cold drinks. This was less than the 30% Ms Devine had previously estimated and gave standard rated sales of takeaway food of £37,468 with associated output tax of £6,244. The total output tax on sales from Nibbles was therefore £24,970.

33. Mr Stokes estimated that 64.97% of the Abergeldie sales were standard rated, amounting to £288,212 with associated output tax of £48,035. The estimate of standard rated sales at Abergeldie was based on the analysis of purchase invoices carried out by Ms Devine, with his own adjustments in the light of correspondence with Mr Adl. The purchase invoices for period 04/13 had been analysed by Ms Devine in the form of a schedule. Mr Stokes’ analysis in the form of a similar schedule (“the Schedule”) split the purchase invoices between ingredients associated with particular types of supply, namely hot food, drinks, cold food, hot and cold food and miscellaneous. For example, purchases of potatoes were treated as referable to supplies of hot food. Catering bread was treated as referable to supplies of cold food. Salad items were treated as referable to both hot and cold food because they could be used as cold salads, on sandwiches or as a garnish for hot food. A miscellaneous category appears to have included items such as sauces. Yoghurt was split between drinks, hot and cold food and miscellaneous.

34. I can give two examples of entries in the Schedule. The first example is an invoice from Bennett's Potatoes dated 5 March 2013 in the sum of £70.50. It has been allocated in the Schedule to hot food. The second example is an invoice dated 29 January 2013 from "AFS" totalling £254.94. It has been split as follows:

Category	£
Hot Food	169.38
Drinks	56.80
Cold Food	-
Hot and Cold Food	11.29
Miscellaneous	17.47
Total	254.94

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35. There is no indication what was supplied on the AFS invoice, or why it was apportioned in the Schedule in the way that it was. I do not know and I have not been told what AFS might supply. That is not a criticism of Ms Devine or Mr Stokes. In the absence of a copy of any of the invoices which go to make up the Schedule, but
10 subject to Mr Adl's argument that no meaningful allocation can be made, the Appellant cannot satisfy me that items have been incorrectly allocated.

36. Mr Stokes viewed purchases referable to hot food and drinks as resulting in standard rated sales, purchases referable to cold food as resulting in zero rated sales, and purchases referable to both hot and cold food as resulting in both standard rated
15 and zero rated sales.

37. Ms Devine had made various re-allocations of items included in her schedule. Some of these could not readily be explained but in any event Mr Stokes made his own re-allocation. This involved reducing the hot food figure by 20% which was allocated to cold food, as shown in the table below. He did this at least partly based on
20 his consideration of a menu for Abergeldie which had been obtained by Ms Devine. The menu showed items available including plate salads and cold sandwiches which would be zero rated if taken away. Most items on the menu were types of hot food and would be standard rated. Mr Adl suggested that there were very few purchases of ingredients to support sales of hot food. In the absence of invoices I do not accept that
25 suggestion.

38. Mr Adl took issue with the menu relied upon by Mr Stokes, suggesting that it was an out of date menu which did not reflect the food served in the period under review. This was a new point taken by Mr Adl at the hearing and it was apparent that Mr Adl had not previously seen the document. The menu had previously been referred
30 to in correspondence from HMRC and during the enquiry no objection had been taken to HMRC's reliance on the menu. I am satisfied therefore that Mr Stokes was entitled to take it into account and that I should do so as well.

39. Totals in the Schedule can be summarised as follows:

Category	Original £	Re-allocated £
Hot Food	2,319	1,855
Drinks	717	717
Cold Food	37	501
Hot and Cold Food	1,648	1,648
Miscellaneous	835	835
Total	5,556	5,556

40. Mr Stokes went on to apportion the purchases of £1,648 which he considered resulted in both hot and cold food sales. He apportioned 30% of those purchases to standard rated sales and 70% to zero rated sales. Miscellaneous purchases were excluded from the analysis. The result was that purchases were treated as giving rise to the following sales:

Standard Rated Sales	£
Hot Food	1,855
Drinks	717
30% Hot and Cold Food	494
Total:	£ 3,066
Zero Rated Sales	
Cold Food	501
70% Hot and Cold Food	1,153
Total:	£1,654

41. From this Mr Stokes calculated that 64.97% of sales at Abergeldie were standard rated and 35.03% were zero rated. He went on to apply those percentages to the total sales at Abergeldie over the Four Year Period of £443,608. He calculated therefore that £288,212 of those sales were standard rated for which output tax of £48,035 ought to have been accounted.

42. Mr Stokes estimated therefore that the Appellant ought to have accounted for output tax on sales from both cafes amounting to £73,006 (£24,970 + £48,035). In fact the Appellant had declared output tax of £38,138 meaning that the VAT underdeclared was calculated as £34,868 over the Four Year Period.

43. By the time Mr Stokes came to make the Assessment in January 2016 some of the VAT periods had fallen out of time for assessment purposes. The Assessment was reduced accordingly so that it covers periods 04/12 to 10/14 and amounts to £24,323.

44. The purchase invoices analysed to support this calculation were returned to Mr Emami. Indeed they had been returned by the time of Mr Stokes' involvement so he had not seen them. The Appellant did not adduce them in evidence before me. Mr Adl did not question the accuracy of Mr Stokes' calculations but he did criticise the purchases-based approach as a matter of principle. I consider those criticisms below.

Reasons

45. The burden in this appeal is on the Appellant to satisfy the tribunal that the amount of the Assessment is excessive and/or that the Assessment was not made to best judgment.

46. It can be seen that there are two elements to the way in which Mr Stokes sought to calculate the correct amount of output. Firstly the output tax on sales at Nibbles, and secondly the output tax on sales at Abergeldie. I shall deal with the Appellant's challenges to those two elements separately.

47. In relation to Nibbles, the Assessment was based on the till records. Output tax was due on all sales recorded in the eat in till and Mr Stokes estimated it was due on 20% of takings recorded in the takeaway till.

48. Mr Adl challenged as arbitrary the estimate that 20% of takeaway sales for Nibbles were standard rated. In evidence Mr Stokes was not able to recall the basis on which he had reduced Ms Devine's figure of 30% but it seems to me that it must reflect treating 30% of takeaway sales as cold salads rather than the 20% figure estimated by Ms Devine. To some extent that is guesswork, however the Appellant has not put forward any alternative estimate. In the absence of any direct evidence from the Appellant or any alternative reasoned estimate I consider that Mr Stokes was entitled to take a broad brush approach. The result of Mr Stokes' approach is that of the takeaway sales at Nibbles, 50% are sandwiches and 30% are cold salads both of which are zero rated. In my view it is not unreasonable to estimate that takeaway sales of cold salads will be less than sales of sandwiches. Mr Stokes was doing the best he could with the evidence before him in circumstances where no better evidence was produced by those with day to day responsibility for running Nibbles. That leaves 20% standard rated hot takeaway food and drinks.

49. I am satisfied that Mr Stokes arrived at what was a best estimate for standard rated takeaway sales at Nibbles. His approach was consistent with the approach endorsed by the Upper Tribunal in *Queenspice Limited v HM Revenue & Customs [2010] UKUT 111 (TCC)* where at [14] Lord Pentland stated:

“ ... the power given to the Respondents under statute is to make an estimate or an assessment to the best of their judgment on such information as is available to them. This necessarily allows the Respondents a substantial margin of error. They are entitled to make what one might describe as an educated guess. They are not required to carry out exhaustive investigations.”

50. In relation to Abergeldie the position was more complicated because there was only one till which recorded all sales. The starting point is a finding of fact that the

Appellant had failed to account for output tax on cold food consumed on the premises and to some extent on hot food and cold drinks taken away. It was therefore necessary for Mr Stokes to quantify the extent of the underdeclaration. In the absence of any records from which he could identify the extent of such underdeclarations he used the same approach as Ms Devine. Neither the Appellant nor Mr Adl suggested any alternative approach. Mr Stokes said and I accept that if an alternative calculation had been put forward he would have considered it.

51. Mr Adl challenges the estimate derived from the purchase invoices that 64.97% of sales at Abergeldie were standard rated. As I understand Mr Adl's challenge based on his correspondence and submissions at the hearing he contends as follows:

(1) Most of the items purchased at Abergeldie were used as main ingredients for cold salads and sandwiches. In so far as the resulting supplies were for takeaway they would therefore be zero rated. Very few ingredients for hot food were purchased.

(2) Purchases made in relation to Abergeldie could in fact be used at Nibbles. It was therefore not possible to draw any inference as to the proportion of standard rated and zero rated sales at Abergeldie.

(3) There was no direct relationship between the cost of ingredients and the sales value of supplies. In particular hot and cold food would have different mark ups.

(4) No consideration was given to special offers or free drinks given with every meal at Abergeldie.

(5) The business operated cafes rather than hot food takeaway shops. There were limitations on the preparation and sale of hot takeaway food. Supplies consisted mainly of sandwiches and cold buffets.

(6) Mr Stokes made various assumptions about Abergeldie knowing that Ms Devine had not visited that business.

52. The difficulty with Mr Adl's challenge to the basis of the Assessment in relation to Abergeldie is that it is not supported by evidence as to the day to day operation of the business. The Appellant was given an opportunity in the case management directions for the appeal to serve witness statements but did not do so. I appreciate that Mr Adl has given evidence but I am not satisfied that he is able to give reliable evidence as to the day to day operation of the business, for example in relation to how particular purchases would have been used in the business, whether purchases delivered to Abergeldie were consumed at Nibbles, what special offers there might have been or what limitations there might have been on the supply of hot food. Mr Adl as the Appellant's accountant is not in a position to give direct evidence of these matters. He does not work in the business.

53. The purchase invoices have not been adduced in evidence before me. Without seeing the invoices I do not accept that they were incorrectly allocated. Mr Stokes has assumed that purchases allocated to hot food and drinks result in standard rated supplies, to cold food cold food result in zero rated supplies and to hot and cold food

result in a mixture of the two. There is no distinction between eat in and takeaway. In fact very little was allocated exclusively to cold food, and what was allocated mainly comprised bread. The purchases allocated to hot and cold food were then split between hot food and cold food based on 30% being standard rated. This took into account to some extent what Mr Adl had said about the low proportion of hot food being served.

54. Mr Adl sought to criticise Mr Stokes for not asking to see the invoices supporting Ms Devine's analysis. I do not accept that Mr Adl's criticism is fair. Mr Stokes adopted the analysis carried out by Ms Devine, making certain adjustments. There was no challenge to Ms Devine's analysis by reference to the underlying invoices. The challenge was to the principle of her calculations. If there had been a challenge by reference to specific invoices then no doubt Mr Stokes would have asked to see the invoices. Further, the Appellant in this appeal has not relied on the specific invoices to challenge Mr Stokes' analysis. I do not accept therefore that it is open to the Appellant, in the absence of invoices, to suggest that the process of allocation is wrong.

55. Mr Adl's real criticism was that as a matter of principle the nature of the purchases was not a reliable indicator as to the nature of the supply. For example, purchases of bread or other ingredients may be used in a toasted sandwich giving rise to a standard rated supply, or in a cold sandwich for consumption off the premises giving rise to a zero rated supply. Even putting that to one side, using the price of purchases to give an indication as to the value of sales ignores any differences in mark ups.

56. It seems to me that this is one of those cases where it is easy to criticise the approach taken as being less than scientific, but it is more difficult to identify an alternative approach. I accept that there is a broad correlation between the nature of certain purchases and the nature of the resulting sale. For example, potatoes are more likely to be used for sales of hot food rather than sales of cold food. When analysing the cost of purchases it is not possible to say how good the correlation is because different items on the menu will have different mark ups. That is a criticism that the Appellant can justifiably make, but he has not suggested any better method. In the absence of any better alternative suggested by the Appellant I am satisfied that Mr Stokes' approach gives the best estimate of the proportion of standard rated supplies made at Abergeldie. It is within the substantial margin of error referred to by Lord Pentland.

57. During the course of the hearing Mr Adl produced a "trial balance" for the Appellant for the year ended 31 January 2014. The trial balance included sales figures for Nibbles and Abergeldie, in each case split between standard rated and zero rated supplies as follows:

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Nibbles:	£
Standard rated sales	22,532
Zero rated sales	49,154
Total:	71,686
Abergeldie:	
Standard rated sales	22,950
Zero rated sales	81,241
Total:	104,191

58. Mr Adl told me that the Appellant gave him readings from the tills and the above information was taken from those readings. He said that the split between standard rated and zero rated sales from Abergeldie was taken from the till readings. I am unable to accept that evidence. Firstly it was produced without warning and without explanation as to why it had not been put to HMRC before now. Mr Adl said that it had been given to Ms Devine but it was not referred to in any of the correspondence. It remained unclear why, if evidence such as this was available to provide an exact split for the Abergeldie Café, it had not been referred to in the correspondence. Secondly, the underlying till readings were not available. Thirdly, the split for Nibbles did not match the figures obtained by Ms Devine from the two tills at that café identified above, although the total was similar. Fourthly, it does not take into account the errors in declarations which I have found above.

59. Mr Adl made various other criticisms as to the way in which the investigation was carried out. In particular he criticised delays in correspondence and failures to provide HMRC's analysis on a timely basis. For the reasons given above my focus is on the computations of Mr Stokes which support the Assessment.

60. In the light of all the evidence and my findings of fact I am satisfied that the Assessment is the best estimate that can be made of the Appellant's underdeclaration of output tax. I am not satisfied that Mr Adl's criticisms support any different calculation of the underdeclared VAT, or that they call into question whether the Assessment was made to best judgment as that term is understood from the authorities cited above.

25 *Conclusion*

61. For the reasons given above I must dismiss the appeal.

62. 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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 30 MAY 2017

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