TC01878

Appeal number: TC/2009/12683

Income Tax – Penalties – Suppressed takings from Restaurant business reflected in concealed director's remuneration – Negligent submission of incorrect Tax Returns – Abatement of penalty.

Article 6 – Was there unreasonable delay by the State – Yes - Did it prejudice entitlement to a fair hearing – No.

Standard of proof – Civil.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAHIR IQBAL KHAWAJA **Appellant**

- and -

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

TRIBUNAL JUDGE: LADY MITTING
MEMBER: RAYNA DEAN FCA

Sitting in public in Manchester on 6 -9 February 2012

Tim Wheeler, litigation friend, for the Appellant

Adam Tolley, of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Khawaja appeals against a penalty determination made by the Respondents on 17 November 2004, pursuant to section 95(1)(a) Taxes Management Act 1970, the Respondents believing that Mr Khawaja had submitted incorrect tax returns, in that he had negligently underdeclared his income, first in the form of director's remuneration derived from under declared takings of Sahib Restaurant Ltd ("SRL") and secondly in the form of rental income and benefits in kind.

2. For the sake of ease, we refer to the Respondents throughout as HMRC, although their correct title pre 2005 would have been, in these proceedings, the Inland Revenue. On behalf of HMRC, we heard oral evidence from Mr Robert James Etty, the officer responsible for raising the penalty assessments. Mr Khawaja gave oral evidence and also called on his behalf Mr Peter Ferner and Mr Gary Staniland. He was to have called Mr Kaiser Matlub, but Mr Matlub was prevented from attending by a family bereavement. To avoid an adjournment, Mr Wheeler and Mr Tolley reached an agreement as to how a section of his witness statement, which we set out below, could be put before the Tribunal.

3. A number of issues arise out of this hearing but we begin with a chronological overview, necessary to place the hearing before us in the context of the history of the entire case.

Chronological overview

4. In October and November 2000, HMRC raised the following seven assessments against Mr Khawaja, one for each of the tax years 1992-3 to 1998-9 inclusive. The first four were HMRC assessments and the latter three, adjustments to self-assessment returns submitted by Mr Khawaja.

1992-3	Assessment omitted remuneration		£70,000
1993-4	Assessment omitted remuneration		£80,000
1994-5	Assessment omitted remuneration		£90,000
1995-6	Assessment omitted remuneration		£100,000
1996-7	Assessment omitted remuneration	Tax	£42,222
1997-8	Assessment omitted remuneration	Tax	£54,224
1998-9	Assessment omitted remuneration	Tax	£64,904

5. Mr Khawaja appealed against the assessments, his appeal being heard by the General Commissioners on 25, 26 and 27 June 2001. They determined the omitted remuneration in the following figures.

1992-3	Determined @	£15,000
1993-4	Determined @	£21,000
1994-5	Determined @	£31,000
1995-6	Determined @	£41,000
1996-7	Determined @	£51,000
1997-8	Determined @	£61,000
1998-9	Determined @	£71,000

The General Commissioners had taken as their base year 1995-6 and had determined that for that year the under declared income derived from the profits of the company was £27,750 and in respect of other matters, £13,250. They then adjusted the figure downwards for earlier years, particularly to take account of the reduced business of the Restaurant because of adjoining tram works, and upwards for later years, on the basis that the Restaurant was trading increasingly successfully.

6. Mr Khawaja appealed by way of case stated the decision of the General Commissioners, his appeal coming before Lawrence Collins J (as he then was) on 27 November 2003. He upheld the Commissioners' determination in principle but reduced each year's assessment by £5,000 to reflect the fact that some of the assessed rental income had in fact been declared and mortgage payments included in the assessment should not have been so included. He did not touch that element of the undeclared income which had been attributed to the takings from the company.

7. Mr Khawaja sought permission to appeal to the Court of Appeal against the decision of Lawrence Collins J. Permission was refused on paper by Jonathan Parker LJ. An oral application was refused by Neuberger LJ (as he then was) on 7 April 2004.

8. The amounts of tax payable for the years in question having now been set, and we should add also paid by Mr Khawaja, by virtue of the completion of the appeal process, the assessments as varied by Lawrence Collins J constituted "sufficient evidence that the income or chargeable gains in respect of which tax is charged in the assessment arose or were received as stated therein" (Section 101 TMA). Accordingly on 17 November 2004, HMRC raised the following penalty assessments which are the subject of this appeal. The first of the seven years, 1992-3 had fallen out of time and the penalties were abated by 50% resulting in penalty determinations of 50% of the tax shortfall.

Year	Tax Difference	Amount of Penalty
1993-4	£4,168.25	£2,084
1994-5	£7,009.50	£3,504
1995-6	£10,644.00	£5,322
1996-7	£14,962.24	£7,481
1997-8	£20,152.52	£10,076
1998-9	£25,730.16	£12.865

9. Mr Khawaja appealed the penalty determination, his appeal coming before the General Commissioners on 26 July, 12 September and 22 September 2005. The General Commissioners, applying the incorrect standard of proof, determined that Mr Khawaja had, beyond reasonable doubt, negligently understated his income in respect of rental income and benefits in kind for the full six years but they were not satisfied, beyond reasonable doubt, that he had negligently understated income in respect of remuneration from the restaurant. Without giving reasons, they determined the amount of penalties as follows:

1993-4	£900.00
1994-5	£900.00
1995-6	£900.00

1996-7 £1,000.00
1997-8 £1,100.00
1998-9 £1,200.00

10. HMRC appealed against this determination by way of case stated, their appeal coming before Mann J on 17 July 2008. He held that the General Commissioners had erred in law in applying the criminal standard of proof and that it should have been the civil standard applied to tax penalty proceedings and he therefore allowed the appeal in the following terms:

> "1. The appeal is allowed. This matter shall be remitted to the General Commissioners to reconsider the appeal as to penalties in relation to the matters which they found not to have been proved beyond reasonable doubt, and the penalties appropriately payable in respect thereof, taking such account as they see fit of the penalties they have previously found appropriate and payable.
>
> 2. If and to the extent that the cross-appeal was validly made, it is dismissed."

11. On 1 December 2008 Mr Khawaja sought leave to appeal out of time against the decision of Mann J. Permission was refused on paper by Mummery LJ on 9 February 2009 and on oral hearing by Moses LJ on 19 March 2009.

The issue before the Tribunal and the approach to be taken

12. The issue before us the Tribunal is therefore to determine the appeal against the balance of the penalty assessments to be dealt with in accordance with the order of Mann J. There was a dispute between the parties as to precisely how the £6,000 penalty, upheld by the General Commissioners, in respect of the property income should be reflected, HMRC having treated it as a straight deduction from the original penalty of £41,332 leaving in issue £35,332. Mr Wheeler, arguing that this would be unfair as it would deprive Mr Khawaja of the benefit of the abatement allowed by the General Commissioners, submitted the true figure should be £33,892. Mr Tolley, whilst not consenting, did not object to our adopting Mr Wheeler's figure which we therefore do.

13. It was common ground that following the decision of Jacob J (as he then was) in *King v Walden* (2001) STC 822 at para 53 the effect of the determination of the General Commissioners in 2001 as varied by Lawrence Collins J was to fix the amount of tax for the purpose of that amount being the tax payable and to create, for the purposes of the penalty proceedings, (the penalties being tax based) a rebuttable presumption that that was the amount of tax due and by reference to which the penalties should be calculated. It was further common ground that the legal burden of proof lay with HMRC throughout. There was however an evidential burden on Mr Khawaja to rebut the presumption as to the amount of tax due. There was, as put by Mr Tolley, an evidential presumption that "For the purpose of subsequent penalty proceedings pursuant to section 101 TMA, these assessments became sufficient evidence that the amounts in respect of which tax was charged in the assessments arose and were received as stated in the assessments."

14. In the light of how Mr Khawaja's case was to be put, we felt it important to establish with the parties the extent of the evidential burden to be borne by Mr Khawaja. The General Commissioners had concluded, at paragraph 8.9 of the Stated Case, that

> "the Appellant had omitted remuneration received by him from Sahib Restaurant Ltd, both in cash and in kind, during the years under appeal before us."

We put forward the proposition that there was in effect a two fold presumption, first as to the amount of tax due and secondly that it had been due from Mr Khawaja. The evidential burden would therefore be on Mr Khawaja to rebut both limbs of this composite presumption. Mr Tolley expressly accepted this proposition and Mr Wheeler did not demur from it or challenge it in any way. The evidential burden is therefore on Mr Khawaja to rebut the presumption both as to the amount of tax due and that it was due from him.

The standard of proof

15. The matter had been remitted by Mann J because the General Commissioners had applied, in his finding, the incorrect standard of proof. He makes it quite clear that they erred in applying the criminal standard and the case was remitted to be considered "on the basis of the correct standard of proof" (paragraph 30), ie the civil standard of a balance of probabilities.

16. Mr Wheeler however argued that in the light of *Gale v Serious Organised Crime Authority* (2011) UKSC 49 the correct standard of proof was in fact beyond reasonable doubt. In *Gale*, the Supreme Court concluded that it was the civil standard of proof which applied to recovery proceedings under the Proceeds of Crime Act. They so held because, in their analysis, the proceedings should be regarded as civil rather than criminal. Mr Wheeler stressed that the Supreme Court only held that the civil standard applied because the proceedings were civil. He drew from that the proposition that if the proceedings involved a "criminal trial" in that they resulted in the imposition of a penalty or punishment, then the standard of proof required would be that applicable to criminal proceedings.

17. We cannot accept this "jump". All the Supreme Court was doing was to hold that the civil standard applied to what in effect were civil proceedings. We have to accept Mr Tolley's contention that *Gale* has no bearing upon tax penalty proceedings, it being concerned with the application of Article 6 to subsequent proceedings which cast doubt on the validity of a prior acquittal in criminal proceedings.

18. There is also of course, as far as this tribunal is concerned, the ruling of Mann J that the re-hearing should apply the civil standard. We believe that that is binding upon this tribunal and we reject Mr Wheeler's argument that the effect of *Gale* is to "change the law" such that it comes within the ambit of *Arnold v National Westminster Bank Plc* (1991) 2 AC 93. Mr Wheeler cited the following reference by Lord Keith to the judgment of Sir Nicholas Browne Wilkinson VC in the court below.

> "In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the

yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can therefore see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case."

19. We take the view that *Gale* first does not apply to the proceedings before us and secondly does not constitute a change in the law such as would allow us to depart from the direction of Mann J. The correct burden of proof to be applied is that of a balance of probabilities.

Article 6 ECHR

20. Article 6(1) ECHR provides that

> "In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Mr Khawaja contended that his right to a fair trial within a reasonable time had been breached, that as a result it was no longer possible for there to be a fair hearing and that the penalty determination should therefore be quashed. A number of sub-issues arise from this contention with which we will deal in this order;

(a) When does time begin to run?

(b) Has there been a breach of the "reasonable time" requirement

(c) If so, what should be done?

(a) When does time begin to run

21. The competing dates are June 2000 as contended by Mr Khawaja and 2004 when the penalty assessments were raised, as contended by HMRC. It was accepted by both advocates that time will run from the date when there was "official notification…by the competent authority of an allegation that he has committed a criminal offence" (*Eckle v Federal Republic of Germany* (1982) 5 EHRR 1). Lord Bingham stated in Attorney General's Reference (No. 2 of 2001) 2003 UKHL38; [2004] 2AC 72 that in general the relevant period would begin at the earliest time at which a person is "officially alerted to the likelihood of criminal proceedings against him."

22. Mr Tolley put the relevant date at 17 November 2004 when the penalty notice was issued or at the very earliest 21 March or 15 July 2004 when letters were sent to Mr Khawaja advising him that penalties were to be imposed upon him personally. The then policy of HMRC was that penalties would not be imposed until the amount of tax had been determined in that the tax assessed had become final. This would either have been 30 days from the issue of the assessment when the time for appealing it had expired or, if the assessment had been appealed, the conclusion of the appeal process. In this case the conclusion of the appeal process had been in April 2004 when Neuberger LJ rejected Mr Khawaja's application for leave to appeal. We were told

that the reason behind the policy was so that a taxpayer would not be put to the trouble and expense of defending a penalty assessment if in fact it turned out that the tax was not due. This is no longer the policy and we were told that assessment and penalty notice are now issued together.

23. Mr Khawaja's contended date of 20 June 2000 arises in the following way. In 1997, HMRC began an investigation into SRL which we understand culminated in an assessment being raised against the company on 31 March 2000 and against which the company appealed on 3 April 2000. There was then at some stage a change of direction by HMRC when they decided not to pursue the company but Mr Khawaja personally. The assessment against the company, we were told by Mr Etty, would have been "informally discharged under Revenue procedure." Mr Etty accepted that the company may well not have been informed of the discharge as that would not have been Revenue policy. On 20 June 2000 an interview took place between HMRC officers and Mr Khawaja. We did not see a full transcript of the interview but were told that this was the interview at which Mr Khawaja was made aware that HMRC were considering pursuing him personally rather than the company. This would make sense from a timing point of view as assessments had already been raised against the company and appealed and assessments were to be raised against Mr Khawaja personally later that year. In the course of the interview, the interviewing officer said to Mr Khawaja

> "…and there's a similar penalty regime to Customs and Excise in which abatements can be deal (SIC) be given for such things as disclosure and co-operation and the gravity of the offence. Things work similarly, if it is decided or if it is agreed that there are additional takings on which tax arises then that tax is subject to penalties. Those penalties can be mitigated by reference to disclosure, co-operation and gravity…."

24. Arguing against the June 2000 date, Mr Tolley contended that it did not satisfy the test as Mr Khawaja was not then officially alerted to the likelihood of penalty proceedings against him. There was no Hansard warning and the mere reference to a leaflet was not a clear and unequivocal indication to Mr Khawaja that he was suspected of criminal misconduct.

25. Accepting Mr Wheeler's argument, we conclude that time does begin to run from 20 June 2000. On that date, Mr Khawaja became aware of the HMRC intention to pursue him personally and there is nothing unclear or equivocal in the statement …"if it is decided or if it is agreed that there are additional takings on which tax arises then that tax is subject to penalties." Mr Khawaja was being informed that if additional tax was to be found to be due from him, then that tax is subject to penalties. He was not told it *may be* or that it *could be* but that it *is* subject to penalties. The conversation then went into how the penalties could be mitigated and Mr Khawaja was handed leaflet IR73. This, in our view, was the moment when Mr Khawaja's situation was "substantially affected". From then on, the risk of an assessment against him being upheld carried with it the concurrent likelihood of a penalty assessment.

(b) Has there been a breach of the "reasonable time" requirement

26. We begin by defining the timescale we are looking at. We have determined it should begin on 20 June 2000. The case was initially listed for full hearing before the Tribunal in April 2011. It was taken out of the list at Mr Khawaja's request because his witness Mr Ferner was not available. Mr Wheeler expressly did not rely on any delay between April 2011 and this hearing so the period in question is June 2000 to April 2011.

27. Case law has established a number of legal principles in analysing what constitutes a "reasonable time" for the purposes of Article 6(1). We should take into account the complexity of the factual and legal issues arising, the conduct of the applicant and of the state and what is at stake for the applicant. The state is not responsible for delay that is attributable to the conduct of the applicant. The delays we are looking at are those attributable to the state, but these would include delays occurring within the legal process. These principles are, we understand, non contentious between the parties. Rather more contentious would be the conduct of Mr Khawaja in the pursuit of his various appeals. Mr Tolley argued that Mr Khawaja had in effect created a good proportion of the delays himself in his pursuit of unmeritorious appeals. Mr Wheeler argued that Mr Khawaja could not have it held against him that he had made full use of the procedures available to him under domestic law to pursue his defence *(Eckle)*. We take our stance from paragraph 82 of *Eckle* which reads as follows:

> "Far from helping to expedite the proceedings, Mr and Mrs Eckle increasingly resorted to actions – including the systematic re-course to challenge of judges – likely to delay matters; some of these actions could even be interpreted as illustrating a policy of deliberate obstruction.
>
> However, as the Commission rightly pointed out, Article 6 did not require the applicants actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for having made full use of the remedies available under the domestic law. Nonetheless, their conduct referred to above constitutes an objective fact, not capable of being attributed to the respondent State which is to be taken into account when determining whether or not the proceedings lasted longer than the reasonable time referred to in Article 6(1)."

28. Mr Wheeler pointed to six specific areas of what he called "exceptional delay" and we now take these in turn.

<u>20 June 2000 to 17 November 2004</u>

Mr Wheeler argued that there was no reason why HMRC could not have issued the penalty at the same time as the assessments were raised in late 2000. Mr Wheeler attributed the entire four year delay to the state. However, as Mr Tolley submitted, this was the policy of HMRC at the time and the penalty determinations were raised as soon as practicably possible after the conclusion of the appeal proceedings. In principle we accept Mr Tolley's argument but having said that, this was a policy which lends itself to the possibility of delay and lengthy time periods between the raising of the assessment and the penalty and there is no reason why we should not look at the delays which occurred within that period. Mr Khawaja was entitled to

pursue his appeals and indeed it has to be observed that Neuberger LJ who dealt with the final appeal did not give any indication he found it to be frivolous or totally without merit. Within the legal process however there was a quite considerable delay. The Commissioners concluded their hearing on 27 June 2001. Their case stated was not signed off until 11 March 2002 and the case did not come before Lawrence Collins J until November 2003. There was thus a delay of almost two and a half years in the first appeal coming on for hearing. The remainder of the legal process within that period passed relatively speedily but there was then a delay of some six months before the penalty assessments were issued.

26 July 2005 to 26 September 2005

This was the delay in listing the adjourned date for the original penalty determination hearing before the General Commissioners. We find nothing untoward in this.

26 September 2005 to 24 January 2006

This was the period it took from the conclusion of the penalty hearing before the General Commissioners for their decision to be communicated to the parties. As the notification to the parties consisted only of a one and a half page purely factual record and was dated 30 November 2005, we do find it untoward that it should take so long. We are not here talking about a full written reasoned judgment.

24 January 2006 to 5 February 2008

This was the length of time it took for the clerk to the General Commissioners to state his case. He has accepted full responsibility for the delay which appears to have been for reasons personal to him. However, this does not mean, as Mr Tolley contended, that it is not the responsibility of the state. It was a delay within the judicial process and the state takes responsibility for delays both by its personnel as well as by its systems.

The failure of the High Court to effect service of the sealed order of Mann J

The order of Mann J was sealed on 25 July 2008 but through some administrative error was not served on Mr Khawaja until November. There clearly appears to have been some error in the system but Mr Khawaja had been represented in court. He knew he wished to appeal and knew he would need the sealed copy Order. It was up to him to chase it up rather than just wait for it to arrive and then chalk up the delay. It should be noted that Moses LJ expressed his view as "the appeal is in my view hopelessly out of time, with no adequate explanation as to why this was. The applicant says he was out of the country when he received the copy of the sealed order that is dated 25 July 2008. But that is no excuse."

19 March 2009 to 23 February 2010

This is the period between the dismissal of Mr Khawaja's renewed application for permission to appeal to the Court of Appeal and the directions hearing before the tribunal.

There clearly was some delay in the transfer period between the General Commissioners and the Tribunal but as Mr Tolley pointed out Mr Khawaja did nothing for himself to progress the matter and letters which might have moved things on went unanswered.

29. On the face of it, it would seem that there must have been an inordinate delay for it to take eleven years for the penalty proceedings to reach this hearing. However, before we can find that there has been an 'unreasonable delay', we have to discount those periods when the fault does not lie with the state. Mr Khawaja has pursued endless appeals and whilst not holding this against him, it is "an objective fact, not capable of being attributed to the state". Far more culpable is the failure of Mr Khawaja to expedite matters and indeed in a number of cases to positively delay them. To be balanced against this however there have been clear and unacceptable delays within the judicial process for which Mr Khawaja, as far as we know, does not bear any blame.. We refer here specifically to the delay in the first appeal to Lawrence Collins J; the delay in the release of the decision of the General Commissioners hearing the penalty proceedings; the delay in the preparation of the stated case following those penalty proceedings and finally probably some part of the delay in the transfer period between the General Commissioners and the Tribunal. We find this a far from straightforward decision but on balance we believe the delays caused by the state have been unacceptable and unreasonable and we conclude that there has in this case been an unreasonable delay for which the state should be regarded as responsible.

(c) What is to be done

30. It was accepted by Mr Wheeler, obviously correctly, that it was necessary to demonstrate prejudice before we could even consider either quashing the penalty, as Mr Wheeler wishes us to do, or staying the proceedings. We now therefore consider whether or not the delay has prevented Mr Khawaja from getting a fair trial. Mr Wheeler submitted first that Mr Khawaja has lost the ability to have this hearing before the original General Commissioners. Mr Wheeler's reasoning appears to be that we would not have been in the position to take full account of the £6,000 penalty already imposed. In fact as we recited earlier in this decision, this has been taken account of and adjusted in accordance with Mr Wheeler's calculation. Secondly, Mr Wheeler argued that HMRC had the opportunity to improve the presentation of its case. This has clearly not happened as they called no evidence other than that of Mr Etty and indeed it has to be said that as against this, Mr Khawaja has called all the witnesses whom he wished to call (subject to Mr Matlub of whom more below). Of the witnesses who gave evidence, Mr Ferner was clearly the master of his brief and had no difficulty getting his point across. He had before him his reports which were factual and arithmetical, again not prejudiced by the passage of time. Although the original till engineer Mr Dobson could no longer give evidence before us, we did hear Mr Staniland who reported to Mr Dobson and had worked at SRL. Mr Staniland also appeared to be the master of his subject and was able to explain to us fully how this till was operated by Mr Khawaja and how it was in fact capable of being operated had he so wished. We were not prejudiced by the fact that the till itself was out of production and we were not able to see a working model. Neither do we accept Mr Khawaja's assertion that he, himself, was prejudiced in the giving of his evidence by the delay. We note Mr Tolley's point that these matters will have remained fresh in

Mr Khawaja's mind given the number of times he has had to give evidence on them in the intervening period. He gave evidence in 2001 before the General Commissioners; in 2005 before the General Commissioners and in 2007 before the VAT Tribunal. The vehemence and clarity of his evidence before us leads us firmly to the view that on all salient points the passage of time has not dimmed his memory or his ability to give the evidence he would have wished to give.

31. We conclude and find that Mr Khawaja has not been prejudiced by any delay which there has been and the delay has not prevented him from having a fair hearing. There is therefore no question of our quashing the penalties or staying the proceedings.

32. There remains the question however of what we can do given that we have found that there was an unreasonable delay but that it has not prejudiced Mr Khawaja. Mr Wheeler argued that that section 100B (2)(b)(ii) TMA gave us a discretion to reduce the penalty to recognise the infringement of Mr Khawaja's Article 6 rights. We do not read section 100B as giving us this power. This section gives the power to reduce the penalty if we believe the *amount* is incorrect. This has, in our view, to relate to the calculation of the penalty itself and the factors giving rise to it. It cannot be reduced purely and simply to take into account some totally extraneous and unlinked event. There is nothing about the penalty which is time based so no adjustment can be made by that route. The jurisdiction of the tribunal is defined by statute and we do not see that we have any statutory power to reflect the delay in any adjustment to the penalty. We believe that all we can do is make our finding and acknowledge the delay.

Did Mr Khawaja submit incorrect tax returns for the years 1993-4 to 1998-99?

33. It is the case of HMRC that Mr Khawaja negligently underdeclared his income derived from the profits of SRL in each of the years in question. HMRC, bearing the legal burden of proof, rely on the earlier findings of the General Commissioners, for the most part upheld in the High Court.

The case before the General Commissioners

34. The General Commissioners heard oral evidence from Mr Khawaja and on his behalf from Mr Michael Thomas, a partner in the tax consultancy firm representing him, and Mr Peter Dobson, an electronic till expert. Mr Etty, representing HMRC, called several officers.

35. At the conclusion of the hearing, the Commissioners handed a brief resume of their findings to the parties which records as follows:

> "4. We then very carefully considered all the evidence put before us concerning the alleged under-declared restaurant profits, and have the following comments upon that aspect:
>
> (1) With regard to the average number of customers dining in the premises we have to say that we were not very persuaded of the accuracy of the figures put forward by the Customs and Excise Officers following their covert

observations. Nevertheless we find that the numbers admitted to by the Appellant were understated

(2) Unfortunately the Appellant's habit of keeping some till slips and destroying others understandably gave the wrong impression to the Inland Revenue. We feel that the supposed missing till slips in the consecutive numbering sequence have largely been explained by the evidence of Mr Dobson, the till engineer, but we still feel such leaves a number of 'missing numbers' without a cogent explanation.

(3) We consider it difficult to find an explanation for why a 'z' – reading would be taken from the till more than once a day, other than on occasional engineer's visits.

(4) As to the delivery and invoicing of the Appellant's supplies, we find the system very strange and uncommercial and obviously open to manipulation.

Accordingly, we find there is evidence of irregularity in the recording of meal sales.

5. We consider the fairest way of computing a more correct total for sales is to work upon the amount of chicken meat purchased, of which there have been several versions put before us during the proceedings. Our own figures for this exercise are as follows:-

(1) Whole chickens of 8661lbs at 50% wastage = 4,330lbs available to serve.

(2) Chicken breasts of 11,973lbs at 40% wastage = 7,183lbs available to serve.

(3) Other meat of 4586lbs at 10% wastage = 4,127lbs available to serve.

(4) Total available to serve is therefore 15,640lbs or 250,240oz.

(5) On the basis of 10oz per meal and an average of £10 per meal sales would be £250,240.

(6) Taking out the VAT element of £37,270 leaves a VAT exclusive figure of £212,970.

(7) Deducting the amount of sales declared in the accounts £184,938 gives a discrepancy of £28,032.

6. Accordingly the figure of £28,032 when added to the £13,250 concealed emoluments as above produces a grand total of £41,282 – say £41,000." (Note added by the current Tribunal – the General Commissioners' figures were based on 1995-6).

36. The Stated Case recorded further findings of fact set out as follows:

"8. Having carefully considered the oral and documentary evidence put before us, we found the following Primary Facts:-

8.1 That the Appellant was a controlling director of the Company known as Sahib Restaurant Limited. *This was not disputed by the parties.*

8.2 That the Appellant was in receipt of rental monies from the said Company in respect of the premises owned by the Appellant from which the Company carried on its restaurant business. That the Appellant had arranged for the Company to discharge out of those rental monies, mortgage payments applicable to the said restaurant premises. That there was still a balance of rental monies left over after the said loan interest payments had been made. *In these findings we relied upon the letter from the Appellant's own accountants, Kirtley Qureshi & Co dated the 22nd September 1999.*

8.3 That in addition to discharging out of the rental monies the loan interest applicable to the restaurant building, the Company had also discharged the loan interest payments upon a private property of the Appellant taken out with the Bradford & Bingley. *In this we relied upon a further letter from Kirtley Qureshi & Co, the Appellant's own accountants, dated the 22 September 1999, paragraph 2(a) thereof.*

8.4 That the Appellant had been in receipt of benefits in kind from the Company in the form of car benefit, fuel benefit, and the payment of outgoings in respect of the flat above the restaurant whilst the Appellant had been resident there. *On this, we accept the evidence of Mrs Cullen, HM Inspector of Taxes, which was not disputed by the Appellant.*

8.5 That the books and records kept by the Company in respect of its restaurant business were subject to discrepancies and that the annual accounts lodged for the Company were subject to inaccuracies. *On this we accepted the evidence once again of Mrs Cullen, HM Inspector of Taxes, and the submissions of Mr Etty, which we felt had not been rebutted before us by either the Appellant or his agent Mr Renshaw.*

8.6 That the raw meat purchased by the restaurant in the year to the 31st October 1996 was : whole chickens 8,661lbs; chicken breasts 11,973lbs; and other meat 4,586lbs, at a minimum. *On this we relied upon the figures set out in the business economics exercise prepared by the Inland Revenue, noting that the commensurate figures used in the business economics exercise prepared by Messrs Renshaw Thomas were actually slightly higher.*

8.7 That the average amount of meat in the meals served by the restaurant was approximately 10 ounces and the average price of a meal was approximately £10. *On this we accepted the figures put forward by the Inland Revenue in their business economics exercise as being fair and reasonable in the circumstances.*

8.8 That the wastage on whole chickens was 50%; on chicken breasts was 40%; and on other meat was 10%. *On this we rejected the wastage percentages put forward by both the Appellant and the Revenue, and found in accordance with our own assessment of the uncooked chicken placed before us by Mr Renshaw during his submission.*

8.9 That the Appellant had omitted remuneration received by him from Sahib Restaurant Limited, both in cash and in kind, during the years under appeal before us. *That this was so, at least as far as the benefits in kind were concerned, was not disputed by the Appellant or his Agent.*"

37. It is clear from the layout of the General Commissioners' resume that they used the business economic exercises and their own variation thereon to calculate the amount of the suppressed takings, *not* to establish that there had been a suppression. We take this from their paragraph 4 in which they list a number of factors they took into account and concluded "Accordingly, we find there is evidence of irregularity in the recording of meal sales". Their paragraph 5 then begins "We consider the fairest way of computing a more correct total for sales …". We are aware that Mr Wheeler was arguing before us that the calculations which he was to produce would demonstrate that there had been no suppression but we are, at this stage in our decision, looking only at the factors upon which the General Commissioners found that there had been a suppression as these are the matters relied upon by HMRC in their evidence to us. We do for these purposes therefore put the business economic exercises to one side and will come back to them in due course. Reading the resume and the stated case together, it is apparent that the General Commissioners based their view that there had been suppression on the following factors:-

- The system of invoicing adopted by SRL's suppliers.
- The workings of the till, the billing process and 'z' readings.
- The HMRC covert observations.
- The inaccuracy of SRL's books, records and company accounts.

On some, but not all, of these matters Mr Khawaja gave oral evidence to the Tribunal and called supporting evidence and we take each of them in turn. It was Mr Khawaja's submission that there was no suppression.

The suppliers

38. Mr Khawaja was to have called Mr Kaiser Matlub, who as we have said was prevented from attending by a family bereavement. Mr Matlub had put in a witness statement dated 23 December 2010 and to avoid the need for an adjournment, the parties agreed that we should accept in evidence the following extract from the witness statement which describes the firm's method of invoicing.

"All our sales invoices are dated with Monday's date although deliveries may be made not only on a Monday but on other days throughout the week also. This is because it saves me considerable time if I write up the sales invoices for our regular customers for the following week in advance. This will involve me

in preparing say twenty such sales invoices with the following Monday's date and the name and address of each customer. The remainder of each invoice will be left blank pending receipt of each customer's actual order at which time the order will be filled in on the invoice. If deliveries are made at different times throughout the week involving further orders from the same customer then those further orders will be added to the same invoice. We will just keep adding items to the same invoice but the invoice will still be dated with the Monday's date. "

39. Mr Khawaja added little other than to verify that this was the process. He challenged the General Commissioners' comments on the process as being unfair and arising only because of HMRC submissions to that effect. We have no reason to doubt the truthfulness of Mr Matlub's description and can but endorse the Commissioners' comments which are clearly right. This however is not to say the process was manipulated. We make no finding of manipulation as we heard no evidence which could lead us to that conclusion. However, we do not accept Mr Wheeler's assertion that to have made the comment, the General Commissioners must have misunderstood the process.. We see no reason why they should have done, or indeed that they did.

The system of billing and the workings of the till

40. In his witness statement, taken as his evidence in chief, Mr Khawaja described his electronic till as no more than a cash drawer to store the takings and to produce an itemised bill for customers. He maintained that all takings would be run through the till and recorded on the 'z' report. SRL did not regard the individual customer bills as being a prime record for the purpose of its accounts and there was no system of taking copy or duplicate bills. When asked in cross examination why a duplicate bill was not taken for the accounting records when all that was needed to obtain one was to press a button, Mr Khawaja replied that the waiters were far too busy. It was, he said, "not a possibility". We were told that some customers would leave their bills behind and if these were found not to have been too damaged or defaced then they would be collected up by the waiting staff and archived. The purpose of this, Mr Khawaja said, was that if a customer were to ring up afterwards and ask for his bill it could be produced. These random bills would also be produced to visiting officers on a VAT inspection. Mr Khawaja accepted in cross examination that the restaurant did have an upstairs till, in addition to the main till downstairs. This till was used only as a training till for new bar staff. The upstairs was only used if the restaurant was particularly busy at weekends or for a private party and even then the till would only be used occasionally for cash drinks. Bills were sometimes run off from the upstairs till but all would be processed from downstairs where the payment would be entered and recorded.

41. Mr Khawaja would keep a manual daily record of takings. He would count the cash in the till and record the amounts. This daily record of takings should, but did not always, match the 'z' reading, either in category or amount because mistakes could happen by the inadvertent pressing of the wrong button on the till. The till, which was operated by all the waiters rather than one designated operative, was situated on the far side of the bar thus making it difficult to access and lending itself to errors in keying in. We were taken to a sample cash record dated 19 March 1999

and the corresponding 'z' reading. The total takings tallied to within a pound or two but the individual elements did not. The 'z' reading cash takings were recorded as £842.59 as against £686.39 on the manual record. Cheques matched but the PDQ record on the 'z' reading was recorded at £62.95 against the manual record of £279.80. Mr Khawaja explained that the written record would be correct as the PDQ figure would be taken from the PDQ machine but on the till it must have been rung through wrongly as cash. Mr Khawaja explained that the accuracy of the manual record was not important. What mattered was the 'z' reading and even if a keying-in error occurred, the total amount would be accurate. We should note here that this apparent mismatch of cash record and 'z' reading was referred to before the General Commissioners and was contained within Mr Etty's submissions being recorded as follows, "Mr Etty drew our attention to a sample from the 19 March 1999, when neither the credit card total nor the cash total tallied with the figures recorded by the Appellant in the cash book." It appears that the explanation which was given to us was not given to the General Commissioners but for our purposes we would merely say that we accept the reconciliation and it appears that the error arose as described.

42. It was Mr Khawaja's almost invariable practice, he told us, to take one 'z' reading per day and this would ordinarily have been at the end of the shift which could be in the early hours of the following morning or occasionally it would be taken the following day before the start of the next day's trade. When asked just how often two 'z' readings per day could be taken, Mr Khawaja said no more than once or twice a year. There were occasions when an engineer came when several readings might be taken as part of the maintenance exercise. Mr Khawaja told us that before the General Commissioners, one officer had misstated that when he carried out a walk in inspection in the early hours of 19 December 1999 at the close of business, he found that a 'z' reading had already been taken earlier in the evening, thus wiping the record. It was this assertion, Mr Khawaja had believed, that had led to the General Commissioners comment upon the 'z' readings. That the officer's statement was untrue was apparently accepted by the officer himself before the VAT Tribunal and was evidenced to us by the production of the 'z' readings dated and timed 18 December at 04.50 (No. 228); 19 December at 04.53 (No. 229); 20 December at 13.29 (No. 230) and 21 December at 03.05 (No. 231). This incident of the 19 December 1999 was also referred to in paragraph 6.3 of the stated case, being recorded as a submission by Mr Etty. At that time, there was no evidence to show that the officer had lied and we accept that it could well have been a factor which influenced the General Commissioners in their finding at 4(3) in the resume. There was however further evidence, as we recite below, on multiple 'z' readings. We were shown a print out listing sequential 'z' readings taken from 3 March 1999 to 1 April 1999. This list had been compiled by Mr Khawaja and was put in evidence before the General Commissioners. There were 32 listed readings for a 30 day period. Two readings had been taken on the 28 March at 02.37 and 13.25; on 29 March at 12.54 and 13.07 and on 1 April at 01.03 and 12.42. Listed as 'missing' are No's 2078 which is still unexplained and 2099 which was not in fact missing but recorded elsewhere. No's 2089 to 2095 were missing, put down by Mr Khawaja to an engineer's visit although there was no evidence of this but seems probable as 2088 was timed and dated 01.21 on the 16 March and 2096 at 01.09 on 17 March. There seems no other logical reason why seven readings should have been taken during one 24 hour period. Mr Khawaja was asked by Mr Wheeler in re-examination why there should have been two readings on the 28 March to which Mr Khawaja replied rather vaguely that there may have

been a private party. He was not asked to, and did not, explain the double readings on the 29 March or 1 April.

43. On behalf of Mr Khawaja Mr Gary Staniland gave evidence. Mr Staniland is a support engineer employed by Fujitsu Siemens. Mr Staniland was responsible for programming although not installing the Casio TK 5100 electronic till used throughout the relevant period. In his witness statement, taken as his evidence in chief, he commented specifically on the concern expressed by the General Commissioners at the 'missing numbers' and 'missing till slips'. Mr Staniland explained that there is no consecutive numbering sequence so far as till slips produced by this machine are concerned. What the Commissioners described as 'consecutive numbers' on the till slips is not a consecutive number at all but is a number generated according to the number of transactions that have been made on the till at the point of production of the till slip. He explained that the till could issue three till slips consecutively but they would not be numbered consecutively but would each have a different but not consecutive 'transaction number' which would be governed by the number of operations keyed through the till over the relevant period of time. The reference to 'missing numbers' was misconceived and he likened it to attempting to judge how many miles a car has been driven by counting the number of times its doors have been opened and closed. The till is programmed to keep a separate record for each table. Every transaction processed through the till is given a sequential number. The number and a transaction are then allocated to the appropriate table. For example, table 1 might have allocated to it transactions numbered 1, 5, 7 and 10 etc. The number allocated to the bill would not be a bill number in the sense of all bills being given a sequential number to each other but it would merely be the next transaction number going through the till. Missing till slips can therefore not be explained by missing numbers. When a meal bill is printed off it is called a 'guest receipt', although the word receipt is a misnomer. This is not necessarily the final bill because it is not unknown for customers to, for example, order further drinks whilst perusing their bills or guest receipts. It would be possible to run off a second copy of the guest receipt but would serve no useful purpose as there is nothing to say it would be the final bill. A duplicate copy of the final bill can be obtained by the pressing of a single key when payment is made.

44. Mr Staniland explained that every till will be customised to the requirements of the business. SRL's till had therefore been programmed in accordance with instructions which Mr Khawaja would have given. There are a number of functions and reports which could be generated but each business defines those which it needs or wants. In the case of SRL, the till was programmed in such a way that the 'z' report would not be a transactional report but merely a brief summary of aggregate takings. A 'z' reading would be taken by turning a key on the till to the 'z' position and pressing 'cash'. It would therefore be possible to accidentally take two 'z' readings if the key remained in the 'z' position and the cash button was inadvertently pressed twice.

45. What we take from Mr Staniland's evidence is first, that the transaction numbers to be found on each bill identify nothing in terms of sales. They are just process numbers. Secondly, tills are programmed according to the instructions of the business. Mr Khawaja could have given instructions for there to be an itemised and transactional 'z' reading but he did not. In reality the 'z' readings produced by this

till were never, in isolation, going to provide an audit trail. The reports simply did not disclose enough information. Thirdly, it would be possible for a 'z' reading to be taken accidentally but only if the 'z' key remained in place. To take a 'z' reading is a two stage operation and it is therefore highly unlikely that an accidental 'z' reading could be taken other than by pressing the cash key twice in quick succession.

The covert observations and the flawed accounts

46. As recorded in the resume, the General Commissioners found that although they did not accept HMRC's figures on the covert observations, they were satisfied that Mr Khawaja had understated the number of his customers. As recorded in the stated case, the General Commissioners found that the company books were subject to discrepancies and the annual accounts subject to inaccuracies. Neither of these findings were referred to before us. No evidence was given in relation to them and no submissions.

Our conclusions on whether or not there were suppressed takings from the Restaurant

47. We find the evidence put before us clearly points to a suppression of takings. Looking at the 'z' readings, there were three occasions within a four week period when more than one 'z' reading had been taken and for which there was no satisfactory explanation. This would have been totally contrary to Mr Khawaja's stated practice. Mr Khwaja had the till programmed so that it did not show individual bills on the z reading. We accept and understand how the numbering on the till operated and that the numbers on the bills were not in fact sequential bill numbers but merely transaction or process numbers. The problem here however is, as pointed out by Mr Tolley, Mr Khawaja did not keep a full set of bills. There was no audit-worthy set of records. It would have been easy for duplicate bills to have been kept. All that was needed was one press of a button. We find equally unsound Mr Khawaja's explanation that he kept random bills in case a customer should ring up and ask for his bill. That might explain keeping them for a few days but not archiving them and keeping them for years. We are strongly influenced by the findings of the General Commissioners that Mr Khawaja understated his customer numbers and that the accounting records and the company accounts were inaccurate. Mr Khawaja offered no explanation on either of these matters. An understatement of customer numbers equates to suppression of takings. Mr Khawaja would always have found it difficult to satisfy the evidential burden on him to rebut any presumption of suppression because of his failure to keep proper records. His records never did and were never intended to provide an audit trail. We also, we have to say, accept Mr Tolley's submission that it is a fair inference that if a taxpayer provides an incorrect return in one respect, he is more likely to have made errors in other respects. Again, as Mr Tolley pointed out, there was nothing specific about the benefits in kind to lead to the conclusion that the errors were isolated examples.

48. The findings of the General Commissioners were also considered and endorsed by Lawrence Collins J who said at paragraph 26,

> "in view of the matters set out in the decision, on the account of the evidence and arguments put before the Commissioners, and in view of the findings of fact

and conclusions in the case stated, it is quite impossible to say that there was no evidence to support the Commissioners' findings that there were undeclared profits from the Restaurant and equally impossible to say that the only true and reasonable conclusion would have been that there were no such undeclared profits. Indeed, the material indicates that there were fully entitled to make the findings they did."

49. For all these reasons HMRC have satisfied us on a balance of probability that there were undisclosed takings from SRL. Having so found, we now set about establishing the amount of such undisclosed takings, again using 1995-96 as a base year.

Quantum

50. We have set out in paragraphs 35 and 36, the findings of the General Commissioners and their reasoning. Their starting point was the amount of raw meat purchased. It was never made clear to what extent this was derived from invoices but it was a figure which both parties invited us to adopt. The Commissioners then applied a wastage element of their own choosing, rejecting the wastage percentages put forward in both the business economics exercises presented to them. They adopted the portion size and applied the average meal price, in both cases taken from the HMRC business economics exercise.

51. It was Mr Khawaja's case that the approach of the General Commissioners was flawed. In support of this contention, Mr Ferner gave evidence on behalf of Mr Khawaja. Mr Ferner is an independent expert and consultant with regard to food matters, specialising in meat and is a Member of the Institute of Meat. He is a registered meat surveyor of the International Meat Traders' Association Incorporated and acts as an expert witness in such matters. Mr Ferner's brief was to examine the Commissioners' findings as to wastage, although he accepted in cross examination that this was not the sole consideration in determining the number of meals capable of being served. Just as important, he accepted, was to determine the amount of raw meat purchased, how much usable meat could be extracted and the average portion size. Mr Ferner observed chefs at the restaurant preparing and cooking chickens, front ends of chicken and a leg of mutton. He was able to watch and analyse the entire cooking process over several days and his findings were set out in detailed tables. His findings as to cooked meat yield can be summarised as follows:

Whole chickens (chicken wings counted as waste)	26.77%
Chicken breasts (chicken wings counted as waste)	28.45%
Leg of mutton	34.16%

52. Although not specifically commenting in his report on portion size, Mr Ferner did produce data on portion size as follows:

Chicken breasts							Average
Grams	190	200	165	210	210	180	192
Ounces	6.70	7.05	5.82	7.41	7.41	6.35	6.79

Chicken thighs				Average
Grams	250	194	264	236
Ounces	8.82	6.84	9.31	8.32

Leg of mutton				Average
Grams	160	160	150	157
Ounces	5.64	5.64	5.29	5.53

53. Mr Wheeler put forward a comprehensive table comparing sales figures on alternative bases. His starting point for all of them were the gross weights of chicken and lamb adopted by the General Commissioners. To these he applied the yield figures from Mr Ferner's report and as a comparison showed those applied by the General Commissioners. He concluded that on Mr Ferner's calculations there would be a total of 118,048 ounces of cooked servable meat comprising whole chickens, chicken breasts and lamb, and that portion size would be between 6 and 8 ounces. That compared with the General Commissioners' weight of 250,256 ounces and 10 ounce portion size. Adopting Mr Ferner's figure of 118,048 ounces of available meat, he then divided this into portions of varying sizes ranging from the 10 ounces applied by the General Commissioners to the 6 ounces being Mr Ferner's minimum portion size.

54. Mr Khawaja had selected and analysed approximately 300 of his archived guest receipts. These ranged over the period 25 August 1996 to 5 June 2000 and showed a sales value per main course chicken/lamb portion of £5.69 or £6.19 to include when chicken or lamb was taken as a starter. They also showed an average sales value for the whole meal per main course chicken/lamb portion of £13.69. Mr Wheeler, adopting Mr Khawaja's figures, invited the Tribunal to apply a base figure of £6.19 per meal to a 7 ounce portion, this being the average of Mr Ferner's portion sizes. As the £6.19 was only for the chicken/lamb element, Mr Wheeler then sought to add in additional percentages for all other food (i.e. everything excluding the chicken/lamb portion) and drinks. The percentage he applied produced a total sales figure (ex VAT) of £184,137. Mr Wheeler then invited us to make a further adjustment to factor in drinks bought at the bar which apparently were not a substantial number and to factor out buffet sales. He did not produce any evidenced figures for these. Mr Wheeler then put to us that the accounts of SRL for the base year 1995-6 showed sales (ex VAT) of £184,938. It was thus Mr Wheeler's contention that this demonstrated that there had been no suppression of takings.

Our conclusions as to the amount of the suppression

55. It should be borne in mind that the only reason we are being asked to carry out what in effect is a reconstruction of takings is because there are insufficient primary records upon which any reliance can be placed. The General Commissioners had before them two conflicting business economics exercises, never the best starting point, and took from them what they thought they could rely upon and adopting their own figures when they felt they had to reject both. What else could they in fact have done and if we now depart from their conclusions it is not to be taken as a criticism of their approach.

56. The General Commissioners did not have the benefit of Mr Ferner's evidence. He has carried out an expert analysis and his findings are based upon observation. There are however clear limitations to Mr Ferner's approach. He was in a test situation which would no doubt differ markedly from what goes on on a busy night. Over the period at which we are looking there would have been a number of different chefs all applying differing practices. He recorded only 12 portions of cooked food. However, given these limitations, Mr Ferner's evidence is the best which we have and we will use it as a starting point. The main flaw in the approach of Mr Ferner and Mr Wheeler in establishing portion size is that the weights will vary for each cut of meat. We heard no evidence to assist us in how this should be approached and we have therefore dealt with it in the following way. Mr Ferner calculated that the net weight after wastage should be as follows:-

Whole chickens	2405 lbs
Chicken breasts	3406 lbs
Other Meat	1567 lbs
Total	7378 lbs

We have assumed that whole chickens represent 50% breast meat and 50% thigh. We have therefore recast the table as:

Chicken thighs	1202 lbs
Total chicken breasts	4608 lbs
Other meats	1567 lbs
Total still remains	7378 lbs

Applying these weightings to Mr Ferner's average portion size gives:

	Weight lbs	%	Average portion size in ounces	Weighted average
Chicken thighs	1202	16.30	8.32	1.36
Total chicken breasts	4608	62.46	6.79	4.24
Other meats	1567	21.24	5.53	1.17
Total	7378	100.00		6.77

We were unable to ascertain what adjustment, if any, should be made for the chicken wings, treated as waste, which were sold as starters, and have made none. We note that the number of such sales appears to be low.

57. Having established a portion size, we now come to look at the value to be attributed to it. We have to reject Mr Wheeler's approach as, to give sales of drinks and other food, it applies percentages to the main course values. This has the effect of altering the other sales by reference to the size of meat portions. This is clearly illogical. Rather, we use the average value per total meal of £13.69 produced by Mr Khawaja's schedules, and apply this to the number of portions of 6.77 ounces. This gives us a figure for sales of £203,158 (ex VAT). The declared sales for 1995-6 were £184,938. Our calculations therefore give a figure for suppression for the year 1995-6 of £18,220.

58. The General Commissioners, as recited earlier in this Decision, then adjusted this figure down for earlier years and up for later years. Mr Wheeler attacks that approach as being unreasoned as he says there is no explanation as to how and why the years have been marked up or down and it cannot give an accurate or reliable figure for the years in question. Our response to this is that first it was not totally unreasoned because the explanation was given as to why they felt it necessary to make the adjustment. Secondly, Lawrence Collins J found no problem with that approach and left it untouched. Finally, we have had no evidence to show that it was in any way an incorrect approach and no alternative figures to replace those used by the General Commissioners having been produced. However, although we accept the principle of what the General Commissioners did, given the current variation in the calculated suppression, we believe the proper and fairest way of approaching the differentiation for earlier and later years would be to calculate it on a percentage basis. This is not altogether a satisfactory approach but is probably the best which we have. The General Commissioners' applied what amounts to a 'laddering percentage' to the figure of £41,000 for 1995-6. We have adopted this percentage and applied it to the suppression of £18,220 for that year to give suppressed takings as follows:

Tax year	General Commissioners determination £	"laddering %"	Laddering applied to suppressed 1995-6 restaurant takings £
1992-3	15,000	37%	6,666
1993-4	21,000	51%	9,332
1994-5	31,000	76%	13,776
1995-6	41,000	100%	18,220
1996-7	51,000	124%	22,664
1997-8	61,000	149%	27,108
1998-9	71,000	173%	31,552

Are the undisclosed takings from SRL attributable to Mr Khawaja?

59. It has always been the case of HMRC that the under declared profits from SRL had been received as income by Mr Khawaja personally, thus giving rise to the alleged under declaration of income in his personal tax returns. This contention was accepted by the General Commissioners in 2001, the effect of their decision being to determine that there had been under declarations by SRL of which Mr Khawaja had been the beneficiary and he had thus submitted incorrect tax returns. Before us, Mr Khawaja was arguing that there is no evidence that he was the sole beneficiary of such under declared sales as we might find there to have been. It is just as likely, in his submission, that they would have been shared equally with his brother Mr Din or received by neither of them and applied to the company's own purposes.

60. In support of this contention, Mr Wheeler took us to a number of documents which not only demonstrated Mr Din's interest in the company at the time but that this was fully known to HMRC. Mr Din and his brother were co directors and equal shareholders in SRL. Mr Khawaja was however responsible for the day to day running of the business, Mr Din's only involvement in this being if, for example, Mr Khawaja was on holiday. There was much discussion of whether Mr Khawaja was a

'controlling director' within the definition in S416 ICTA 1988.. Such legal niceties are in fact of no avail in dealing with what, in effect, is a practical issue. To demonstrate the extent of Mr Din's financial interest in the company, Mr Wheeler relied on a company tax return showing Mr Din to have been in receipt, during the year ending 31 October 1994, of director's remuneration of £10,000 and a letter from SRL's accountants, Messrs Kirtley Qureshi, dated 23 October 1998 referring to Mr Din having a director's loan account of £17,263. Further Mr Din and Mr Qureshi both signed off the company accounts for the year ending 31 October 1994.

61. That HMRC were aware of Mr Din's interest is demonstrated in a number of documents. There is a note of an interview with Mr Khawaja on 24 August 1998 in which Mr Khawaja told Mrs Cullen, the inspector in charge of the case, that his brother had started to take a wage from the company as he required more money for his personal and private expenditure. A letter from HMRC to Messrs Kirtley Qureshi dated 26 July 1999 recites, "I am already aware that £4,200 appears for Mr Din on the 1996-7 P14". The same letter goes on to refer to Mr Din as having concealed emoluments, for which a Regulation 49 assessment was to be raised on SRL. A letter of 2 December 1997 from HMRC to Messrs Kirtley Qureshi refers to it being necessary to see Messrs Khawaja and Din and a further letter of 17 April 1998 refers to "concern about the level of income available to the directors".

62. Mr Etty accepted that no interviews with Mr Din had ever taken place and no enquiries were ever actually made of him. He accepted he had no knowledge of Mr Din's business or personal affairs.

63. Mr Etty was pressed in cross examination by Mr Wheeler as to why Mr Khawaja was thought to have been the sole recipient of the suppressed takings found by the General Commissioners. His response was that HMRC had already established that Mr Khawaja had submitted incorrect returns and indeed an incorrect mortgage application. HMRC were also influenced by the fact that Mr Khawaja was in charge of the day to day running of the business and as such had access to all the incoming cash.

64. It was Mr Wheeler's submission that in the complete absence of any empirical evidence of untoward financial reward from concealed sales by Mr Khawaja and in the absence of any hint that Mr Din was being defrauded by Mr Khawaja then the only reasonable assumption was that Mr Khawaja and Mr Din, as equal shareholders, benefited equally from such undisclosed sales as the Tribunal found there to have been. He pointed to the fact that HMRC had found no evidence of an inexplicably affluent lifestyle or of concealed assets.

65. The clear finding of the General Commissioners in 2001 was that the undisclosed profits which they found there had been had been received as income by Mr Khawaja and not declared. Whilst that finding is not binding upon this Tribunal and indeed is open to challenge by Mr Khawaja, it does give rise to a rebuttable presumption that this is so. The evidential burden of rebutting the presumption is upon Mr Khawaja and we have to accept Mr Tolley's submission that the burden has not been discharged. The evidence which Mr Khawaja has produced and to which we were taken by Mr Wheeler clearly demonstrates that Mr Din had a financial interest in the business but it does not go beyond that. We have no reason to doubt Mr Khawaja's

evidence that he himself was responsible for the day to day running of the business, taking such decisions as would arise within this capacity but that on strategic matters he would consult with his brother. Equally, as equal shareholders, if there was to be a dividend distribution it would be divided equally between the brothers but that is no indication of the division of income from the business. The mere fact that they were equal shareholders and directors does not necessarily imply an equal division of the profits earned. They would always have been a matter for agreement between Mr Khawaja and his brother. That Mr Din benefited from any undisclosed takings or that they were ploughed back into the business is no more than suggestion and unevidenced. We also bear in mind, in rejecting Mr Khawaja's submission, that this is the first time this argument has been put forward. That Mr Khawaja himself was not the sole beneficiary of the under declared takings was a major part of his case before us and quite obviously, is of critical importance when appealing against an assessment or a penalty based on the premise that he personally received the income. Yet this was never raised before the 2001 General Commissioners and indeed never raised on the appeal to Lawrence Collins J. In reply to cross examination, Mr Khawaja said that this was because he was badly advised. However, as far as we can see neither was it put forward to the General Commissioners on the penalty hearing in 2005. We were told that, on that hearing when Mr Wheeler represented Mr Khawaja, Mr Wheeler put in cross examination to Mr Etty that it was possible that the concealed sales could have gone elsewhere. As far as we could ascertain, the suggestion was never in fact any stronger than that, and we understand that Mr Khawaja never put forward as a substantive argument that Mr Din would have shared in the concealed takings. Had it been argued but overlooked by the General Commissioners, surely it would have formed a part of the 'cross appeal' to Mann J. However, he makes no reference to it either and we conclude that it was never brought up.

66. For all these reasons we reject the submission that Mr Khawaja was not the sole beneficiary of the undisclosed takings.

Did Mr Khawaja act negligently and if so what penalty should be imposed?

67. Having satisfied ourselves that Mr Khawaja did submit incorrect tax returns in that he under declared takings out of SRL, the question arises as to whether that omission was negligent. Mr Khawaja's case throughout has been that he did not submit incorrect returns and no substantive case has therefore been advanced on this issue. There is no contention that he acted fraudulently and the only two practical alternatives are that the omissions were accidental or that Mr Khawaja was negligent. We reject the notion that the incorrect returns were accidental. First the amounts of tax are too great and persisted over too long a period to make an innocent error a credible explanation. We also take into account that there was clear and now indisputable neglect in relation to the remuneration element. We find that Mr Khawaja was negligent in his submissions of incorrect returns.

68. We now therefore have to address the question of the penalty. Penalties imposed pursuant to section 95 TMA are set at a maximum of 100% of the difference between the amount of the tax due on the return and the amount it would have been on a complete and accurate return ("the tax shortfall"). The minimum would be nil. Section 100 TMA empowers an officer to determine the amount of a penalty at such

level as he thinks appropriate and internal guidance is given to the officers to arrive at an appropriate figure. The guidance suggests a maximum of 20% abatement should be given for disclosure; 40% maximum for co-operation and 40% maximum for seriousness (size and gravity).

69. It was Mr Etty who was responsible for raising the penalty assessments and he explained that 'disclosure' meant in this context a disclosure of the irregularities or an admission that the returns or accounts had been wrong. He felt that Mr Khawaja had made no actual disclosure at all. Although Mr Khawaja eventually agreed there had been an omission of rents and benefits, he never accepted the under declared director's remuneration. Mr Etty allowed 5% abatement for disclosure.

70. Mr Etty described Mr Khawaja's co-operation as initially being reasonably good. Books and records were voluntarily supplied; Mr Khawaja attended several meetings and permitted officers to attend at the business premises; he invited officers to a till demonstration and he also invited them to witness the business economics exercise carried out by his accountants in 2001. However, Mr Etty told us that after an interview in June 2000, Mr Khawaja "withdrew his co-operation". Accordingly, he allowed 30% abatement as against the 40% suggested maximum. Mr Etty was somewhat vague in his responses when we the Tribunal questioned how the withdrawal of co-operation manifested itself. He talked of Mr Khawaja ceasing to engage. We were unhappy at this apparently unsupported allegation of a withdrawal of co-operation and asked to see the surrounding documents which had not been put in evidence before us. They were very speedily and helpfully produced and revealed a letter dated 8 August 2000 from Philip Rayner, the company's VAT consultant, to the VAT investigating officer advising that SRL could not help further with their enquiries. How this letter came to be passed to Mr Etty we do not know but it seemed to have no bearing on the continuing Inland Revenue enquiry which was being conducted on behalf of Mr Khawaja by Messrs Kirtley Qureshi and indeed following the meeting in June 2000, further correspondence took place and two further meetings on 13 July 2000 and 18 January 2001.

71. Seriousness involves looking at the quantum and the gravity of the offence which can range from innocence through negligence to fraud. Mr Etty believed Mr Khawaja had acted fraudulently and recommended an abatement of only 5%.

72. Mr Etty had to seek the approval of his manager Mr Howard Lines before the penalty could be raised and when he put his suggested total abatement of 40% to Mr Lines, Mr Lines, whilst agreeing with the figures for disclosure and co-operation, considered that Mr Khawaja had acted negligently rather than fraudulently and he proposed a 15% abatement, giving 50% overall. Mr Etty's response was that he would acquiesce and put this to the parties but that he himself disagreed.

73. We are not bound by the HMRC internal guidance, as indeed the officers are not either as it carries no statutory authority and is precisely what it says – guidance. We do not however see any reason to increase the abatements outside the guidance levels or to give any further abatement for any other reason. We accept the figures for gravity and disclosure but are not happy with the failure to give Mr Khawaja the full abatement on co-operation and we would increase this to 40%, thus giving an overall abatement of 60%.

74. Based on our findings as to the amounts of takings suppressed (para 58) and applying a 60% abatement we calculate the penalties payable as follows:

Tax year	Suppression £	Tax rate	Tax	40% penalty £
1992-3	6,666	40%	2,666.34	1,066.54
1993-4	9,332	40%	3,732.88	1,493.15
	2,052	25%	513.00	
	11,724	40%	4,689.64	
1994-5	13,776		5,202.64	2,081.06
	4,124	25%	1,031.00	
	14,096	40%	5,638.40	
1995-6	18,220		6,669.40	2,667.76
	8,671	24%	2,081.04	
	13,993	40%	5,597.16	
1996-7	22,664		7,678.20	3,071.28
	2,194	23%	504.62	
	24,914	40%	9,965.52	
1997-8	27,108		10,470.14	4,188.06
1998-9	31,552	40%	12,620.68	5,048.27
Total	129,318			19,616.11

Summary of our conclusions

75. We now set out a summary of our conclusions on the various issues before us.

(i) Article 6: There was in part an unreasonable delay on the part of the State but Mr Khawaja was not prejudiced in the presentation of his case by such delay and the delay has not deprived him of his entitlement to a fair hearing. Having made that finding, the Tribunal does not have the jurisdiction to recognise the delay in any reduction in the penalty. (Para's 20-32).

(ii) Standard of Proof: The standard of proof to be applied is the civil standard of a balance of probability. (Para's 15-19).

(iii) Has there been a suppression of takings from SRL: Yes, in the sum of £18,220 for 1995-96 and for the earlier and later years in accordance with the table in paragraph 58.

(iv) Was Mr Khawaja the beneficiary of such suppression: Yes. (Para's 59-66).

(v) Did he negligently submit incorrect Tax Returns: Yes.(Para 67).

(vi) Is he liable to a penalty: Yes, in the sums set out at paragraph 74.

The appeal is thus allowed in part.

76. 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.

TRIBUNAL JUDGE

RELEASE DATE: 8 March 2012