Neutral Citation: [2024] UKFTT 00639 (TC)

Case Number: TC09244

FIRST-TIER TRIBUNAL
TAX CHAMBER

Centre City Tower, Birmingham

Appeal references: TC/2019/09582
TC/2019/09580
TC/2020/00888
TC/2020/00885

Suppression of profits – best judgment – discovery assessment – penalties – personal liability notice – restaurant

Heard on: 13 – 16 May 2024
Judgment date: 18 July 2024

Before

TRIBUNAL JUDGE MICHAEL BLACKWELL
SHAMEEM AKHTAR

Between

B J SHERE KHAN STAR CITY LIMITED

First Appellant

MR. BABAR SADDIQ

Second Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Miss Charlotte Brown, instructed by AKA Accountants

For the Respondents: Mr Simon Bracegirdle, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Second Appellant, Mr Saddiq, was at all material times sole director and shareholder of the First Appellant, BJ Shere Khan Star City Ltd ("BJSKSCL").

2. It is agreed that BJSKSCL operated a restaurant trading as Shere Khan at Unit 13 of Star City, a leisure and entertainment complex in Birmingham. It is said by HMRC, but denied by the appellants, that BJSKSCL also operated a restaurant at Unit 1B of Star City, trading as Oodles N'Oodles ("Oodles").

3. The output tax element of the VAT assessment in dispute comprises of three elements: (i) understated sales from Shere Khan; (ii) omitted sales from Oodles; and (iii) overstated zero rated sales. The input tax element of the assessment includes payments said to be made on a BMW 5X, certain payments for fuel and payments to Dobhai (Holdings) Ltd ("Dobhai"), said to be made for the leasing of kitchen equipment.

4. The corporation tax ("CT") assessments relate to what are said to be understated profits from Shere Khan and omitted sales from Oodles. The additional sales were assessed as extractions of funds from the company by a director, so subject to an additional CT charge on the director's loan account. It is agreed that no CT returns were filed by BJSKSCL in the final two of the accounting periods in dispute.

5. A VAT assessment was originally issued on 12 June 2018, however the decision under appeal relates to an amended assessment dated 17 July 2019, issued pursuant to s73(1) of the Value Added Tax Act 1994 ("VATA") for VAT Accounting Periods 01/11 to 07/14 in the sum of £1,201,573: being for alleged underdeclared sales (£969,622) and disallowed input VAT (£231,951). This was reduced on 11 February 2021 following ADR to £1,096,344 (£947,823 for output tax and £148,521 for input tax).

6. On 12 July 2019 HMRC issued related penalties to BJSKSCL in the sum of £735,274.22 for periods 01/11 to 07/14, pursuant to Schedule 24 of the Finance Act 2007 ("FA 2007"). The penalties are said to be for deliberate behaviour and comprise a penalty for alleged output tax underdeclared with a penalty percentage of 61.25%, following reductions of 25% and a penalty relating to disallowed input VAT with a penalty percentage of 59.5% following reductions of 30%.

7. On 11 July 2018 HMRC issued five decisions relating to BJSKSCL, upheld on review dated 27 February 2020, relating to five CT discovery assessments issued pursuant to paragraph 41 of Schedule 18 of the Finance Act 1998, covering periods 2010/2011 – 2014/15 being in the sum of £2,052,967.09 and an associated company penalty, pursuant to Schedule 24 of FA 2007, in the sum of £741,730.50 issued on 30 July 2019.

8. The quantum of the matters under appeal for BJSKSCL are summarised in the following table:

Decision	Period covered (VAT) or year ended (CT)	Issued	Amount (£)	Varied amount sought (£) (11 February 2021)
VAT assessment	01/11 to 07/14	17 July 2019	1,235,096	1,096,344
VAT penalty	01/11 to 07/14	12 July 2019	735,274.22	668,911.57
CT Assessment	30 April 2011	11 July 2018	198,626.38	n/a

CT Assessment	30 April 2012	11 July 2018	411,337.70	n/a
CT Assessment	30 April 2013	11 July 2018	601,024.52	n/a
CT Assessment	30 April 2014	11 July 2018	688,149.67	n/a
CT Assessment	30 April 2015	11 July 2018	152,828.84	n/a
CT Penalty	30 April 2011 to 30 April 2013	30 July 2019	741,730.50	n/a

9. On 30 July 2019 HMRC issued an associated company penalty pursuant to Schedule 24 of FA 2007 in the sum of £741,730.50. This only relates to the years for which BJSKSCL filed CT returns.

10. On 12 July 2019 HMRC issued Mr Saddiq a personal liability notice ("PLN") for the VAT penalties of £735,274.22 and on 31 July 2019 HMRC issued Mr Saddiq with a PLN for the CT penalties of £741,730.50. Both notices were issued pursuant to paragraph 19 of Schedule 24 FA 2007 for the period 20 February 2011 to 30 April 2013. Both notices make Mr Saddiq liable for 100% of the penalties.

THE HEARING

11. At the hearing we heard evidence, on behalf of the appellants, from Mr Saddiq and from Mr Kahn, an accountant who had performed calculations and corresponded with HMRC on the appellants' behalf. We also heard evidence from Officer Beard, who issued the VAT assessment, and Officer Pinder, who issued the CT assessment. Aside from Officer Beard, who attended via video link, all witnesses attended in person.

FINDINGS OF FACT

Did BJSKSCL trade as Oodles

12. It is common ground that the lease on Unit 1B is held by BJ Star City (UK) Ltd ("SC"). Mr Saddiq was a director of SC until he resigned on 19 February 2010. The lease was assigned to SC from Service Retail UK Ltd (previously Big John's Retail Ltd).

13. The lease on Unit 13 was held by Star City MW Ltd (formerly BJ Star City Ltd).

14. It is also agreed that Oodles was previously operated by Businessrite Services Ltd ("Businessrite"), another company of which Mr Saddiq was a director.

15. Mr Saddiq's case is that Oodles, as operated by Businessrite, between August 2008 and February 2010 was not successful. Because it was seen as a Chinese restaurant, it was difficult to educate a potential Muslim audience that pork was not sold and the food was halal. The "English" (Mr Saddiq's phrase) audience were deterred because it was not possible to buy alcohol or bring alcohol. Also Star City had negative publicity due to shootings in the area, resulting in a loss of footfall. Businessrite entered liquidation in January 2010 and was dissolved on 22 August 2012.

16. Mr Saddiq's case is that after January 2010 Oodles was closed for refurbishment, in order to modernise, with the intention that the modernised premises would operate a Pan-Asian restaurant as a division of BJSKSCL. He says that BJSKSCL was paying £160,000 pa rent on an empty site and he had personally guaranteed the rent.

17. Earlier in his witness statement he said that prior to opening Oodles in 2010 Unit 1B had been converted from a night club and bar to a restaurant and that the work took almost two years to complete. We find there to be no reason to disbelieve this.

18. Mr Saddiq says that he then received a proposal from Mr Zahoor Malik and Mr Zeeshan Hamid to take a licence on Unit 1B and run Oodles as an ethnic led concept. They would take on responsibility for paying the rent and overheads, and they would complete the refurbishment. In return they would be given an exclusive right of occupation for two-years with no additional payment for the licence.

19. Mr Saddiq was attracted by the proposal as he considered that the payment of rent on Unit 1B, which he was guaranteeing, was an onerous obligation which he wanted to avoid. Mr Saddiq believes that Mr Malik and Mr Zeeshan traded as Oodles through two companies, Star City Noodle Bar Limited and Recoverage Limited. He was not involved in either company. From Companies House returns Mr Saddiq noted that the director of Recoverage Limited was Mr Chen Zhou and the director of Star City Noodle Bar Limited was Ms Mei Chen. A Mr Chen was the head chef at Oodles when it was ran by Mr Malik and Mr Zeeshan, however Mr Saddiq does not know if it was Mr Chen Zhou.

20. Mr Saddiq also says he allowed Mr Malik and Mr Hamid to use two merchant bank accounts. The first was opened in the name of B and J Restaurants Limited, another company that he was director of. The second was with American Express, set up only to take American Express payments and had little or no activity overall. He says that he let them use the merchant accounts because Mr Malik and Mr Zeeshan had difficulty in opening their own account, and without this assistance they would not be able to operate the business and he would be required to pay-out on his personal guarantee of the rent.

21. In August 2014 Mr Malik and Mr Hamid vacated Unit 1B and Mr Saddiq gave his son and nephew, Mr Muhammad Waqaas Babar and Mr Mauheed Johngir, the opportunity to run the business of Oodles and Shere Khan. They paid nothing for this: it was a gift. They did this through their company Two Bros Restaurant Brands Ltd ("Two Bros"), acquiring both of the businesses in 2014. The licence of Mr Malik and Mr Hamid ended in July 2014, on their giving notice. Mr Malik and Mr Hamid gave notice as their two main chefs did not have their visas renewed by the UK Boarder Agency.

22. To support their contention that BJSKSCL traded as Oodles at Unit 1B, HMRC rely on the following facts:

(1) In October 2013 £61,035.03 of the credit card receipts of Oodles was paid into the bank account of BJSKSCL.

(2) The records of BJSKSCL were found in Unit 1B.

(3) The registered office of Recoverage Limited was at Unit 13.

(4) Neither Star City Noodle Bar Limited nor Recoverage Limited ever filed statutory accounts.

(5) Certain invoices from a supplier called Cocktail are addressed to BJSKSCL at Unit 1B.

(6) Oodles was listed as a transfer of a going concern on the VAT return of Two Bros.

(7) The address on the licence to occupy for Mr Malik and Mr Hamid, which is in Bradford, does not appear to be connected with either Mr Malik or Mr Hamid. While a Mr Malik purchased it in 2005 it was rented out thereafter, including in 2011 when the licence was signed.

(8) BJSKSCL paid towards the refurbishment of Unit 1B.

(9) BJSKSCL paid the rent of Unit 1B, for a period, while it was operated by Mr Malik and Mr Hamid.

23. In response, adopting the same numbering, Mr Saddiq says:

(1) The payment of the credit card receipts of Oodles into the bank account of BJSKSCL happened when the terminals were upgraded by the merchant provider when they moved from Duality to World Pay. The merchant account was in the name of B And J Restaurants Ltd, another company that Mr Saddiq was director and shareholder of. These payments were set-off against money owed by Mr Malik and Mr Hamid, for payments under the licence agreement that they had failed to pay and which had therefore been paid by BJSKSCL, so Mr Saddiq would not be called to pay under his guarantee.

(2) The records of BJSKSCL were left in the office in Unit 13: Mr Saddiq did not worry about this because he trusted his son and nephew. Due to major refurbishment works in Unit 13, under Two Bros, the office area was removed. The records of BJSKSCL were therefore removed to Unit 1B, which was also then controlled by Two Bros and there was available office/storage space in which to house them. It took over a year to find the records, as no one had told Mr Babar and Mr Johngir where the records had been moved to.

(3) Although the registered office of Recoverage Limited was at Unit 13, Recoverage Limited never traded from that address. Mr Saddiq allowed this as a temporary measure, while refurbishment work was being carried out on Unit 1B, but never followed up on this afterwards.

(4) The fact that neither Star City Noodle Bar Limited nor Recoverage Limited filed statutory accounts does not mean that they never traded.

(5) Others Cocktail invoices in the bundle are addressed to Unit 18 (with which there is not said to be any link), or simply Shere Khan's.

(6) The VAT return that claimed it was a transfer of a going concern was completed by Two Bros, not Mr Saddiq or BJSKSCL. Further documentary evidence of this has not been exhibited or otherwise provided to the appellant.

(7) There is no documentary evidence of these checks for Mr Malik and Mr Hamid. In any event, whether those individuals exist on HMRC's systems and were no longer living at an address years after the licence was signed and they vacated the premises, has no bearing on whether they physically traded at Unit 1B.

(8) BJSKSCL paid for refurbishment of Unit 1B before Mr Malik and Mr Hamid took possession, as the original intention was for BJSKSCL to operate a branch from there.

(9) Some rent payments were made by BJSKSCL on Unit 1B because otherwise it would have been unpaid and Mr Saddiq would have been personally liable as guarantor. This was set-off against the payment of credit card monies into the BJSKSCL bank account.

24. We find these answers persuasive. Further, Mr Saddiq has also produced eight invoices from Keyani's and several invoices from Peonix addressed to Star City Noodle Bar Ltd at Unit 1B. The Keyani's invoices are dated between 15 December 2011 and 11 July 2012. Many of the Pheonix invoices that we have are illegible, but the five legible ones are dated between 29 December 2011 and 27 December 2012. Mr Saddiq says he found these invoices under the till in 1B in 2014 after Mr Malik and Mr Hamid left. He has also produced

a bill for non-domestic rate, dated 2 April 2013, issued by Birmingham City council to Star City Noodle Bar Limited at unit 1B.

25. Mr Saddiq has also produced a summons to Birmingham Magistrate's Court for non-payment of non-domestic rate, dated 20 June 2012, addressed to what appears to be Star City Noodle Bar Limited at unit 1B, although part of the name and address is illegible.

26. We attach some weight to such documentary evidence and accept Mr Saddiq's account of its provenance.

27. We are conscious of the fact that the assessment is made against BJSKSCL, not against Mr Saddiq. Accordingly even if we were to accept the involvement of Mr Saddiq in the operation of Oodles, that would not necessarily show that it was BJSKSCL (which of course has separate legal personality) that was trading. It could be Mr Saddiq as sole trader: we note points 23(2) and 23(9), above, suggest that Mr Saddiq used the property of companies he owned as if it was his own property. It could also have been one of his (many) other companies.

28. We are also conscious that much more evidence might be thought to have been reasonably available. For example the landlords could have been contacted as to who was generally paying the rent and who they considered were occupying the premises. Former staff could have given witness statements. Evidence could have been supplied by the bank who issued the merchant account. Also former suppliers could have been called upon to give evidence. Absent of a finding of absence of best judgment, the burden of proof would be on the appellant to show this. However we acknowledge that Messrs Hamid and Malik vacated the premises in 2014 and accept Mr. Saddiq's oral evidence that he did not hear from them again. HMRC's enquiries commenced three years later and evidence for this appeal was served in 2022. So we accept obtaining such evidence might have been problematic.

29. However, viewing the evidence before us in the round, we find that while it could perhaps have given rise to a suspicion that BJSKSCL was trading as Oodles, it could not have reasonably given rise to anything more than a suspicion. We do not consider that the evidence could give rise to a belief that BJSKSCL was operating Oodles throughout the relevant period. Indeed, we consider several factors on which HMRC rely, may in fact point in the opposite direction. The fact that for a short period money from the merchant account was paid into BJSKSCL's bank account shows that this was not generally done: and we find the explanation for it credible. The fact that Star City Noodle Bar Limited filed no statutory accounts might also point to it being non-compliant rather than dormant. We find it plausible that Mr Saddiq would arrange for Mr Malik and Mr Hamid to be granted a licence at no rent, to avoid his own personal liability for the matter. Similarly we find that it is plausible that Mr Malik and Mr Hamid would have been allowed to use the merchant acquirer accounts so they could trade and allow Mr Saddiq to avoid personal liability for rental payments as guarantor for Unit 1B.

Was there a suppression of profits at Sher Khan

30. In his witness statement Officer Beard explains that a review of bank statements and annual accounts suggested there was a suppression of profits, particularly:

(1) The cash:card sales ratio of Units 1B and 13 when visited in 2017 showed higher cash sales.

(2) The bank statements, which relate only to Shere Khan, show higher receipts from credit cards and other deposits (excluding deposits from director) than the gross sales in the 01/12, 01/14 and 04/14 VAT Periods.

(3) In 01/12, credit card sales deposited into the bank were higher than gross sales declared in the VAT return (output tax plus net outputs).

(4) A comparison of the turnover in the annual accounts to the net outputs in the VAT return also show differences. Firstly, the 2012 turnover is different from the turnover for 2012 (comparative) in the 2013 Accounts. Secondly, the turnover in the 2012 accounts and 2013 accounts for 2012 and 2013 all show higher turnovers than the net outputs in the VAT returns for the same periods.

(5) Whilst the SAGE Ledgers matched the VAT returns, the Z readings showed different sales overall and in particular weeks. These differences were listed by Officer Beard in a letter dated 8 July. In response Officer Beard was provided with different SAGE Ledgers with different totals.

31. The comparison of the cash:card ratio is unpersuasive for a number of reasons. Firstly, the 2017 figure is jointly for both Oodles and Shere Khan. There is no reason why the cash:card ratio of Oodles should be relevant, any more than that of any other unrelated restaurant at Star City.

32. Further, the evidence suggests that Shere Khan when run by Two Bros was a substantially different enterprise than when it was run by BJSKSCL. The old menu did not have a "Grab & Go Section". The photographs of the signage on the front of the restaurants show "Shere Khan Restaurant Juice and Coffee Bar", when under BJSKSCL. This was replaced by "Shere Khan's Restaurant" under Two Bros. This is consistent with Mr Saddiq's testimony that, under him, Sher Khan involved quick service, small menus at a low price, quick turnaround, an emphasis on the juice bar and cold food. He said that the new owners were tech savvy, oriented to larger gatherings, weddings, students and home deliveries. The new owners immediately dispensed with the juice bar and "Grab & Go" section of the menu. We accept this part of his testimony.

33. In addition to the area being different, Star City was also a different sort of complex at the relevant times. As Officer Beard admitted in his evidence, it previously had a gym and casino, in addition to the cinema. However by 2017 only the cinema was left.

34. We place limited weight on the interior photos of the two restaurants, especially as evidence as to who the clients were. The photos are not necessarily representative of the makeup of customers. However they are consistent with Mr Saddiq's testimony that the new restaurant catered more to families and large gatherings.

35. We also accept that the environment of Star City had changed substantially over the six years. We accept Mr Saddiq's testimony that the area was previously associated with gun crime, but regeneration and the opening of a new university, caused it to become more associated with students.

36. We also note that no evidence of the till data of Two Bros has been adduced, beyond the references to the findings in Officer Beard's witness statement. There is also no record of the visit report. As such the appellant has been denied the ability to challenge Officer Beard's findings, based on an analysis of the underlying evidence. Nor can this Tribunal verify the accuracy or reasonableness of the method. It would not be appropriate for us to have regard to factual findings made in *Mauheed Johngir & Muhammed Waqas Babar v HMRC* [2024] UKFTT 00274 (TC), as HMRC invited us to. The appellants in that case were not those before us in this case. While they are the son and nephew of Mr Saddiq, and the appeal concerned the restaurants they ran at Star City, we do not regard their to be a sufficient degree of identification that not following the decision would be an "abuse of process": see *Hackett v HMRC* [2020] UKUT 212 (TCC) approving *Hackett v HMRC* [2016] UKFTT 781

(TC). Rather, the general rule applies, that "findings of fact made by another decision maker are not to be admitted in a subsequent trial because the decision at that trial is to be made by the judge appointed to hear it ('the trial judge'), and not another": *Hoyle v Rogers and another (Secretary of State for Transport and another intervening)* [2015] 1 QB 265 at [39].

37. The extracted till data apparently covers 75 days from 26 August 2017 to 8 November 2017. It is noted that in other calculations, used to support the allegations of suppression, a 17 day period (in relation to average cash sales) and a 7 day period (in relation to the percentage of zero-rating) have been used in the analysis. A short *random* sample may be considered representative, however the 75 days are not a random sample: they represent the full data that Officer Beard was able to access. While in evidence he stated that the 7 and 17 days were a random sample from the 75, no evidence was given as to how such randomisation was carried out. The 17 day period contains Eid, which we accept is likely to increase sales. But in addition to the volume of sales, it is highly likely the nature of the trade would differ during Eid potentially resulting in a different cash:card ratio. Indeed, we accept the comparison produced by Mr Khan of 2012 sales, which shows sales of £20,219.49 in the week before Eid and £29,378.87 in the week following Eid.

38. We also note Mr Saddiq's evidence that, while card sales were encouraged, he operated a charge for card sales under £10. We accept this evidence and consider it is a further explanation why the average value of card and cash sales was similar in 2017, but different when the restaurant was operated by BJSKSCL.

39. For these reasons we find that the cash:card ratio from the 2017 inspection is not a reasonable comparison to deduce the cash card ratio when BJSKSCL operated Shere Khan.

40. We also do not accept Officer Beard's assertion that in certain periods bank deposits were greater than gross sales declared, to be evidence of suppressed sales. In his witness statement Mr Khan exhibited calculations showing these differences to be attributable to miscalculations and that money was not always regularly banked. Officer Beard confirmed during cross-examination that he had not considered this and would need to look into it. We note that no challenge was made to this evidence. We accept however that, contrary to Mr Khan's calculations the payment from Consilium Legal was not inappropriately included in the analysis. Even so, we do not regard this as evidence of suppression of profits.

41. We accept Mr Khan's (unchallenged) analysis which shows mistakes by Officer Beard in his calculation of credit card receipts.

42. We note there is an inconsistency between the 2012 accounts and the comparator in the unsigned 2013 accounts, filed with HMRC. However, we note that the signed version of the 2013 accounts, filed with Companies House, has figures that do match. We accept that the unsigned accounts must have been filed in error with HMRC: there would be no rational basis for deliberately filing comparator figures different to those for 2012 previously filed. We accept that the correct accounts are likely to be those that are signed, rather than unsigned.

43. As a result of Officer Beard basing his analysis on the unsigned set of accounts, this has also affected his analysis in the table at [61] of his witness statement showing differences between turnover and declared outputs. The correct accounts give a turnover of £960,677 for 2013 instead of the £1,010,480 Officer Beard has used, which would result in a difference of about £4,000 rather than £56,000. For the quarter 04/12 net output in the table is £808,833. Using Mr. Khan's table to April 12 adding the net sales column gives £813,892.65. That would make a difference of £28,877 not £33,936. Whilst there is still a difference we consider this is most likely, having regard to the totality of the evidence, due to the chaotic nature of the record keeping of the appellant, and does not evidence suppression of profits.

Similarly, having regard to the totality of the evidence, we consider the provision of different SAGE ledgers with different totals was due to chaotic record keeping by the appellant and not suppression of profits.

Zero rating

44. There is no dispute as to which items would qualify for zero rating. In closing submissions Mr Bracegirdle conceded that, for the purpose of this appeal, all supplies from the "grab and go" menu would be zero rated. It is also accepted that catering supplies that were supplied cold to be reheated would be zero rated. The dispute concerns the extent to which those items were supplied.

45. In evidence we were told that the tills did not distinguish between zero rated and non-zero rated goods. It was therefore not possible for this to be done automatically. Rather, at the end of each day staff members went through the till receipts to calculate the proportion of zero and non-zero rated supplies. As it happened, this was said to be consistently 12%. The receipts were then destroyed.

46. We find it unlikely that staff members would calculate by hand the zero rated supplies each day (or twice weekly when the book keeper came in, as was alternatively suggested). This is especially so when set against the generally chaotic way that the tax affairs of the business was conducted: including not filing a CT return for the final two years and being unable to locate the books when requested. The chaotic way the affairs of the business was conducted is also evidenced by the failure to retain records for the items discussed below in relation to input tax.

47. Furthermore, the oral evidence of the 12% being claimed on the basis of an actual rate of 12% calculated daily, is contradictory to Mr Saddiq's witness statement, which says:

> "The majority of the time, our zero-rated sales came very close to 15% but in order to be careful we used 12% of our total sales as zero rated."

48. From that we find that there was, in all likelihood, an honest attempt to claim the right amount of zero rated output tax, but that was most likely based on a rough and ready method of sampling: hence why the amounts were rounded down to avoid overclaiming.

49. Whilst we note Mr Khan's experience that most catering businesses have zero rated sales above 15%, we consider this to be a highly fact specific enquiry, which would depend on the nature of the business and the ability of a particular business to evidence zero rated sales.

50. It is for the appellant to show that the supplies are zero rated. For the reasons above, we find the appellant's evidence to be unreliable on this matter.

51. For this reason, we do not consider there are grounds for departing from Officer Beard's best judgment assessment of 2% of sales when there was the Virgin Active gym in Star City and, 1% for the rest of the time. Whilst this figure is quite likely too low, we find the appellant has not discharged the burden of proof, which is on it, to show that a higher figure is appropriate.

Input tax

52. Regulation 29(1) of the Value Added Tax Regulations 1995 requires the taxpayer to hold the evidence of the input tax, namely, the tax invoice, at the time of making the claim. Where the tax invoice is not held regulation 29(2) allows HMRC a discretion to accept alternative evidence such as proof of payment, orders, delivery notes, correspondence.

BMW X5

53. In his letter of 20 February 2020 Officer Beard denied a deduction in respect of the BMW X5 as it appeared to him to be for personal use.

54. Mr Saddiq's evidence was that this vehicle was used to pick up and drop off staff, especially late at night when public transport was no longer available. He said that the vehicle was covered in livery advertising the business and stayed in the open car park, as an advertisement. He said it was insured for any driver aged over 25.

55. There are no photographs of the vehicle, evidencing the livery. Nor has there been exhibited any invoice for the livery of the vehicle, or email correspondence relating thereto.

56. No witness statements have been provided from staff members, relating to how they were taken to and from work in the vehicle.

57. In the absence of corroborative evidence, which could potentially have been provided if proper records were kept, we do not find there to be reason for disturbing Officer Beard's best judgment assessment on this point.

Fuel

58. Given that we have found there to be no evidence that the BMW X5 was acquired or used for business use, it follows that the fuel for that vehicle should also not be allowed.

59. We were told in evidence that staff members were often reimbursed £20-£30 each week, to cover the fuel they used to make home deliveries in their own vehicles when the van was busy. No witness statements of staff members have been provided. Nor have we been provided with an itemised list of payments to individual staff members. It would be reasonable to expect such records to be kept.

60. In the absence of corroborative evidence, which could potentially have been provided if proper records were kept, we do not find there to be reason for disturbing Officer Beard's best judgment assessment.

Dobhai

61. It is the appellant's case that payments of rent for the leasing of kitchen equipment were made to Dobhai, a company also owned by Mr Saddiq.

62. It is said that the rental payments were £1,345 per week, including VAT. However these were not paid weekly, but only from time-to-time. Dobhai only raised invoices on receipt of these payments, so not to have to account for VAT without being in funds. We find that plausible.

63. Mr Saddiq's evidence was that there was a £25,000 deposit paid for the equipment, however this has not been returned yet. The equipment was placed in storage after removal from the restaurant.

64. However, many of the descriptions and amounts of these invoices are inconsistent with this narrative.

65. An invoice dated 31 March 2012 is for "Interest Pmnts shere khan". This is for about 25.25 times the weekly price, so difficult to see how that relates to any whole number of weeks. Further the description does not imply a payment for kitchen equipment rental.

66. An invoice dated 30 April 2012 is for "Rent: Service charges April". This is for six times what is said to be the weekly price, so not solely for April. Given the excess payment in the earlier month it is difficult to see how this can be for arrears. Further the description does not imply a payment for kitchen equipment rental.

67. An invoice dated 31 May 2021 is for "Rent: Service charges May 2012". Again it is for 7 times the weekly price, so not solely for May. Given the excess payment in the earlier two months it is difficult to see how this can be for arrears. Further the description does not imply a payment for kitchen equipment rental.

68. An invoice dated 30 June 2012 is for "Rent: Management charges June." Further, it would appear to be for 7 times the weekly price, so not solely for June. Given the excess payment in the earlier three months it is difficult to see how this can be for arrears. Management charges are not a normal description of hiring kitchen equipment.

69. An invoice dated 30 June 2013 is for "Management May and June charges". This is for 19 times what is said to be the weekly price, so not solely for May and June.

70. An invoice dated 31 July 2013 is for "Management charges July 13". This is for 10 times what is said to be the weekly price, so not solely for July.

71. Whilst Mr Saddiq suggested management charges imply management of kitchen equipment, we do not consider this is a natural use of the English language. As this is a regular transaction we find it perplexing why there are so many different descriptions of a regular transaction, none of which mention kitchen equipment.

72. The fact that so many different descriptions are used is another pointer to the generally chaotic record keeping of Mr Saddiq's business. We find it unlikely that the payments were for different things, given the recurring unit-amount. However it is for the appellant to provide adequate documentary proof of what the payments are for. They have not done that.

73. Mr Saddiq also suggested that larger payments than for the rental period specified could be for accumulated amounts. However, when there are seemingly over-payments for so many consecutive periods, it would be for the appellant to show arrears were due, or a surplus was accruing that as subsequently utilised. They have not done that.

74. Officer Beard has, by mistake allowed two of these invoices. It was suggested that there was an inconsistency by continuing to allow these two invoices, so all the others should be allowed. We disagree. Whilst Officer Beard may have chosen to allow the taxpayer the benefit of Officer Beard's error, this does not require the error to be extended.

75. We also note there is no schedule produced of the equipment that was said to be rented.

76. We do not consider that the appellant has shown these payments were for the rental of kitchen equipment and therefore do not allow these amounts as input tax.

Best Judgment for VAT Assessments

77. VATA requires a "best judgment" assessment, providing that:

> "73 Failure to make returns etc.
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the *best of their judgment* and notify it to him.
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment." [our emphasis]

78. It is clear that there is a two stage process to be followed in considering a VAT assessment raised by HMRC in cases such as this. First, it must be established whether the assessment was made "to the best of their judgment". The burden lies on the taxpayer to establish that it was not. If that hurdle is passed, the burden then lies on the taxpayer to demonstrate that the assessment raised by HMRC is excessive. In *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, 292-3 Woolf J (as he then was) said, in respect of the precursor provision in s 31(1) of Finance Act 1972:

"the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and *bona fide*. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words 'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them."

79. In *C A McCourtie Customs and Excise Commissioners* [1992] Lexis Citation 802 Dr A N Brice, sitting as a judge of the VAT Tribunal, noted that:

"In addition to the conclusions drawn by Woolf J in *Van Boeckel* earlier tribunal decisions identified three further propositions of relevance in determining whether an assessment is reasonable. These are, first that the facts should be objectively gathered and intelligently interpreted; secondly, that the calculations should be arithmetically sound; and, finally, that any sampling technique should be representative and free from bias."

80. In *Rahman (trading as Khayam Restaurant) v Customs & Excise Commissioners (No 2)* [2003] STC 150, [2002] EWCA Civ 1881, Chadwick LJ gave the following guidance:

> "*The approach which tribunals should adopt on appeals under s 83(p) of the 1994 Act*
>
> [42] In the final paragraph of his judgment in Rahman (No 1) [1998] STC 826 at 840 Carnwath J drew attention to the dangers of 'an over-rigid adherence to the two-stage approach'. He said:
>
> > 'I do not wish to diminish in any way from the importance of guidance given by Woolf J [in the Van Boeckel case] to Customs officers as to how to exercise their best judgment when making assessments. However, when the matter comes to the tribunal, it will be rare that the assessment can justifiably be rejected altogether on the ground of a failure to follow that guidance. The principal concern of the tribunal should be to ensure that the amount of the assessment is fair, taking account not only the commissioners' judgment but any points raised before them by the appellant.'
>
> I respectfully agree with those observations.
>
> [43] It is inherent in the structure of the legislation that a taxpayer can challenge, on an appeal under s 83(p) of the 1994 Act, both the fact that an assessment under s 73(1) of the 1994 Act has been made and the amount of that assessment. There will be cases where the power to make an assessment ought not to have been exercised; because the pre-conditions to the exercise of the power (failure to make returns; failure to keep documents or afford facilities for verification; incomplete or inaccurate returns) were not satisfied. I suspect that those cases will be rare; but the tribunal can address them if and when they arise. There will also be cases where it is apparent on the face of the material before the tribunal that the power to assess has not been exercised in accordance with the 'best judgment' requirement; for example, where the commissioners have not taken into account information which was made available to them by the taxpayer before the assessment was made, or can put forward no basis upon which the assessment can be supported. Again, I suspect that those cases will be rare.
>
> [44] In the usual case the tribunal will have the material before it from which it can see why the commissioners made the assessment which they did; and may have further material which was not available to the commissioners when the assessment was made. In such cases, as it seems to me, a tribunal would be well advised to concentrate on the question 'what amount of tax is properly due from the taxpayer?' taking the material before it as a whole and applying its own judgment. If that leads to the conclusion that the amount of tax properly due is close to the amount of the assessment, the tribunal may well take the view that it would be a sterile exercise to consider whether the commissioners exercised best judgment in making their assessment. The tribunal has power 'on an appeal against a decision with respect to any of the matters mentioned in section 83(p) [of the 1994 Act]' to give a direction specifying the correct amount of the tax due; and where such a direction is given the assessment has effect as an assessment of the amount specified in the direction (see s 84(5) of the 1994 Act).
>
> [45] It is in cases where the amount of tax found by the tribunal to be properly due is substantially different from the amount assessed by the commissioners that the tribunal may think it appropriate to investigate why there is that difference; and to seek an explanation. That investigation may—but, often (as in the present case) will not—lead to the conclusion that the

> commissioners did not exercise best judgment in making their assessment. The tribunal may take the view, in such cases, that the proper course is to discharge the assessment. But even in cases of that nature, as it seems to me, the tribunal could choose to give a direction specifying the correct amount—with the consequence that the assessment would have effect pursuant to s 84(5) of the 1994 Act. It could not be criticised for doing so. The underlying purpose of the legislative provisions is to ensure that the taxable person accounts for the correct amount of tax."

81. *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015; [2004] STC 1509 both Carnwath LJ (at [[22]) and Chadwick LJ (at [84]) emphasised that a best judgment would be made where the officer made an "honest and genuine attempt" to make a reasoned assessment. Even in cases where there was no best judgment, the Court of Appeal suggested (at [23]-[28] and [90]) that it was open to the Tribunal not to discharge the assessment but to specify the correct amount, as Chadwick LJ also suggests in the passage quoted above. Carnwath LJ noted (at [29]) that:

> "Even if the process of assessment is found defective in some respect applying the *Rahman (2)* test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it. In the latter case, the tribunal is not required to treat the assessment as a nullity, but should amend it accordingly."

82. Carnwath LJ also noted (at [38]) that any allegation of dishonesty or other wrongdoing against those acting for the Commissioners should be stated unequivocally and that the allegation and the basis for it should be fully particularised.

83. Chadwick LJ accepted, at [75], that an assessment made on behalf of the Commissioners by an officer who had, consciously or unconsciously, 'closed his mind' to any material which did not fit his case, would not be an assessment of an amount due to the best of their judgment.

84. In *Karoulla (trading as Brockley's Rock) v HMRC* [2018] UKUT 255 (TCC) Judges Herrington and Scott cited with approval the summary of "best judgment" by Judge Scott in *Fio's Cash and Carry Ltd v HMRC* [2017] UKFTT 346 (TC) where he said:

> "14. In considering an appeal against an assessment under section 73(1), the approach to be adopted was set out in two Court of Appeal decisions, *Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners* [2002] EWCA Civ 181, and *Pegasus Birds Ltd v Customs and Excise Commissioners* [2004] EWCA Civ 1015. The law was more recently summarised by the Upper Tribunal in *Mithras (Wine Bars) Limited v HMRC* [2010] UKUT 115(TCC).
>
> 15. The first stage is for the tribunal to consider whether, at the time such an assessment was made, it was made to the best judgment of the Commissioners. At this stage, the tribunal's jurisdiction is akin to a supervisory judicial review jurisdiction. As stated by Chadwick LJ (as he then was) in *Rahman* (at [32]):
>
> > 'In such cases…the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable, or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case, the proper inference may be that the assessment was indeed arbitrary'.

16. Chadwick LJ observed (at [43]) that instances of a failure to exercise best judgment would be rare. As he stated at [36]:

> '…But the fact that a different methodology would, or might, have led to a different—even to a more accurate—result does not compel the conclusion that the methodology that was adopted was so obviously flawed that it could and should have had no place in an exercise in best judgment.'

17. Where the tribunal is satisfied that the Commissioners have used their best judgment in making the assessment, the second stage for the tribunal is to consider whether the amount assessed is correct. As *Mithras* makes clear, in relation to this second stage the tribunal has a full appellate jurisdiction. It can therefore consider all available evidence, including material not available to HMRC at the time when the assessment was made, in substituting its own judgment as to the correct amount of the assessment.

18. The courts have emphasised that in most appeals against a best judgment assessment the tribunal's focus should be on determining the correct amount of VAT. As Carnwath LJ stated in *Pegasus Birds* (at [38]):

> '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.'"

85. It was agreed by the parties that the determination of whether the assessment is on the basis of best judgement applies to the entire assessment. As is evident from the foregoing analysis, we agree that the input tax was correctly assessed. We also agree with the assessment with regard to zero rating. However, we do not agree that there was a suppression of profits. Viewing the assessment as a whole, we must determine with it is best judgment.

86. Miss Brown's submissions on this point are that the assessment:

(1) Is not based on evidence since the VAT assessment is based upon till data from Two Bros that has not been adduced in these proceedings. No evidence of the visit report relating to the visit to Two Bros has been adduced, nor has Officer Beard adduced any analysis of the till data which gave rise to his conclusion that the card to cash ratio was 63: 37. Accordingly, the decision is not based upon evidence.

(2) Did not use representative sampling periods: the extracted till data apparently covers 75 days from 26 August 2017 to 8 November 2017. There is no way to verify this but, in any event, a 75 day period is not representative to extrapolate across 5 years. It is noted that in other calculations, used to support the allegations of suppression, a 17 day period (in relation to average cash sales) and a 7 day period (in relation to the percentage of zero-rating) have been used in the analysis. There is no rational basis for these samples or why different sample periods were used.

(3) Is arbitrary and unreasonable because:

(a) It is based upon till data extracted from two different businesses trading 3-6 years after the periods covered by the assessment. This is not reasonable and is an irrelevant consideration.

(b) Without seeing the till data and associated analysis, this Tribunal is not in a position to determine that HMRC's approach was fair and reasonable as the Appellants have not been given the opportunity to consider or test it and this

Tribunal cannot verify its accuracy or reasonableness. Officer Beard's conclusions and the 63:37 card to cash ratio are not accepted. From Officer Beard's oral evidence, it is understood that this ratio is a joint ratio for both Shere Khan and Oodles restaurants. At the very least therefore, it would be unreasonable to have the same card to cash ratio split for two restaurants with different offerings.

(c) HMRC failed to take into account relevant considerations such as seasonality. It was common ground the 17 day period covered Eid, price differentials or the changing demographic.

(d) The assessment includes Oodles n' Oodles, a restaurant that was not trading through the First Appellant, essentially for the same reasons we have found this to be the case.

(e) Officer Beard's calculations used to support the assertion that sales have been suppressed are flawed, unreasonable and do not prove suppression.

(4) The assessment includes Oodles that was not trading through BJSKSCL, essentially for the same reasons we have found this to be the case.

(5) Officer Beard's calculations used to support the assertion that sales have been suppressed are flawed, and do not prove suppression, essentially for the same reasons we have found this to be the case. The calculations are therefore said to be unreasonable.

87. From the findings we have made above it will be apparent that the primary factual basis on which these submissions are made is largely accepted.

88. However we do not consider that it follows that it is one of those "rare" cases where the officer has not made a "honest and genuine attempt" at making an assessment. No allegation of dishonesty has been made against the officer. Whilst, on his own admission, Officer Beard did not review the calculations provided by Mr Khan, the fact that there have been changes to the original assessment shows that he generally kept an open mind: reviewing evidence as it came in. Even though we consider that the facts that made Officer Beard consider that BJSKSCL was trading as Oodles could only, at best, give rise to a suspicion that may warrant further investigation rather than a conclusion, we consider that it does not follow from such misjudgement that Officer Beard did not make an honest and genuine attempt in his assessment. Furthermore, we are in agreement with Officer Beard's assessment with regard to zero rating and input tax.

89. Even if we were wrong in our assessment of best judgment, we do not consider that this is a case where the defect is so serious or fundamental that justice requires the whole assessment to be set aside. Given the lack of evidence in respect of the input tax claims and zero rating we consider, rather, justice can be done simply by correcting the amount to what the tribunal finds to be a fair figure on the evidence before it.

Whether Shere Khan omitted sales from its CT returns for the periods 30 April 2011 to 30 April 2013

90. It is clear from Officer Pinder's letter of 23 May 2018 that the CT assessment for omitted sales are on the same basis as the VAT assessment for suppression of profits. It does not relate to the input tax items (for example seeking to deny and expense, in the calculation of profits, which is not wholly and exclusively for the purpose of the trade). Nor is zero rating relevant to this.

91. It follows from our decision that there was no suppression of profit for the purpose of VAT, that there are no omitted sales for these periods.

Discovery assessments

92. The relevant parts of Schedule 18 of Finance Act 1998 ("FA 1998") specify that:

> "*Assessment where loss of tax discovered or determination of amount discovered to be incorrect*
>
> 41
>
> (1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that—
>
> (a) an amount which ought to have been assessed to tax has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given which is or has become excessive,
>
> he may make an assessment (a "discovery assessment") in the amount or further amount which ought in his opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> *Restrictions on power to make discovery assessment or determination*
>
> 42
>
> (1) The power to make—
>
> (a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or
>
> (b) a discovery determination,
>
> is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below.
>
> …
>
> *General time limits for assessments*
>
> 46
>
> (1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.
>
> (2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).
>
> (2A) An assessment in a case involving a loss of tax—
>
> (a) brought about deliberately by the company (or a related person),
>
> …
>
> may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

93. In *Anderson v HMRC* [2018] UKUT 159 (TCC); [2018] STC 1210, which was approved by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17; [2021] STC 1049 at [72], Morgan J and Judge Berner stated (at [24]) that they regarded the following propositions as established by the various previous authorities:

> "(1) s 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;
>
> (2) the concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;
>
> (3) the concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;
>
> (4) if the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of sub-s (1);
>
> (5) s 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;
>
> (6) although s 29(1) directs attention to the position of the actual officer, s 29(5) refers to the position of a hypothetical officer: *Sanderson v Revenue and Customs Comrs* [2016] STC 638 at [25];
>
> (7) although there might be some points of contact between the real and the hypothetical exercises required by sub-s (1) and sub-s (5) respectively, the tests for the two exercises are different: *Sanderson* at [25];
>
> (8) the actual officer referred to in s 29(1) is not required to consider whether the test required for s 29(5) is satisfied: *Hankinson v Revenue and Customs Comrs* [2012] STC 485, [2012] 1 WLR 2322;"

94. With regard to the subjective element they held (at [27]) that:

> "it cannot be said to be premature for an officer to 'discover'… 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."

95. Further with regard to the subjective element they held (at [28]) that:

> "In *Sanderson*, Patten LJ described the power under s 29(1) in this way (at [25]):
>
> > 'The exercise of the s 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."

96. With regard to the objective element (at [30]) they held that:

> "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."

97. In *Tooth*, which considered the equivalent provisions for discovery assessments in the Taxes Management Act 1970, Lord Briggs and Lord Sales (with whom the other members of the panel agreed) held (at [42]) that deliberately meant a statement "which when made, was deliberately inaccurate", it was not sufficient for it to be "a deliberate statement which is (in fact) inaccurate".

98. Lord Briggs and Lord Sales (at [63]-[65]) also accepted the following passage from *Charlton v Revenue and Customs Comrs* [2012] UKUT 770 (TCC), [2013] STC 866 that discovery involves a change in mind but not necessarily new information:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

99. Further Lord Briggs and Lord Sales accepted ([64]-[65]) the submissions made on behalf of HMRC that:

> "whether there is a discovery for the purposes of s 29(1) depends upon the state of mind of the individual officer of the Revenue who decides to make the assessment. For these purposes there is no concept of the Revenue having collective knowledge such that if one officer makes a discovery that is to be regarded as a discovery made once and for all by the Revenue as a whole. The result, according to Ms McCarthy's submission, is that a second or third officer (and so on) can also make the same discovery for themselves, so that each of them becomes entitled serially to issue a discovery assessment."

100. Lord Briggs and Lord Sales (at [79]) noted that the position was qualified by section 29(1) of the Commissioners for Revenue and Customs Act 2005, which provides that:

> "Anything… begun by… one officer of Revenue and Customs may be continued by… another",

noting that:

> "This would allow for one officer to begin consideration of a file under s 29(1) of the TMA and make a discovery and then pass it on to another to complete the exercise of assessment without the second having to revisit the opinion of the first officer that there was an insufficient assessment to tax in the return."

101. However, we note this still requires that the first officer has the subjective view that the assessment to the relevant tax is insufficient.

102. The legal framework is set out for completeness: we were taken through it at length.

103. With regard to the objective test, we have already stated our finding that the evidence could only reasonably give rise to a suspicion, rather than a belief, that there was an insufficiency of tax. Hence we find that the objective test is not met as the belief could not have been reasonably held.

104. This is all the more the case when we consider the information that was, on her own account, before Officer Pinder. It was noticeable from Officer Pinder's letter of 23 May 2018 was in the following terms:

> "I believe that the company's self-assessment tax calculation for the above periods are inaccurate. This is because of the reasons set out in the letter sent to you on 16 May 2018 by my VAT colleague Mr Beard.
>
> The checks carried out by my colleague have revealed that the turnover declared in the company accounts is inaccurate…
>
> My colleague has explained the basis upon which he has arrived at the revised figures in his letter."

105. Similarly, Officer Pinder's witness statement suggests her view regarding the deficiency of CT was formed on the basis of relying on Officer Beard's view of suppression. In her oral testimony she mentioned how she sat down with officer Beard and would go through his calculations: although this was not mentioned in her witness statement. However, what she did not mention in her witness statement or oral testimony is going over the reasons Officer Beard gave for believing BJSKSCL to be trading as Oodles.

106. We find it was not reasonable for Officer Pinder to merely take as given Officer Beard's view that BJSKSCL was trading as Oodles, without interrogating the reasons for holding this view. We find this to be a further reason for holding that the objective condition was not met.

107. It follows, in our view, that the conditions for issuing a discovery assessment were not met.

Penalties

108. The amount of VAT subject to any penalty only relates to the amounts in respect of zero rating and input tax, as we have decided for the appellant in respect of suppression of profits.

109. Likewise, as we have decided that there were no omitted sales for CT purposes and that the discovery assessment was invalid, any CT penalties fall away.

110. It is HMRC's case that the VAT penalties relate to deliberate but not concealed behaviour. As such the penalty is 70% of the potential lost revenue: para. 4 of Schedule 24 FA 2007. But that is subject to potential reductions for disclosure, under paras. 9-10 of Schedule 24 FA 2007, which specifies:

> "*Reductions for disclosure*
>
> 9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by—
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.

(2) Disclosure—

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

(b) otherwise, is "prompted".

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

10(1) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% to a percentage (which may be 0%) which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% to a percentage, not below 15%, which reflects the quality of the disclosure.

(3) Where a person who would otherwise be liable to a 70% penalty has made an unprompted disclosure, HMRC shall reduce the 70% to a percentage, not below 20%, which reflects the quality of the disclosure.

(4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of the disclosure.

…"

Input output penalties (including zero rating)

111. The penalties in respect of output tax (including zero rating) are explained in schedule 2 to the letter of Officer Beard dated 11 June 2019. Under the heading "description of the inaccuracy" it states:

> "Cash sales have been suppressed and under reported in the VAT return. In addition, you have not provided any evidence to demonstrate the zero rated sales claimed."

Officer Beard stated that the behaviour was deliberate for the following reason:

> "We consider that the behaviour was deliberate. This is explained below.
>
> From the review of the records provided it is clear that cash sales have been suppressed. In this respect, the cash sales on the Z readings appear to have been manipulated. *In addition, no evidence has been provided to demonstrate an audit trail for the zero rated sales claimed in the Returns.* Finally, evidence suggests that you have failed to declare any sales in relation to a second restaurant. It is clear that the Z readings were manipulated during the cashing up process which was undertaken by you, and that the manipulated figures were recorded on sales sheets that were used to complete the VAT Returns. Accordingly, it is clear that you knew the Returns were incorrect when you made the Returns." [our emphasis]

112. It is notable that the explanation in respect of the behaviour being deliberate in the letter covers behaviour relating to the alleged understatement of profit, rather than the zero rating. Similarly, HMRC's statement of case states the behaviour to be deliberate since:

> "355. No evidence was provided to demonstrate an audit trail for the zero-rated sales declared in the returns."

113. Officer Beard stated that the behaviour was prompted for the following reason:

> "The disclosure was Prompted because you didn't tell us about the Inaccuracy before you had reason to believe that we'd found out about it, or were about to find out about it."

114. With regard to reductions for the quality of disclosure, Officer Beard allowed the following reductions, totalling 25%:

> "**Telling**
>
> I have allowed 5% for telling. Whilst you have provided information regarding the business in general, you have not admitted to any inaccuracies.
>
> **Helping**
>
> I will allow 10% for helping. During the enquiry, you only provided Bank Statements. Subsequently in the Caseworker Reconsideration, you have provided sales information for three VAT periods only, despite repeated requests for all the information requested under a Schedule 36 Information Notice.
>
> **Giving**
>
> I will allow 10% for giving access to your records. During the enquiry, you only provided Bank Statements. Subsequently in the Caseworker Reconsideration, you have provided sales information for three VAT periods only, despite repeated requests for all the information requested under a Schedule 36 Information Notice."

115. Under the policy in HMRC's Compliance Handbook these are out of, potentially, maximum reductions of 40% for helping, 30% for telling and 30% for giving access (totalling 20%).

116. In the letter of 11 February 2021, which reduced the amendment to the assessment in respect of input tax, Officer Beard did not adjust the reductions for disclosure, noting that (separately, but identically, in respect of input and output tax):

> "Behaviour and quality of disclosure remain as per original Penalty."

Input tax penalties

117. The penalties in respect of input tax are explained in schedule 2 to the letter of Officer Beard dated 11 June 2019. Under the heading "description of the inaccuracy" it states:

> "Over claiming Input Tax. During the enquiry, you provided no evidence to demonstrate Input Tax has been claimed correctly, whilst the purchases and Input Tax claimed in the VAT Returns are significantly greater than the purchases noted in the Annual Accounts."

Officer Beard stated that the behaviour was deliberate for the following reason:

> "We consider that the behaviour was deliberate. This is explained below. During the enquiry, no evidence to demonstrate Input Tax has been provided despite requests under a Schedule 36 Information Notice. When the Input Tax and Purchases claimed in the VAT returns are compared to the Purchases in the Annual Accounts there is a significant difference suggesting that Input Tax has been over claimed."

Officer Beard stated that the behaviour was prompted for the following reason:

> "The disclosure was Prompted because you didn't tell us about the Inaccuracy before you had reason to believe that we'd found out about it, or were about to find out about it."

118. With regard to reductions for the quality of disclosure, Officer Beard allowed the following reductions, totalling 20%:

> "**Telling**
>
> I will allow 5% for telling. In this respect, you have not provided any explanations for the over claimed Input Tax.
>
> **Helping**
>
> I will 10% for helping. [sic] Whilst no information was provided during the enquiry, despite the issuance of a Schedule 36 Information Notice, you have subsequently provided some Purchase Invoices and Ledgers during the Caseworker Reconsideration for 11 periods.
>
> **Giving**
>
> I will allow 15% for giving access. Whilst no information was provided during the enquiry, despite the issuance of a Schedule 36 Information Notice, you have subsequently provided some Purchase Invoices and Ledgers for during the Caseworker Reconsideration for 11 VAT periods."

119. As noted above, under the policy in HMRC's Compliance Handbook these are out of, potentially, maximum reductions of 40% for helping, 30% for telling and 30% for giving access (totalling 20%).

Careless or deliberate?

120. The burden of proof is on HMRC to show deliberate behaviour.

121. Deliberate behaviour, in this context, requires proof that the taxpayer knowingly provided HMRC with a document which contained an inaccuracy, intending that HMRC rely upon it as accurate. This incudes where a taxpayer *suspects* that a document contains an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC. However, the suspicion must be more than merely fanciful: *CPR Commercials Ltd v HMRC* [2023] UKUT 61. As noted in the statement of case, the burden of proof is on HMRC.

122. In our view the behaviour with regard to the input tax was careless rather than deliberate. The record keeping of the company appears to be chaotic. We accept Mr Saddiq's evidence that he lost the records whilst the office of Oodles was refurbished and only rediscovered them, by chance, over a year later. Similarly, his failure to keep records in respect of the expenditure on petrol by employees suggests a chaotic and disorganised operating system. We accept Mr Saddiq's evidence that he was not able to obtain records from his former bookkeeper and accountant as they were uncooperative. With the help of Mr Khan, the appellants have produced a certain amount of evidence which persuaded HMRC to vary the original VAT assessment. This all suggests that the errors in the returns were attributable to carelessness, rather than deliberate behaviour on the part of the first appellant.

123. With regard to the zero rating we have also reached the view that the behaviour was careless. The explanation in the statement of case for the behaviour being deliberate, being lack of accompanying evidence, is as consistent with carelessly failing to retain records as it is with deliberately failing to audit zero rated sales.

124. We agree with HMRC that the disclosure was prompted.

125. We therefore adjust the calculation of the penalty so it is based on careless rather than deliberate behaviour.

126. Given the detailed correspondence and calculations provided to HMRC by Mr Khan, on behalf of the appellant, we consider the reduction for helping is too little. We would increase that from 10% to 20%. We consider the reductions for telling (5%) and giving (15%) that were allowed by HMRC are appropriate, for the reasons stated in HMRC's letter which we quote above.

Personal liability notice

127. We have found, above, that the inaccuracy was not deliberate, accordingly the requirement for a PLN in paragraph 19(1) of Schedule 24 to Finance Act 2007 is not met.

128. Accordingly, the appeal against the PLN is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

129. 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.

MICHAEL BLACKWELL
TRIBUNAL JUDGE

Release date: 18th JULY 2024