



Neutral Citation: [2024] UKFTT 00159 (TC)

Case Number: TC09085

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

In public by remote video hearing

Appeal reference: TC/2022/11726

INCOME TAX – Eat Out to Help Out Scheme – claim by appellant for support payments for meals sold in August 2020 – HMRC assessment on basis that appellant not entitled to all of the payment – evidence of cash paid for the meals - assessment subjectively and objectively reasonable? – subjectively yes – objectively no – amount of claim established to our satisfaction – appeal allowed

Heard on: 7 September 2023 and 1-2 February 2024

Judgment date: 26 February 2024

Before

**TRIBUNAL JUDGE NIGEL POPPLEWELL
MR MOHAMMED FAROOQ**

Between

CAFÉ JINNAH LLP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Taher Nawaz of T Nawaz & Co Ltd

For the Respondents: Mr Liam Ellis litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. This appeal concerns the Eat Out to Help Out Scheme (“**EOHOS**” or “**the scheme**”) which was intended to provide discounts to customers who ate in qualifying restaurants to incentivise consumers to use those restaurants and restore consumer confidence both of which had been adversely affected by COVID. It operated during the month of August 2020 and only for 13 days in that month, namely Monday Tuesday Wednesday of each week (“**scheme days**”).

2. A restaurant operating the scheme was entitled to apply a discount to qualifying sales made at the restaurant equal to the lesser of £10 per diner or 50% of the value of the customers meal. It did not include alcohol, restaurant discounts, restaurant service charges.

3. The restaurant proprietor was able to claim the amount of discount by way of a support payment from HMRC by making a claim to that effect.

4. The appellant was registered for the scheme and operated it throughout August 2020. It made five claims totalling £103,351 for the five weekly periods in August 2020.

5. HMRC paid the appellant the amount of these claims but, following an investigation subsequently sought to clawback £74,366.30 by raising an assessment for that amount on 4 April 2022 (“**the assessment**”). This amount was subsequently reduced on review by £10,600, so the amount at stake in this appeal is £63,766.30.

6. HMRC assert that they have made a valid assessment, and that the appellant has overstated payments made for meals supplied under the scheme. In essence, they think that cash which the appellant claims was paid for those meals, was not so paid. The appellant asserts that the assessment is not a reasonable one, and in any event it had been paid the amounts which it claimed for the meals supplied under the scheme.

7. We make two observations at this stage. Firstly, we understand that this is the first appeal which has been brought in relation to the scheme.

8. Secondly, we find ourselves in the somewhat unusual position where the appellant is arguing that he has received more cash than HMRC have given him credit for, and HMRC is arguing that he did not receive that cash. Our experience is that it is usually the other way round. In most of the cases which come before the tribunal, a taxpayer in the restaurant trade is usually suspected by HMRC of having received takings of an amount greater than those which it has declared for tax purposes, And HMRC assert that those takings have been received in cash. They therefore assess, and the taxpayer responds by denying those cash receipts. This appeal, therefore, is a “reverse suppression” case.

9. It is also worth saying at this stage that the appellant has paid VAT and the LLP members have paid income tax on the full amounts (including cash receipts) which it says it received for the supply of the meals under the scheme.

10. The appellant was represented by Mr Taher Nawaz who also gave evidence on behalf of the appellant. HMRC were represented by Mr Liam Ellis. We were very much assisted by their clear submissions both written and oral for which we are most grateful. However, we have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching our conclusions.

11. For the reasons given later in this decision, we have concluded that the assessment was not objectively reasonable. Furthermore, the appellant has satisfied us that the payments made for meals supplied under the scheme included the full amount claimed of £103,351. Its claim for support payments under the scheme was valid and accurate. We have therefore allowed the appeal.

THE LAW

12. As things turned out, there was little dispute between the parties as to the relevant law which we have set out in appendix to this decision. Words and phrases defined in that appendix bear the same meaning in the body of this decision.

THE EVIDENCE AND FINDINGS OF FACT

13. We were provided, for the original hearing, with a bundle of documents which included the legislation and authorities. Between that hearing and the reconvened hearing we were provided with additional documents. Oral evidence on behalf of the appellant was given by Mr Saleem Akhtar, designated partner of the appellant (“**Mr Akhtar**”) and Mr Nawaz. Oral evidence on behalf of HMRC was given by the assessing officer, Officer Rory Maddison (“**Officer Maddison**”). From this evidence we find the following as facts:

Background

(1) Mr Akhtar has been in business since 1981. He and his extended family have provided catering and food industry services, including the operation of a cash-and-carry and restaurant, during that time The appellant was formed in 2016. It operates a restaurant in Bradford.

(2) The restaurant business was very badly affected by Covid, and the scheme provided a lifeline. Existing customers took advantage of the discount and ate in the restaurant on scheme days, rather than at weekends when they might otherwise have eaten there. Those customers paid in both cash and by credit card.

(3) The scheme also attracted new customers many of whom were known to the appellant as they came from the local area in which Mr Akhtar and his family is embedded. Many of those customers did not have bank accounts or credit cards and paid for their meals in cash.

(4) The scheme operated as the government had intended and attracted a very large number of customers to the restaurant. According to Mr Akhtar, people were queueing for three or four hours a day. To cater for this increased trade, he roped in a number of family members, and the takings of the restaurant were substantial. Much of these takings were in cash. It was difficult at that time to physically attend a bank to deposit that cash, so it was kept in a substantial safe on the premises. There were dangers of queuing outside a bank when carrying large amounts of cash.

(5) Although there were restrictions on the numbers of people who could eat together due to the social distancing rules, it was Mr Akhtar’s evidence that families of up to 30 people were allowed to eat at the same table.

(6) Whilst the floor plan of the tables show that few tables could sit more than eight people, it is clear from the photographs and Mr Akhtar’s oral evidence that it was possible to move the tables around to cater for larger groups. And indeed, this is what happened on many occasions. The capacity of the restaurant is 165 individuals.

(7) The appellant employed 12 individuals at the restaurant during August 2020 of whom three were furloughed. Its opening hours were 11:30 am to 11:30 pm every day except Fridays when the opening hours were 4 pm to 11 pm. Customers did not need to book a table.

Paperwork

(8) The business did not use a till. Orders are taken on pads of paper which are pre-ordered in bulk from a supplier. The waiter taking an order writes the order, but not the price, on the pad. It also records the table and number of diners. Each written order comprises four identical copies. The top copy is taken to the counter where a member of staff adds the price of each of the dishes on that top copy. The remaining three are taken to the kitchen for use by the chefs.

(9) When a customer pays, he may or may not take with him the top copy of the bill. If he does take it, the amount of the bill is entered onto an A4 sheet of paper (spreadsheet) which

identifies the number of people, the table at which they ate, and the amount of the overall bill. At the end of each evening the amount on the spreadsheet together with the bills which are being retained are added up and bundled together. They are tied up with elastic bands and the date and the amount taken is written on a slip of paper and folded in with that bundle.

(10) These original bills are usually kept for a week and then binned although during the Covid period, they were kept for the entire month of August in order to justify the claims. The information is given to a member of Mr Nawaz' staff as his firm is responsible for ensuring that the takings are properly recorded for tax and accounting purposes.

The claims under the scheme

(11) Details of the claims which totalled £103,351 made by the appellant under the scheme are set out below:

| Period | amount claimed |
|-------------------------|-----------------------|
| 03/08/2020 - 05/08/2020 | £18,842 |
| 10/08/2020 - 12/08/2020 | £23,844 |
| 17/08/2020 - 19/08/2020 | £24,625 |
| 24/08/2020 - 26/08/2020 | £26,579 |
| 31/08/2020 - 31/08/2020 | £9,461 |

The compliance check and the assessment

(12) Officer Maddison opened a compliance check into the scheme payments on 21 April 2021. In a letter of that date he asked for a great deal of information and documentation regarding the operation of the restaurant including a description of the appellant's business, the processes used to take an order, a full breakdown showing daily sales together with supporting records, a floor plan of the table layout, bank statements for accounts into which business income had been deposited and any corrections to the claim.

(13) In response to this, under cover of an email dated 4 June 2021, the appellant's agent responded to these queries and supplied over 200 pages of documentation. This included sample bills, records of daily takings identifying the table numbers with the number of customers and each bill for that sitting, a spreadsheet recording the bankings, a table plan and a summary of daily income for August 2020. It also recognised that there had been an over claim of £671 (approximately).

(14) Officer Maddison responded to this information by way of a letter dated 11 June 2021 seeking further information. In this letter he notes that "you have provided example bills. None of these include the time or date of the order is taken. How is it possible to reconcile these individual bills to dates to clarify whether the claims are accurate"?

(15) In response to that particular query, the agent, on 24 June 2021, pointed out that the "Bills not timed but no requirements to do so either. Bills for each day have been provided and discounts applied to daily sales not based on the morning or afternoon".

(16) In an email dated 6 August 2021, the agent told Officer Maddison that bank opening hours had been severely shortened and there were always large queues outside banks. As a result it was too risky to spend hours outside before being served and therefore cash was used to pay wages and suppliers. Remaining cash was kept in a safe on the premises.

(17) There was further correspondence in August 2021 in which Officer Maddison asked for information which, in the opinion of the appellant's agent (rightly in our view) had previously been supplied to the officer.

(18) On 19 November 2021 Officer Maddison explained that in his view no evidence had been provided which substantiated the number of diner/covers who used the scheme, the total value of all eat in food and non-alcoholic drinks sold where scheme discounts were given,

and how the total value of scheme discounts claimed was calculated. He also questioned why the business did not use a till system.

(19) In an email of 23 December 2021, the agent confirmed that in and with the agent's email of 4 June 2021 the officer had been supplied with meal bills showing details of diners/covers and value of eat in food, as well as the details of the calculations and discount claims for the period. It also went on to explain why no till system was in use. It observes there was no legal requirement to use a till system.

(20) In a letter dated 21 February 2022 Officer Maddison provided a summary of his view of the matter at that time. It told the appellant that it was issued prior to an assessment being issued and required the appellant's immediate attention. It explained that following an examination of all the business records, the appellant had not provided sufficient information to support the claim. The deficiencies were identified as being the same as set out in his letter of 19 November 2021.

(21) In the officer's view, the claim for support payments of £103,351 must have equated to takings, either by card or cash, to at least that amount. In his view the bank statements supplied by the agent showed no cash deposits during the relevant period. He was however prepared to accept that card payments received by the business on scheme days were "scheme allowable transactions". In his assessment, total card payments received on scheme days was £28,984.71, and so support payments equal to the value of those card payments would be allowed.

(22) As far as cash takings are concerned, he accepted that some customers would inevitably have paid cash for goods but no evidence had been provided to support any cash takings. No cash deposits had been identified as being paid into the bank account and none of the various spreadsheets provided by the agent substantiated the stated takings nor did the meal bills.

(23) The officer considered the claim that cash was used to pay suppliers and wages. He noted that most purchases were made from three suppliers and his review of the paperwork supplied by the agent confirmed that those suppliers were paid by cheque.

(24) Even if cash had been used to pay wages, this would have been a fraction of the amount received.

(25) In short, his view was that: "ultimately no evidence has been provided to verify how the stated cash takings were utilised by the business. This is despite the business being obligated to maintain such records".

(26) The letter ended by explaining that the officer intended to raise an assessment for £74,366.30.

(27) In an email dated 16 March 2022, the agent pointed out that amounts credited through use of credit cards to the appellant's bank account during the month was £72,057.12, the majority of which related to scheme days, and this is a much higher figure than that which has been credited by the officer. It also identified two specific purchase invoices from suppliers, one for £8,100 from Creation Design Curtains & Blinds, and one for £2,500 from Bradford Asian radio, which were paid in cash. It went on to say that many other purchases were made in cash. It observed that the cash in hand balance as at 31 August 2020 was £42,057.20 and also cash drawings had been made by the proprietors.

(28) An assessment for £74,366.30 was raised on 4 April 2022.

The appeal and the review

(29) By email dated 3 April 2022 the appellant appealed against the assessment and requested an independent review. The review conclusion letter is dated 1 June 2022. It is a conventional document which runs through the background, and information which the reviewing officer has considered.

(30) The reviewing officer endorsed Officer Maddison's view that "no evidence has been supplied to corroborate the amount of cash received accurately account cash was used and how much remains, despite requests to do so".

(31) However, the officer went on to say that "I am however prepared to allow the two payments noted by your agent in their email of 16 March 2022 of £8,100 and £2,500 despite not seeing the invoices for such, as it is not unreasonable that there would have been some cash payments made during this period. I am unable to allow for further cash payments due to the absence of any records".

(32) The reviewing officer then went on to reduce the assessments by £10,600, to £63,766.29.

Information supplied to Officer Maddison

(33) Officer Maddison was supplied with a considerable amount of information and documentation by the appellant's agent. This included the following.

(34) Approximately 25 sample bills for the relevant period. As mentioned above, these are handwritten and are the top copies on which details of the dishes and their respective prices are included. They include the number of diners and the table number. They are not dated, but each of them reflects the scheme discount and the total amount which the customer is required to pay.

(35) The bank statement recording the deposits and withdrawals from the appellant's business bank account from 31 July 2020 through to 15 September 2020 as well as a spreadsheet which effectively reflects the entries in that bank statement.

(36) A seating plan setting out the table layout at the restaurant as well as photographs showing the internal configuration of the tables and chairs in the restaurant.

(37) A spreadsheet identifying receipts for the period 1 August 2020 to 31 August 2020. These record the daily receipts on a gross and net basis, and show that in that period, gross receipts of £261,587 were received of which £12,095.82 was VAT. Net sales are identified as being £249,491.80. The column headed "primary account" states against each daily entry "Bank: Petty Cash".

(38) A daily takings record ("**daily takings record**") for each scheme day, which identifies the table number, customers, total bill, the actual discount applied, the lower of 50% or the actual discount applied, and the correct discount. These are printed documents, but at the top of which there are handwritten notes identifying the date to which those entries apply. In other words, it is apparent from those records, the dates on which the takings were received and the discount given.

(39) A list of purchase invoices for August 2020 which shows that gross purchases amounted to £75,138.78, of which £1,864.76 is VAT leaving a net cost of sales of £73,274.02. There are approximately 120 invoices identified in the table, but all of those relate to just three suppliers, namely, Hilton Ices Ltd, United Foods Cash and Carry, and Tropical Ices.

Balance sheet

(40) Appended to Mr Nawaz' witness statement was a copy of the appellant's balance sheet as of 30 August 2020 as filed with Companies House. It shows that as of 30 August 2020, the cash at bank and in hand was £81,463. The cash at bank and in hand as of 30 August 2019 was £38,411.

Partnership tax returns

(41) Also appended to that statement was an extract from the appellant's tax return for the year ended 5 April 2021 which, at box 3.104, records cash in hand as £42,058.

(42) A comparison of the tax returns for the year ended 5 April 2020 with that ended 5 April 2021, shows that costs of sales had increased by approximately £45,000.

(43) Officer Maddison's evidence was that the partnership return which included August 2020 was filed on 31 January 2022.

Cash payments

(44) At the reconvened hearing, Mr Nawaz tendered in evidence a document entitled "Cash Payments from 1 Aug 2020 to 31 Aug 2020". This comprised a table of cash purchases by the appellant during that month, which amount in total to £37,851.17. To compile this, Mr Akhtar and Mr Nawaz segregated the bank payments from total payments leaving details of cash payments. Mr Nawaz recognised that this was not a normal exercise "as it takes a long time to go through payment by payment identifying bank payments but we have done it even though it is not legally necessary".

(45) It includes the £8,100 and £2,500 mentioned at [13(27)] above. There are a number of cash drawings of £700. There are some cash purchases of £475 which Mr Akhtar explained were payments to farmers and milkmen who were paid in cash. There are then a number of other suppliers identified by name including a payment of £2,934.92 to United Foods Cash and Carry (one of the suppliers which Officer Maddison had identified as having been paid exclusively by cheque), and the payment of wages on 31 August 2020 of £8,288.36.

(46) This table was not, obviously, made available to Officer Maddison prior to the assessment as it had not been created at the time.

Officer Maddison's evidence

(47) We found Officer Maddison to be a truthful and reliable witness.

(48) In addition to the position which we he adopted in the correspondence set out above, he made the following points in his evidence in chief.

(49) He had asked for a full suite of credit card statements from the appellant but that had not been forthcoming. He had to make a best judgment calculation therefore using transactions which were evidenced by the bank statements which had been supplied.

(50) Those statements evidenced £72,057.12 from card takings. Given that the claim was for £103,351, actual takings (either by cash or card) over the 13 days of the scheme must have been at least equal to that amount. His review of the bank statements confirmed that no cash was deposited into the account during that month.

(51) His concern therefore was that the claim was based on a substantial amount of unsubstantiated cash takings.

(52) He had been told that cash takings had not been banked and were used to pay wages and suppliers and any remaining cash was kept in a safe on the premises.

(53) His best judgment calculation using the transactions evidenced by the bank statements was that the card payments evidenced takings on the scheme days as £28,984.71.

(54) He did not accept that the cash payments of £8,100 and £2,500 had been made as no evidence had been provided. Nor was there any evidence of other cash purchases or payment of wages in cash or of cash drawings.

(55) In cross examination and re-examination, Officer Maddison provided the following additional evidence.

(56) He did not have training in accountancy but had a working awareness of the significance of company accounts.

(57) He had made a number of other assessments under the scheme.

(58) He was aware of the existence and significance of an RTI return.

(59) The sample bills with which he had been provided did not include the date of the orders and so could have been created at any time. Nor did they show the time of the orders. They were inadequate as primary evidence of the takings on the scheme days. The daily takings records provided by the appellant did not include the claims. These were summaries. He needed to see the underlying documents.

(60) Although the sample bills identify the discount for each table, there was nothing to substantiate that the discounts reflected in those bills had actually been applied for the benefit of the customers.

(61) No primary evidence had been supplied to substantiate the total sales set out in the daily takings records.

(62) Although there was a handwritten note to the top of those documents ostensibly identifying the dates for which the information was relevant, he thought that they could have been created at any time. In his view they were insufficient to substantiate the claims.

(63) The assessment was based on the financial information which the business could substantiate by way of primary records. This was limited to the credit card income of £28,984.71 which is the amount which, in his best judgment, reflected takings on the scheme days.

Officer Maddison's 2023 verification

(64) In February 2023, as part of HMRC's preparation for this appeal, Officer Maddison conducted an analysis of the appellant's income tax and VAT returns. In his view, pre-Covid, the appellant declared income of approximately £1,400 per day whilst over the 13 scheme days, the equivalent was nearly £16,000 per day.

(65) He also undertook a mark-up exercise calculating the average percentage markup rate on purchases during the period 1 September 2019 to 31 August 2020, and applying that markup to the purchases made by the appellant during August 2020. This gave an estimate of gross profit which when added to the purchases gave an estimate for the sales for August 2020 of approximately £167,431. Allowing for an uptick due to the scheme, he calculated the total scheme sales as approximately £172,698 which would allow a scheme claim for approximately £86,349. Based on this, the appellant had only overclaimed approximately £17,000 rather than the amount claimed under the assessment and the assessment as revised by the reviewing officer.

(66) The VAT return analysis confirmed that the quarterly VAT returns filed by the appellant supported the income figure set out in the appellant's partnership tax return.

DISCUSSION

Who has to prove what?

14. HMRC bears the burden of proving, on the balance of probabilities, that the assessment is a valid in time assessment which was properly served and received by the appellant, and it properly assesses the appellant to income tax as the appellant did not satisfy the conditions of the scheme.

15. If HMRC can establish this, then the burden shifts to the appellant to show firstly that, again on the balance of probabilities, it has been overcharged by the assessment and secondly the more likely amount which should have been assessed.

16. In this case HMRC say that they have issued a valid assessment and the appellant has not established that it has been overcharged.

17. The appellant says that the assessment is not valid, and even if it is, it has shown, on the balance of probabilities, that its claim for support payments was for the correct amounts.

The legal test in paragraph 9

18. HMRC's right and power to issue an assessment where it thinks that a taxpayer has received a coronavirus support payment to which it was not entitled, is under paragraph 9(1) schedule 16 FA 2020. This reads:

'(1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer's opinion to be charged under paragraph 8'.

19. There was discussion at the hearing as to the nature of the officer's opinion. Officer Maddison in his evidence thought that he had made his assessment to best judgment. We are not sure whether he meant this in the context of an assessment for VAT or whether it was just shorthand for making a reasonable assessment.

20. But following that discussion, it is our view, as well as that of the parties, that for an assessment to be valid, the officer must demonstrate that he had both a subjective and an objective opinion that the appellant was not entitled to the support payment in the amount claimed.

21. It is our view that the assessing powers given to an officer are akin to those in section 29 TMA. This view is supported by the fact that paragraph 9 goes on to import, into the appeal process, parts 4-6 TMA which are consistent with a discovery assessment under section 29 TMA.

22. The correct approach is therefore set out in the case of *Jerome Anderson v HMRC* [2018] UKUT 159 ("*Anderson*").

"The subjective test"

25. It is clear that before an officer makes a discovery assessment, he must have formed a certain state of mind. The question raised on this appeal is: what must the officer think or believe? The three judges in the Divisional Court in *R v Kensington Income Tax Commissioners* all agreed that it was not necessary for the officer to reach a conclusion which was justified by sufficient legal evidence. However, when describing what was required for this purpose, the three judges expressed themselves in different terms which do not appear to us to describe the same test.

26. Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all of the relevant facts. Further, the officer may foresee that a discovery assessment might give rise to questions of law some of which might not be straightforward.

27. In *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership*, when considering the meaning of "be aware of" for the purposes of s 29(5), it was said that "awareness" was a matter of perception not conclusion and that it was possible to say that an officer was "aware of" something even when he could not at that stage resolve points of law and even though he was not then aware of all of the facts which might turn out to be relevant. Although the word "discover" and the phrase "be aware of" cannot be treated as synonyms, we consider that if it is possible to be aware of something when one does not know all of the relevant facts and one cannot foretell how relevant points of law will be resolved, it cannot be said to be premature for an officer to "discover" that same something even when he knows he is not in possession of all of the relevant facts and does not know how relevant points of law will be resolved.

28. In *Sanderson*, Patten LJ described the power under section 29(1) in this way:

"The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made."

We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case

concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

“The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.”

That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.

The objective test

29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act “honestly and reasonably”.

30. The officer’s decision to make a discovery assessment is an administrative decision.

We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be “reasonable”, this should be expressed as a requirement that the officer’s belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer’s belief was not reasonable”.

23. And at [43] it applied this objective test in the following way:

“The FTT asked itself whether Ms Lampard’s belief that there had been an insufficiency of tax was a reasonable belief. It appears that the FTT applied a wholly objective test as to whether her belief was reasonable. We were taken to the evidence before the FTT and, at the very least, we conclude that it was open to the FTT to make that finding on that evidence. However, it seems to us that the FTT applied a stricter test than was necessary. If we apply what we consider to be the correct test, namely, whether Ms Lampard’s belief was one which a reasonable person could form on the information available to her, then we would conclude that a reasonable person, acting on that information, could form the belief which she had formed. Indeed, it is obvious that the FTT would also have held that this lower test was satisfied” (emphasis added).

24. This approach was endorsed by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 said at [72]

“the exercise of the s29 (1)) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on the available information at the time when the discovery assessment is made”. From this and other authorities the [UT in *Anderson*] derived a series of propositions... including that in s29(1) the concept of an actual officer discovering something involves an actual officer having a particular state of mind in relation to the relevant matter, which requires the application of a subjective test (explained further at paras 25-28). There is also an objective test, in that mere suspicion of an under-assessment of tax is not sufficient and the belief which the

officer forms regarding the under-assessment has to be one which a reasonable officer could form (paras 24 and 29-30)..."

25. So, for HMRC to establish that they have made a valid assessment, we need to find the following:

- (1) Officer Maddison believed that the information available to him pointed in the direction that the appellant had received a support payment to which it was not entitled; and
- (2) That belief is an objectively reasonable one i.e. one which a reasonable officer could form on the basis of the information available to him.

The parties' submissions

26. In summary, Mr Ellis submitted as follows:

- (1) The assessment correctly assesses the appellant firm by assessing Mr Akhtar as nominated partner.
- (2) The appeal centers on a straightforward dispute which is whether the appellant has provided sufficient evidence to prove that they applied the amount of scheme discounts claimed and have therefore substantiated the amounts received under the scheme.
- (3) HMRC would expect to have been provided with evidence of the total amounts claimed which should tally with the income shown on bank statements and on till Z readings.
- (4) This requires the appellant to show the underlying records on which the claim was made and on which the discount was based. This requires bills for the meals which include the dates and times on which those meals were served.
- (5) The evidence which has been supplied to Officer Maddison including the bank statements, sample undated handwritten bills, photographs, diagrams of the restaurant layout, daily takings records, purchase invoices and a summary of the income received in August 2020, as well as the evidence in the partnership tax for turns, the VAT returns, and that appellant's balance sheet, is insufficient to establish that the amount claimed reflects income which was actually received on the 13 scheme days.
- (6) The appellant may have kept the records required by the regulations, but the issue is whether it had proved, to the satisfaction of Officer Maddison that the income claimed was actually received on those days.
- (7) The daily takings records, which have a handwritten note on the top identifying the relevant date to which those records relate, have been manually created. No underlying records have been provided to verify the figures in those records.
- (8) The bank statement shows £72,057.12 in credit card receipts between 3 August 2020 and 4 September 2020 and no cash banked at all in that month. As the appellant has claimed £103,351 of support payments, HMRC would expect to see evidence of at least that amount of cash and credit card receipts being banked in that period.
- (9) The bank statements show that all of the purchase invoices supplied by the appellants were paid by cheque and not by cash.
- (10) The increase of cash in hand and the bank between the year ended 30 August 2019 and the year ended 30 August 2020 (an increase from £43,052 to £81,463) does not demonstrate that there was an increase in the amount of cash taken in August 2020. And certainly doesn't demonstrate that additional cash was taken on the 13 scheme days. It simply reflects the cash received during the year. It also reflects £67,311 of support payments made to the appellant by HMRC in August 2020.
- (11) The cash payment schedule provided by Mr Nawaz prior to the reconvened hearing was not available to Officer Maddison.
- (12) The claim for support payments of £103,351 means that, as a minimum, £206,702 must have been taken on the 13 scheme days which amounts to approximately £15,900 per day.

This is a 987% increase in sales compared to the average daily sales in the year to 31 August 2019.

(13) Mr Nawaz has submitted that because Mr Maddison allowed £28,984.71 of discount, this reflects about £56,000 of sales. Yet the purchases in August 2020 amount to approximately £75,000. So those sales cannot sustain the purchases. However, these additional sales reflect only sales on the 13 scheme days, and not the remaining 18 days on which sales were made and which could therefore sustain the purchases. It also did not include takeaway sales which would generate takings to support the purchases.

(14) Officer Maddison allowed £29,984 of credit card sales reflecting an additional £58,000 or so for meals sold.

(15) Neither Officer Maddison nor HMRC have made any allegation of fraud or dishonesty or of falsifying documents. The officer has merely stated that anyone could have written up the daily takings records and so they were not reliable evidence of cash takings during those 13 scheme days. Furthermore, if HMRC thought there had been deliberate falsification, they would have assessed the appellant to a penalty for deliberate behaviour. They have not done so.

(16) Officer Maddison had a genuinely held and subjectively reasonable opinion that the claim for support payments by the appellant overstated the amount actually received for meals sold on the scheme days. He had no primary evidence of any additional cash takings on those days. It was also an objectively reasonably held opinion given the lack of primary evidence supplied to him.

(17) The method which he described of identifying the credit card payments and allocating them to scheme days was a reasonable one. It was reasonable for him to allow those credit card payments as additional takings for the meals sold on scheme days. He came to an objectively reasonable decision based on the evidence which was made available to him.

(18) The cash expenses of £8,100 and £2,500, which had been allowed by the review officer, have been allowed out of fairness even though there is no evidence that these were paid in cash. It is reasonable to expect some cash payments to have been received for meals sold on scheme days.

(19) The evidence provided to us is insufficient to displace the assessment as adjusted by the review officer.

27. In summary, Mr Nawaz submitted as follows:

(1) The records required to support a claim are set out in the EOHOS guidance. These require a trader to keep and supply to HMRC information on the number of diners, the total amount of discount given, and the value of the meals sold. These are all apparent from the sample bills and daily takings records supplied to Officer Maddison by the appellant.

(2) Since these are the records which HMRC say must be kept, they are sufficient to demonstrate to the reasonable officer that the claim was justified.

(3) As HMRC accept in their skeleton argument, it has been possible to reconcile some of the bills provided against the daily takings records but it has not been possible to verify the total amount claimed as only a sample of bills was provided.

(4) Since it was possible for HMRC to reconcile the sample meal bills against the daily takings records, it would have been clear what days those bills related to. And they all related to scheme days. This was sufficient evidence to enable Officer Maddison to approve the claim.

(5) The appellant kept other records in a format which suited it. These were made available to Officer Maddison to enable him to verify and approve the claim.

(6) Officer Maddison consistently asked for records and information which had previously been supplied to him.

- (7) There is clear evidence of additional takings received by the appellant in August 2020, on the 13 scheme days as well as during the rest of the month. Mr Akhtar's oral evidence was that the scheme attracted new customers without bank accounts who paid in cash; existing customers attended the restaurant on scheme days rather than, as traditionally, at weekends; cash was kept in a safe; it was difficult and dangerous to attend a bank to deposit cash.
- (8) His evidence, too, was that the scheme was a lifeline and he therefore roped in additional family members to cater for the increased demand. Because the social distancing restrictions allowed family groups of up to 30, people ate out on scheme days in large groups. The restaurant was able to accommodate this by rearranging its tables and chairs. This evidence was largely unchallenged.
- (9) Officer Maddison was, or should have been, aware of the RTI information on HMRC systems which showed that wages for August 2020 of £8,288.36 had been paid. There was no evidence of payment from the bank account, so it was glaringly obvious that it must have been paid out of cash in hand. And the source of this cash could only have been the meals sold.
- (10) It is not possible to split single bills into payments made by credit card and by cash. It was unreasonable for Officer Maddison to ask for such a split.
- (11) Cash in hand increased by approximately £38,000 during August. This is demonstrated by the difference between the balance sheet total as of 30 August 2020 and 30 August 2019. This increase is borne out by the partnership tax return. Both of these documents were, or should have been apparent, to Officer Maddison.
- (12) The evidence of cash payments compiled by Mr Nawaz and Mr Akhtar demonstrates the cash payments of £37,851 or so, were made during August 2020. These payments, together with the increase in cash of approximately £38,000, means that additional cash of about £76,000 was received in August 2020. And this was either known about or should have been known to Officer Maddison.
- (13) If Officer Maddison is right, then the sales on the scheme days amount to only approximately £56,000. Yet the bank statements show purchases during August of approximately £75,000. Since the sales figures show that approximately 80% of the sales by the restaurant took place on scheme days, then 80% of the purchases should be attributed to the £56,000 of income. This effectively means that the restaurant was hardly breaking even. This is an unlikely circumstance and demonstrates that the sales were likely to have been far greater on those days based on the purchase information.
- (14) It is inherently unlikely that the appellant would boost sales if (as it did) it had to account for VAT at 20% and income tax at 40% on those additional sales. Why, Mr Nawaz asks, would a business seek to pay out 60 but only benefit from support payments of 50.
- (15) There is evidence of a massive increase in sales on scheme days. The reviewing officer accepted the cash was used to pay bills and that cash had been received as payment for meals on scheme days. Officer Maddison unreasonably failed to reach the same conclusion.
- (16) There is no legal requirement to keep a record of cash received. Mr Akhtar's evidence is that it was stored in a safe. There is no legal requirement for it to be banked either.
- (17) The balance sheet is a snapshot of the cash in hand and in the bank as at 30 August 2020. It shows that this had increased from £38,411 in 2019 to £81,463 as of 30 August 2020. The £67,311 of support payments were paid into the bank. This has no impact on the cash in hand position.
- (18) The ostensible increase in sales on scheme days to 10 times more than the average during the 12-month comparison. This can be explained by exceptional sales on scheme days for the reasons given by Mr Akhtar. The fact that only £54,880 or so was received on non-scheme days demonstrates the concentration of sales on scheme days.
- (19) Sales of £261,587 during the month were largely (80%) taken on scheme days (a minimum of £206,702). These were paid for by credit cards and cash.

(20) Officer Maddison's markup exercise in 2023 suggests that £172,698 was paid for the meals on scheme days. And on reflection he would therefore have allowed a claim for scheme payments of £86,349. In fact he allowed only £28,911.

(21) He had been told in correspondence that there had been cash sales and cash expenses (purchases, wages and drawings) yet he made no allowances for these and gave no credit for cash received. This was not the action of a reasonably objective officer.

Our view

28. We start by considering the evidence available to Officer Maddison at the time that he made the assessment. Virtually all of the information that was made available to us at the hearing had been made available to the officer by that time. The only material information was that provided by Mr Nawaz shortly before the reconvened hearing, namely the analysis of cash purchases made during August 2020.

29. Officer Maddison had been told in correspondence that a large number of new customers attended the restaurant on scheme days; that many of those had no bank accounts and paid in cash; the customers that otherwise ate there at weekends changed their eating habits and ate out on scheme days; cash had been kept on site in a large safe because of the difficulties and safety issues of taking that cash to the bank. He had been provided with a table showing total receipts in gross and net terms for August 2020 demonstrating gross receipts of £261,587. He had been told that the restaurant was open between 12 noon and 11 pm and that large groups of Asian families attended and complied with the social distancing. He knew or should have known from the appellant's RTI return for that month that the appellant had paid over £8,000 in wages at the end of August. He had been given sample bills (approximately 25) which he was told had been compiled on scheme days. He was provided with the daily takings records which identified, in a handwritten note at the top of each, the dates to which they related, the number of diners, the total bill, the tables those diners had occupied, the discount applied and the amount claimed and which was eligible to claim. He had the bank statement for the month and the spreadsheet of deposits and outgoings. He therefore knew of the value of the purchases paid from that bank account. He had access to the appellant's accounts filed at Companies House and to the appellant's tax return both of which showed cash balances, the former showing an increase in cash compared with the previous year. He knew or should have known as the relevant documents had been filed with HMRC, that the appellant had paid VAT and income tax on the takings which formed the basis for the claim.

30. From this information he was able to work out that no cash had been deposited in the bank during August, let alone on scheme days. And from this he concluded that the only takings for meals served on scheme days were paid for by credit card. He conducted an analysis of credit card payments, endeavouring to match payments with scheme days, and concluded that £29,984 of credit card receipts were attributable to scheme days.

31. The simple reason given by Officer Maddison as to why he was not prepared to accept that any cash payments for meals had been made on the scheme days was because the appellant could not produce timed and dated bills for the meals ordered. It was only able to produce bills for 25 days which were not signed and dated. In his view the absence of this "raw data" meant that notwithstanding the daily takings records, the appellant had not established that on the scheme days, additional sales had been made and paid for in cash. They were of no use for the purpose of verifying or substantiating the claimed payments. Those daily takings records had been produced "manually".

32. Furthermore, his review of the business records showed that no cash had been deposited during August 2020. It seemed to him that the claim included a large amount of cash for which there were no corroborating records. He also thought that no suppliers had been paid in cash as all three significant suppliers had been paid by cheque.

33. In essence, and whilst he accepted in his evidence that “some customers would have inevitably paid for goods for cash... No evidence to substantiate cash takings had been provided despite the business being obligated to maintain records of such income”.

34. For these reasons it was his view that the appellant had received support payments to which it was not entitled.

The subjective test

35. The first question for us is whether this was an honestly held subjectively reasonable opinion. The test is whether he believed that the information available to him pointed in the direction of the appellant having claimed support payments of an amount to which it was not entitled.

36. Officer Maddison has demonstrated to us that he did satisfy that test. He did not think that the sample invoices were sufficient to demonstrate that on the specific days for which the appellant claimed support payments, specific amounts of cash had been paid on which the appellant could base a claim for those payments over and above the amounts received by credit card. Without that primary evidence which could only be provided by copies of the bills which reflected the meals served on scheme days, those bills being clearly identified as having been issued on such days, and breaking down the payments for those bills into cash, on the one hand, and credit card receipts and the other, he did not consider that the appellant had provided adequate evidence to justify the claim.

37. Furthermore, he took the view that even though he had been told that the scheme generated a change in the pattern of eating behaviors amongst the community which was served by the restaurant, there was nothing empirical to back up the appellant’s submission that this was reflected in additional sales, the majority of which were paid for in cash.

38. He genuinely thought that the appellant had not supplied sufficient evidence to support the claim.

39. So HMRC have satisfied the subjective element which they need to establish for a valid assessment.

The objective test

40. Have they satisfied the objective element?

41. To achieve this they must show that Officer Maddison’s belief that the appellant had over claimed support payments was an objectively reasonable one, i.e. one which a reasonable officer could form on the basis of the information made available to him.

42. In our view they have not done so. We say this for a number of reasons.

43. His conclusion that the appellant was paid solely by way of credit card on scheme days and that not a single meal on those days was paid for in cash is a startling one which is also contrary to the sentiments set out in his letter of 21 February 2021 that some customers would inevitably have paid in cash.

44. This should have put him on notice that his initial analysis was flawed and caused him to review the information supplied by the appellant with an open mind.

45. It is clear that the officer thought that because he did not have signed and dated bills for the scheme days, there was no primary evidence of the takings during those days. Furthermore, because there was no cash banked during August 2020, the appellant could not justify the cash allegedly received on those days. But, as mentioned, he seems to have accepted that some cash had been paid for meals served on those days.

46. The officer said that he did not allege any form of impropriety on behalf of the appellant. It was submitted by Mr Ellis that no allegations of falsification or fabrication were being made against the appellant or any of its members, staff, or agents.

47. It seems to us that this assertion must be treated with some suspicion, given that the appellant provided the daily takings records for the scheme days which clearly identified the

dates to which they related. It told the officer the number of diners and the tables they had occupied, the total receipts, the discounts given, and the scheme claims made in respect of them. It was possible, and HMRC accept this, to marry up the 25 sample bills with entries on the records. In our view the only reason why the officer was not prepared to accept this evidence of takings is because he did not believe that the daily takings records were an accurate reflection of the underlying sales. And this brings with it an implication that those daily records were compiled in a deliberate attempt to over inflate the claim and did not accurately reflect the underlying sales.

48. We would observe that one of the grounds for suspicion regarding the daily takings records was that they had been compiled “manually”. Yet so too had the 25 sample bills. They had been written by hand on a piece of paper. Simply adding a time and date would not, in our view, have rendered these bills evidential gold dust. Adding a time and date could have been done after the event thus falsifying the bills.

49. The officer says that he did not consider those daily takings records to have been an accurate reflection of the underlying sales. But to us the important thing is whether they could be tallied with the bills as a combination of the two is cogent primary evidence of the meals served and payments made on scheme days. And they could be. Those 25 sample bills could be married up with the entries on the daily records. This is more than adequate evidence to justify the veracity of those records.

50. We therefore think it was objectively unreasonable for the officer not to have accepted that the daily record sheets accurately recorded the takings on the scheme days. A combination of the sample bills and those sales records comprises the raw material for the claims. And in our view the objectively reasonable officer would have accepted them as such.

51. Furthermore, there was significant corroborating evidence to support these additional takings. The officer had been told of the change of pattern of eating habits, the way in which the restaurant could be reconfigured, the difficulties with taking cash to the bank. It seems to us that the scheme was having precisely the desired effect. It was providing a lifeline to hard pressed proprietors of hospitality businesses. Yet the officer did not seem to take this into account. Again, it seems to us that he started off from the position of suspecting that the appellant was not telling the truth. And he was not prepared to accept the appellant’s position unless some form of empirical documentary evidence provided a smoking gun. And as the appellant could not do this, he did not accept the appellant’s story regarding additional cash.

52. There are also a number of relevant factors which the officer does not seem to have considered when reaching his conclusion. The fact that the RTI records showed that employees had been paid at the end of August, but no such payment had been made from the bank account. The logical conclusion was that it reflected cash which had not been banked. The fact that the appellant or its members had accounted for VAT and income tax on the additional takings. The fact that both the partnership accounts and the LLP balance sheet showed an increase in cash in hand. An analysis of the purchases which suggests that they supported the supply of meals to a greater extent than the additional £56,000 or so accepted by the officer as evidenced by credit card receipts.

53. None of these matters is conclusive. Indeed, as Mr Ellis suggests, there may be explanations for them which are consistent with any additional cash having been received on non-scheme days. But none of them seems to have been considered, let alone discounted, by Officer Maddison when reaching his conclusion.

54. He seems to have come to the decision that in the absence of dated and timed bills, there was nothing that the appellant could do to justify the additional cash takings. He did not seriously consider any other matters which could have supported the claim. And so he failed to consider the relevance of those other matters.

55. For these reasons we do not consider that Officer Maddison arrived at an objectively reasonable opinion, on the basis of the information available to him, that the appellant had overclaimed an amount of support payment. And we therefore allow its appeal.

Accuracy of the assessment

56. We have considered the position if, contrary to our finding above, the assessment is valid.

57. In these circumstances the burden of establishing that it has been overcharged by the assessment switches to the appellant who must show us that it had been so overcharged (and furthermore what the correct amount of the assessment should be) by producing evidence to that effect. The standard is of course the balance of probabilities.

58. We have no hesitation in saying that the appellant has demonstrated that it has been overcharged by the assessment, and the more likely amount of the support payment to which it was entitled is the amount which it has claimed.

59. We had the benefit of hearing the oral evidence provided by Mr Akhtar and Mr Nawaz on behalf of the appellant. We find them to be honest and reliable witnesses. We accept, therefore, that the daily takings records were honestly and accurately compiled from the bills made out for the meals served on scheme days and accurately reflect the takings on those days.

60. The evidence and other matters which we have mentioned earlier in this decision, including those matters at [29] above is entirely consistent with the appellant's claim.

61. It is equally consistent with the details of the cash purchases set out in the cash payments table referred to at [13 (44)], which was compiled by Mr Akhtar and Mr Nawaz, and which, on the basis of their evidence, we find as a fact was an accurate record of those cash purchases.

62. We have considered Officer Maddison's verification which suggests that on the scheme days the appellant declared income of nearly £16,000 per day. And indeed this is borne out by the daily takings records. But we are satisfied by the evidence given by Mr Akhtar that this is explicable by the increased number of customers, and the changed eating patterns of those customers, on scheme days. We do not, for example, think that serving approximately 650 customers on Tuesday 4 August 2020 over a 12-hour period, as shown in the daily takings record for that day, is inconsistent with that explanation.

63. Furthermore, if instead of comparing the takings on scheme days with an average and compares them instead with the busiest days pre Covid, for example 1 August 2018, a Sunday, when the takings were £4,950, the increase is only some 3 times. This is not so far off the 2.5 times which the officer considered to be a reasonable figure for the increased takings due to the scheme and, again, is consistent with the evidence of the increased number of customers on scheme days.

DECISION

64. We allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

65. 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.

**NIGEL POPPLEWELL
TRIBUNAL JUDGE**

Release date: 26th FEBRUARY 2024

APPENDIX

EOHOS

Framework, claims and assessments

1. To support the restaurant industry through the coronavirus pandemic, on 8 July 2020 the Government announced the EOHOS. The scheme provided for restaurants which offered the EOHOS discount to be reimbursed for the amount of discount given to customers.

2. Section 106 Finance Act 2020 (“FA 2020”) provides:

106 Taxation of coronavirus support payments

(1) Schedule 16 makes provision about the taxation of coronavirus support payments.

(2) In this section, and in that Schedule, "coronavirus support payment" means a payment made (whether before or after the passing of this Act) under any of the following schemes—

(a) the coronavirus job retention scheme;

(b) the self-employment income support scheme;

(c) any other scheme that is the subject of a direction given under section 76 of the Coronavirus Act 2020 (functions of Her Majesty's Revenue and Customs in relation to coronavirus or coronavirus disease).

3. Sections 71 and 76 of the Coronavirus Act 2020 provide the Treasury with the power to direct the Respondents' functions in relation to coronavirus.

4. On 9 July 2020, the Government published a Treasury Direction made under sections 71 and 75 of the Coronavirus Act 2020 (“**the EOHOS Direction**”). This set out the statutory rules for HMRC to administer the EOHOS. The scheme opened for businesses to register on 13 July 2020 and closed on 31 August 2020. Claims for EOHOS support payments could be made from 7 August 2020 until the scheme closed on 30 September 2020.

5. The purpose of the scheme was laid out in paragraph 2 of the Schedule to the EOHOS Direction which stated:

‘The purpose of EOHOS is to provide for discounts to be offered to customers of qualifying restaurants to incentivise consumer use of such restaurants and restore consumer confidence, both of which have been adversely affected by the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease, and provide for payments in respect of those discounts to be made to qualifying persons.’

6. On 9 July 2020, the Government first published guidance entitled ‘Register your establishment for the Eat Out to Help Out Scheme’. The Government subsequently published further guidance on 27 July 2020 entitled ‘Claim money back through the Eat Out to Help Out Scheme’.

7. Under paragraph 3 of the EOHOS Direction, a qualifying person can make a claim for EOHOS payments if they have a registered scheme restaurant the business of which is carried on by

that person.

8. Paragraph 4 of the EOHOS Direction describes a qualifying person as a person who carries on a business in relation to a qualifying restaurant. Paragraph 5 of that Direction clarifies that a qualifying restaurant is one which has been registered with the relevant local authority on or before 7 July 2020 by the qualifying person as a place from which the food business is carried on.

9. Paragraph 7 of the EOHOS Direction details the mechanics of the scheme discount. A registered scheme restaurant may apply the scheme discount in relation to qualifying sales by the restaurant. A qualifying sale is the sale of food or non-alcoholic drink for immediate consumption on the restaurant premises on Monday to Wednesday from 3 to 31 August 2020 but does not include sales for consumption at a private party, reception or other similar function.

10. The amount of the scheme discount is equal to $\chi \times 50\%$ but must not exceed £10 per diner;

Where χ is the amount the customer is charged for a qualifying sale after the deduction of:

- (a) any other discount offered by the restaurant, and
- (b) any restaurant service charge.

11. Paragraph 8 of Schedule 16 FA 2020 makes a recipient of support payments under EOHOS liable to income tax in respect of any amount to which the recipient was not entitled under the scheme. Paragraph 8(4) sets out when income tax becomes chargeable, which, in this appeal, is at the time the support payment was received.

12. Paragraph 8(5) sets out the amount of income tax chargeable as being equal to the amount of support payment to which the applicant was not entitled and has not been repaid.

13. Paragraph 9 gives HMRC the power to make assessments to income tax as chargeable under paragraph 8. Paragraph 9(1) of Schedule 16 FA 2020 provides:

‘(1) If an officer of Revenue and Customs considers (whether on the basis of information or documents obtained by virtue of the exercise of powers under Schedule 36 to FA 2008 or otherwise) that a person has received an amount of a coronavirus support payment to which the person is not entitled, the officer may make an assessment in the amount which ought in the officer’s opinion to be charged under paragraph 8’.

14. The assessment may be made at any time under paragraph 9(2), but subject to the statutory assessing time limits pursuant to sections 34 and 36 of the Taxes Management Act 1970 (“TMA”). Parts 4 to 6 of the TMA also apply to any such assessments including section 31 relating to the appeal provisions.

15. Section 50(6) TMA also applies to the tribunal’s powers on an appeal. Under this subsection, if the tribunal decides that the appellant is overcharged by an assessment other than a self-assessment, the assessment shall be reduced accordingly but otherwise it shall stand good.

Record keeping

16. Under paragraph 3.1 of the EOHOS Direction:

“A claim for a payment of EOHOS must be made in such form and manner and contain such information as HMRC may require at any time (whether before or after payment of the claim) to establish entitlement to payment under EOHOS.”

17. The Government Guidance titled ‘Registering your establishment for the Eat Out to Help Out Scheme’ provided guidance to businesses who wanted to make a claim. Under the section ‘*When you start offering the discount*’, it stated:

‘You should include the Eat Out to Help Out Scheme name on the bill when you offer the discount’.

18. This guidance was updated on 27 July 2020 with a publication titled ‘Claim Money back through the Eat Out to Help out Scheme’ Under the section entitled “*What you’ll need*” that guidance stated

“You will need the records you kept for each day you used the scheme, including the

- total number of diners (covers) who have used the scheme, including children
- total amount of discount you’ve given
- period you’re claiming for

If you’re making a claim for more than one establishment, you will need to have the:

- Records for each establishment
- Overall total value of the claim for all establishments ready before you claim”.

19. Under the section titled ‘*Records you must keep*’ that guidance stated:

“To show the link between the number of diners who got the discount and the total value of scheme discount being claimed for in each claim period, for each day, all you must keep is a record of the:

- total number of diners (covers) who have used the scheme discount in your establishment
- total value of all eat-in food and non-alcoholic drink sold where the scheme discounts were given
- total value of scheme discounts you’ve given and claimed for

If you are using the scheme for more than one establishment, you must keep these records for each.

HMRC may ask for your records relating to the scheme. You should keep records:

- in a format that suits your business

- with your other business records”.