[2020] UKFTT 0009 (TC)

TC07517

VAT AND INCOME TAX – appeal against compulsory registration for VAT – penalty for deliberate failure to notify – information received from supplier - self-invigilation by taxpayer and test purchases by HMRC – discovery assessments – time limits - inaccuracy penalties imposed on basis that behaviour deliberate – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/04188

BETWEEN

TAHSIN DAGDELEN (T/A DEEP SEA FISH BAR) **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 5 December 2019

Martin Kaney, of X-VAT Ltd, for the Appellant

David Wilson and Gemma Truelove, litigators of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Dagdelen is appealing against:

(1)the decision of HMRC dated 22 April 2017 that he was liable to be registered for VAT under paragraph 1(1) of Schedule 1 Value Added Tax Act 1994 ("Schedule 1") with effect from 1 August 2010,

(2)a penalty imposed under Schedule 41 Finance Act 2008 ("Schedule 41") on 13 July 2017 for failure to notify,

(3)discovery assessments issued by HMRC under s29 Taxes Management Act 1970 ("TMA 1970") on 28 August 2018 in respect of the tax years 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2014-2015, and

(4)inaccuracy penalties totalling £15,578.58 imposed under Schedule 24 Finance Act 2007 ("Schedule 24") on 19 May 2017 in respect of each of these six tax years.

PRELIMINARY ISSUE

2. We considered whether all of these four issues set out at [1] above were to be determined by us at the hearing. At the beginning of the hearing, both Mr Wilson and Mr Kaney confirmed their position that all four of these issues were to be determined (which was in line with the matters addressed in each of their skeleton arguments which had been provided to each other and the Tribunal ahead of the hearing).

3. The Notice of appeal dated 18 May 2017 was stated to be against a VAT decision dated 22 April 2017, and the Grounds for appeal refer to HMRC's decision to register the business for VAT from 1 August 2010. The documents accompanying that Notice were HMRC's letter of 17 March 2017, a letter from Mr Dagdelen's accountant, SM Harman Ltd (which was stated to trade as Harman & Co but used both names and which we refer to as "Harman") dated 10 April 2017 requesting a review, HMRC's letter of 22 April 2017 and the review conclusion letter of 24 April 2017.

4. The Notice of appeal was thus made in time against the only appealable decision which at that time had been made by HMRC, namely the decision to register the business for VAT. The penalty for failure to notify the liability to register for VAT was imposed on 13 July 2017, discovery assessments were issued on 28 August 2018 and the inaccuracy penalties imposed under Schedule 24 were issued on 31 August 2018. We have considered the appeal history of these additional three decisions.

5. On 25 September 2018 Harman wrote to HMRC stating that their client will appeal to the Tribunal against VAT and income tax assessments and asking that their letter be treated as an appeal against the assessments raised. No mention was made in that letter of the Schedule 24 penalties or the Schedule 41 penalty.

6. On 27 September 2018 Mr Dagdelen wrote a letter indicating that he did not agree with the "fine" of £15,578.58, and that he was waiting to get the date for the Tribunal hearing. That letter does not state on the face of it whether it was written to HMRC or to the Tribunal, but we conclude that it was sent to HMRC as the bundle did not include any evidence of this having been sent to HMRC by the Tribunal (which we consider would have happened if it had been sent directly to the Tribunal) and Officer Jennifer Morris' witness statement refers to having received an appeal against the penalty on 3 October 2018. (We take the reference to a fine being to the penalties imposed under Schedule 24 as the amount is the same.)

7. On 27 September 2018 Mr Kaney emailed the Tribunal, copied to Mr Wilson, asking to "amend the appeal" to include the Schedule 41 penalty, discovery assessments and Schedule 24 penalties and requested that "the grounds of appeal are amended accordingly".

8. On 24 October 2018 Mr Wilson wrote to the Tribunal seeking clarification of the above "amendment" on the stated basis that three decisions had been introduced not previously appealed, and seeking clarification of whether the appeals had properly been made to the Tribunal.

9. On 3 December 2018 the Tribunal wrote to the parties, stating that it would treat HMRC's letter of 24 October 2018 as an objection to part of the amended grounds of appeal and in particular an objection to the inclusion of further decisions to be appealed. The Tribunal stated that, in particular, HMRC's objection appears to be that no appeal has been properly notified to the tribunal in respect of them, and the Judge believes that HMRC accepts that the appellant has stated his grounds of appeal and that HMRC do not object to the appeals being lodged late to the extent that they are lodged late. The Tribunal then required Mr Dagdelen to provide copies of the assessments and penalties referred to in the email of 27 September 2018 within 14 days, stating "Once these are received, and unless HMRC has any further objections to the amended grounds of appeal, it appears that the appeal will be against all the decisions listed in the appellant's letter of 27/9/18 and on the grounds as notified."

10. Mr Kaney provided copies of the three decisions on 14 December 2018.

11. On 7 January 2019, in the context of requesting an extension of time for filing the Statement of Case, Mr Wilson referred to the three new decisions "which the Respondent does not object to". HMRC then provided their Statement of Case on 28 January 2019, and that document lists as matters under appeal all those matters added by Mr Kaney as well as the decision to register the business for VAT and sets out HMRC's position on all of those matters. It does not take any points about lateness or procedural irregularities.

12. There clearly were timing issues and procedural irregularities arising as a result of the sweeping of three new decisions into the appeal under the banner of amending the original appeal against the decision to register the business for VAT.

13. The appeal to HMRC against the discovery assessments appears to have been made in time (by the letter from Harman of 25 September 2018). The appeal to HMRC against the Schedule 24 penalties was arguably not – the letter was dated 27 September 2018, but there was no evidence as to whether it was sent by first or second class post (and thus when it was deemed to be received), which is relevant as the evidence of Officer Morris was that she did not receive this until 3 October 2018. However, HMRC are able to agree to accept late notice of an appeal, and it is clear both by their conduct at the time and from subsequent letters from Mr Wilson that they have done so here (if in fact this appeal was made late).

14. Mr Kaney asked for these matters to be added to the appeal before the Tribunal on 27 September 2018, which appears to be before any other response from HMRC rejecting the appeal was received. We have no evidence that any such rejection was subsequently received. Having regard to the overriding objective in Rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, we considered that we should nevertheless treat this request as proper notification of the appeal to the Tribunal.

15. As for the Schedule 41 penalty, the notice of assessment letter states that an appeal is required to be made to HMRC within 30 days (and if unsuccessful to this Tribunal) or directly to the Tribunal, also within 30 days. The penalty was imposed on 13 July 2017 and the first reference to any appeal being made against that penalty was the email from Mr Kaney of 27 September 2018. The appeal to the Tribunal was thus unquestionably late, by over one year, and no explanation has been provided for this delay. Mr Wilson was clear in his letter of 7

January 2019 that HMRC did not object to the lateness; however, irrespective of whether HMRC objects, the question as to whether to admit an appeal which is late to the Tribunal is to be determined by the Tribunal (albeit that the position taken by HMRC will be one of the relevant factors taken into account). Having considered the correspondence between the parties and with the Tribunal prior to the provision of the Statement of Case by HMRC, we consider that the Tribunal's letter of 3 December 2018 made it clear that, once the copies of the decisions on the additional three matters were received, and unless HMRC had any further objections, the appeal would be against all of the decisions listed in the letter of 27 September 2018. The lateness and procedural irregularities have thus already been accepted by the Tribunal. We do not consider that we should re-open this question.

FINDINGS OF FACT

16. We had a bundle of papers which had been prepared by HMRC, and witness statements from Mr Dagdelen and Officer Morris. Additional papers were handed up by HMRC during the hearing. On the basis of that evidence, we make the findings of fact set out below. We deal separately with the evidence from the witnesses, and have made additional findings of fact in the Discussion.

17. Mr Dagdelen has owned the Deep Sea Fish Bar, a fish and chip shop, since 15 December 2009. It is a take-away (with no seating for customers). It is located outside of Croydon town centre, in Kenley, on a small parade of about 10 shops, most of which are also takeaway food outlets.

18. On 26 November 2015 Officer Pamela Higgins wrote to the Deep Sea Fish Bar, noting that they were in business but HMRC had not been able to trace a VAT registration number. That letter asked that if the business was not VAT-registered, it should complete a questionnaire and provide monthly turnover figures for the period from December 2009 to November 2015.

19. On 5 January 2016 Mr Dagdelen provided the completed questionnaire (marked with reference CFS-1187042) to HMRC. That form also stated that his agent was Harman, there was one member of part-time staff (Elena Dagdelen, who was confirmed at the hearing to be Mr Dagdelen's wife, who worked 16 hours per week). The monthly sales figures were provided (and are set out at Annex 1 to this Decision).

20. On 22 January 2016 Officer Higgins rang Mr Dagdelen stating that she would like to make an appointment to look at his business records. During that call he told her that he has a till but it keeps breaking down, he "does not use till rolls but writes down his sales" and he does not take credit cards.

21. Officer Higgins and Officer Cummings visited Mr Dagdelen on 4 February 2016. Officer Higgins prepared a note of that meeting (which is described as a summary). That note includes the following:

> (1)in terms of staff, his wife works 16 hours per week at the shop, and he had just taken on another member of staff, who works 4 days a week for 3 hours per day;
>
> (2)he demonstrated the till (showing that the keys describe the purchase price and the price would be displayed), confirming that he does not use a till roll and records takings manually each day; he starts the day with a float of about £140;
>
> (3)takings are banked at least once per week;
>
> (4)he pays all of his suppliers in cash;
>
> (5)Officer Higgins showed Mr Dagdelen her calculation of rolling turnover using his figures and this showed that he was required to register for VAT from 1 October 2012

to May 2013 as he had exceeded the VAT threshold in August 2012 and remained above the threshold until May 2013; VAT would be due for this period, and a penalty may be charged;

(6)Mr Dagdelen said it is difficult to make a living from the business and he would like to sell; and

(7)he provided HMRC with some of the records requested (stating that the rest were with his accountant) and HMRC took these away for examination.

22. The bundle contained several handwritten sheets (which appear to have been written by Mr Dagdelen as the handwriting matches that in his signed witness statement) setting out monthly takings for December 2009 to November 2015, and then setting out the daily takings for this period. These notes are recorded as having been received by HMRC on 4 February 2016 (and scanned into their system later) and we infer that they were handed over by Mr Dagdelen during the meeting on that date.

23. The note of that meeting was sent by Officer Higgins to Mr Dagdelen on 6 May 2016 asking him to sign if he agreed the content. (The papers show that he did sign and return a copy of the note (unamended) on 19 May 2016.) That letter also:

(1)reminded Mr Dagdelen that he needed to maintain full daily sales data noting that his records do not include daily till rolls or daily till readings. No prime records are kept and his method for recording sales is inadequate, and

(2)stated that Officer Higgins was "unable to accept" his purchase invoices as she held information which shows they are incomplete. (We note that this letter did not include any further explanation of this point.)

24. On 15 March 2016 Harman emailed the bank statements from the business' bank account to Officer Higgins. The bank statement provided is a three-page print-out of transactions covering the period from 10 April 2015 to 16 November 2015. They show monthly payments by direct debit to Santander (which we infer are for the mortgage), small interest receipts, regular cash deposits and a giro credit with a reference to CocaCola.

25. Mr Dagdelen conducted a self-invigilation exercise throughout June and July 2016, during which HMRC also conducted test purchases.

26. We had a copy of the self-invigilation sheets (the "SI Sheets") covering some of the period from 9pm on 12 July 2016 to 27 July 2016, which were received by HMRC on 4 August 2016 – there were 11 pages. They appear to have been completed by more than one individual.

27. There was a meeting with Mr Dagdelen and his agent Mr Mehmet of Harman on 3 November 2016 which Officer Higgins attended with Officer Morris. The purpose of that meeting was for HMRC to explain the findings of their compliance check. Officer Higgins prepared a note of that meeting which includes:

(1)Mr Dagdelen wants to sell the business; the shop is quiet, especially from 1.30 to 5pm;

(2)Officer Higgins said she'd compared the two months of self-invigilation with turnover declared in the same months in 2010 to 2015 and it was higher, except for June 2012. She gave the agent a schedule of figures, and Mr Mehmet said that there was not much difference and Mr Dagdelen could not explain the increase. He said there had been no change to his takings during his ownership;

(3)Officer Higgins said that the takings figures Mr Dagdelen had provided showed a pattern – eg, Mondays in June 2013 were £160, £159, £161 and £154; Fridays in June 2013 were £500, £502, £510 and £512. Mr Dagdelen said that is the way it is. Officer

Higgins said this was unrealistic – and during the self-invigilation period there was no pattern to the amounts (and this was what she expected to see). She handed the agent a spreadsheet of daily takings in the self-invigilation period. She found it hard to believe that the previous amounts were correct;

(4)Officer Higgins had contacted suppliers. Information from a supplier, Unique Seafood ("Unique"), had been compared with invoices provided by Mr Dagdelen. She showed the agent a printout of the data held and explained that the final column showed whether the corresponding invoice had been provided by Mr Dagdelen. In 50% of cases it had not. She said that frequently two invoices were provided on the same day and only one was provided to HMRC. She asked why this would happen. Mr Dagdelen questioned why he would get two invoices and denied this had happened; and said he stopped using Unique approximately a year ago. Mr Mehmet said he'd like to check the accuracy of the Unique data;

(5)Officer Higgins said data was also held from Smales but it had not been cross-checked yet;

(6)During the period of self-invigilation HMRC officers had made purchases from the shop, and their reports had been compared to the SI Sheets. 50% of the orders placed by officers, or overheard from other customers, had not been declared. Only 9 of 19 purchases made or overheard were recorded. Mr Dagdelen said he did his best and "they must be there". He said they must have come when he was busy. When asked how telephone orders were recorded, Mr Dagdelen said he had put them on the sheet when the customer collected and paid for them;

(7)Officer Higgins informed Mr Dagdelen that HMRC's evidence suggests sales have been suppressed by 50%. Mr Mehmet said that he thought something was wrong but 50% was quite high and the additional sales amounted to 10-15%. Mr Mehmet said he would like HMRC to carry out a day of invigilation as Mr Dagdelen may have made mistakes. Officer Higgins said she did not think it was necessary to provide any more evidence;

(8)Officer Higgins said that based on Mr Dagdelen's figures he had exceeded the VAT threshold during August 2012 to May 2013. She asked if he could explain why turnover after that period had dropped – Mr Dagdelen said he didn't know it had been higher then. Mr Mehmet said he didn't know this had happened – he had looked at the yearly turnover but not the rolling turnover;

(9)Following a question from Officer Morris, Mr Dagdelen stated that he bought nine bags of potatoes per week;

(10) Mr Dagdelen stated that he had a mortgage on his home of £955 per month and £1523 per month on the business; and

(11) At the end of the note it is stated that Officer Higgins "agreed that agent could keep the Unique Seafood data".

28. We did not have a copy (either with the meeting note or elsewhere in the bundle) of the schedule(s) of figures from the self-invigilation exercise which were produced at that meeting. There may have been one or two schedules, but they are referred to as comparing the turnover from June and July 2016 with that declared in the same months in 2010 to 2015, and daily takings figures from during the self-invigilation period.

29. On 18 November 2016 Harman wrote to HMRC stating that:

(1)the suppression implied by HMRC's exercise is not in line with the client's business – Mr Dagdelen mainly works on his own and it is impossible to make this turnover;

(2)they understood that the fish supplier issued cash invoices, not stating the name of the trader or shop, "Hence the client does not accept that these invoices were issued to him";

(3)they asked their client to improve his record keeping by maintaining daily Z readings from the till - they attached Z readings for three days in November 2016; and

(4)reiterated that the best way to establish the level of takings is by carrying out invigilation at the shop.

30. The Z readings referred to appear to be photos of a section (incomplete) of the till roll. Neither Mr Kaney nor Mr Wilson took us to these during the hearing. The date is not shown on them. We find that they show the following:

(1)Day 1 – "gross sales" of £312.25, from 48 transactions. We concluded that this amount is from sales, and does not include the cash float, as the printout also shows a calculation for average £ per customer of £6.50.

(2)Day 2 (at the top of which is a reference to a "last report" of 11 August 2016) – "gross sales" of £342, from 56 transaction; and

(3)Day 3 – "gross sales" of £308.15 from 56 transactions.

31. On 2 December 2016 Officer Higgins responded to Harman asking for the date from which their client began maintaining Z readings and for all Z readings from the first available date to 3 December 2016 to be forwarded (and rejected the photographs provided). She also asked for the evidence on which the statement had been based regarding the Unique invoices (that which had described them as cash invoices), and stated that HMRC did not have sufficient resources to carry out a full day of invigilation.

32. Mr Dagdelen replied on 10 January 2017, stating he had repaired the till, and stating that he was enclosing four till rolls dated 7 November 2016 to 9 January 2017. The copy of that handwritten letter which was provided to us included a photocopy of the end of a till printout, timed at 9.10pm on 9 January 2017 recording gross sales of £178.30 from 33 transactions. We did not have a copy of the till rolls stated to have been provided.

33. On 27 January 2017 Officer Higgins issued a pre-decision letter to Harman stating that the business was to be compulsory registered from 1 August 2010. That letter states:

(1)The Z readings provided on 18 November 2016 were £308.15 for Tuesday 8 November 2016, £342 for Wednesday 9 November 2016 and £312.26 for Thursday 10 November 2016, whereas the records provided by Mr Dagdelen for the previous year showed average takings for a Tuesday in November were £161.75, for Wednesday were £169.50 and Thursday were £178. This supported her view that the takings figures first provided were understated;

(2)She referred to the meeting of 3 November 2016 where Mr Dagdelen had been told that not all purchases made or overheard during self-invigilation were recorded, the takings declared in those two months were higher than the same months in earlier years (and that these increased takings are still known to be insufficient), the takings records initially provided by Mr Dagdelen at the beginning of the compliance check showed a pattern and are not credible (takings during the self-invigilation period and those on the recent Z readings were variable), and that 50% of the invoices known to

have been issued by Unique were not provided by Mr Dagdelen (stating that he had been given "full details" at the meeting);

(3)Her decision was that takings had been understated by 50% and she had increased the monthly turnover figures declared for December 2009 to November 2015 accordingly. The "enclosed rolling turnover calculation" shows that during June 2010 the cumulative 12 month turnover exceeded the VAT registration threshold of £70,000 - this breach required Mr Dagdelen to register for VAT with effect from 1 August 2010;

(4)Officer Higgins asked for monthly takings figures for December 2015 to May 2016 and August 2016 to November 2016, as well as for the input tax claimable for this period.

34. On the same date, a copy of that letter was sent to Mr Dagdelen, asking him additional questions relevant to the calculation of the penalty.

35. On 17 March 2017 Officer Higgins wrote to Harman informing them that HMRC had decided to register the business for VAT with effect from 1 August 2010. That letter includes:

(1)Harman had not commented on the evidence that she had provided to support HMRC's figures;

(2)under the heading "2010 and 2015 sales figures":

> "Mr Dagdelen's own figures, that he provided at the beginning of my enquiry, show that there is very little difference between the takings in 2010 and 2015. In fact there is little difference in the overall takings for any year.
>
> My figures based on the evidence held that 50% of sales were suppressed, have been achieved by applying an increase to the figures already provided by Mr Dagdelen…"

(3)Mr Dagdelen had self-invigilated for 10 weeks; she did not consider that a one-day invigilation by HMRC "will add much to your argument";

(4)turnover figures had not been provided as requested in her letter of 27 January 2017, and she had therefore calculated the amounts by using the average sales for each month based on information supplied by Mr Dagdelen for previous years, producing an average for each month and then increasing to reflect 50% suppression; and

(5)as input tax claimable for the period from 1 August 2010 to 31 December 2016 had not been provided she had used her best judgment to calculate this figure. The VAT rate that a similar business would pay under the flat rate scheme is 12.5%. Deducting this from the standard rate of 20% results in a figure of 7.5%; she had multiplied the output tax by this figure. She had calculated the VAT liability as £148,185.00 for the period from 1 August 2010 to 31 December 2016.

36. On 5 April 2017 Officer Morris wrote to Mr Mehmet stating that she intended to raise revenue assessments for the tax years 2009-2010 to 2014-2015 to recover the additional income tax liabilities due. She referred to the extension of time limits where behaviour is careless or deliberate, and her conclusion that the behaviour was deliberate. (That letter refers to a "summary A" and a "Schedule B", neither of which were included in the bundle. Mr Wilson was however able to hand these up to us at the hearing.) That letter sets out the revised turnover numbers for the tax years and then calculates additional tax and Class 4 NICs due. Officer Morris gave evidence as to how this had been calculated at the hearing.

37. Harman requested a "local review" of the decision to register for VAT on 10 April 2017 and the outcome of that review, upholding the decision, was notified to Harman on 24 April 2017.

38. On 22 April 2017 HMRC wrote to Mr Dagdelen informing him that he had been registered for VAT and informing him of his VAT registration number. That letter sets out the right to a review or appeal to the Tribunal.

39. On 26 April 2017 Officer Higgins stated that HMRC intended to charge a penalty for failure to register, and that she considered this failure was deliberate.

40. Mr Dagdelen appealed to the Tribunal on 18 May 2017. That appeal was assigned to proceed under the Standard category on 6 June 2017 and HMRC was directed to provide a Statement of Case within 60 days.

41. On 19 May 2017 HMRC sent the penalty explanation letter to Mr Dagdelen in respect of inaccuracies in self-assessment returns. That letter set out that they considered the behaviour was deliberate and prompted (as he did not tell them about the inaccuracy before he had reason to believe HMRC had discovered it or were about to discover it). The penalty range was therefore from 35% to 70%, and HMRC proposed a reduction of 85% for the quality of disclosure, based on 15% for telling (rather than the maximum of 30%), the maximum of 40% for helping and the maximum of 30% for giving. HMRC did not consider there to be any special circumstances. The penalties would therefore be:

Tax year	**Potential lost revenue**	**Penalty amount**
2009-2010	£2,022.44	£814.03
2010-2011	£12,647.84	£5,090.75
2011-2012	£5,480.70	£2,205.98
2012-2013	£5,654.92	£2,276.10
2013-2014	£6,738.83	£2,712.37
2014-2015	£6,159.89	£2,479.35

42. On 22 May 2017 HMRC sent a penalty explanation letter to Mr Dagdelen in respect of the Schedule 41 penalty. The amount was £59,644.46, and this was also categorised as deliberate, prompted behaviour, and a reduction of 85% was given for quality of disclosure (being, as with the inaccuracy penalty, 15% for telling, 40% for helping and 30% for giving).

43. On 13 July 2017 HMRC issued a penalty assessment under Schedule 41 for failure to notify for the amount of £59,644.46.

44. HMRC issued discovery assessments under s29 TMA 1970 on 28 August 2018:

Tax year	**Assessment**
2009-2010	£2,022.44
2010-2011	£12,647.84
2011-2012	£5,480.70
2012-2013	£5,654.92
2013-2014	£6,738.83
2014-2015	£6,159.89

45. HMRC issued the notice of penalty assessment under Schedule 24 on 31 August 2018. The total penalty charged was £15,578.58, and the schedule set this out by tax year, repeating the details set out at [41] above.

EVIDENCE FROM WITNESSES

46. We heard sworn evidence from Mr Dagdelen and from Officer Morris of HMRC, both of whom were cross-examined and of whom we were able to ask questions.

47. Mr Dagdelen's evidence was set out in a handwritten undated witness statement, and he gave additional evidence-in-chief at the hearing. His evidence was as follows:

(1)He mainly works on his own, doing the cooking, serving and cleaning. He does have part-time staff during the busy periods but they help with serving customers; he does the cooking. When he is on his own it can be very difficult when several customers arrive at once to deal with both cooking the food and taking orders and payment.

(2)He works six days per week (the shop is shut on Sundays), and this can be up to 9pm, 10pm or midnight. His busiest hours are from 5pm to 8pm, and he can miss some things or make mistakes when he is busy, especially when he is working on his own. The shop is not consistently busy and so he cannot afford to employ full time staff; the part-timers are usually 16-17 year olds who let him down. He estimates that he works on his own 80-90% of the time.

(3)From Monday to Thursday, the usual takings are around £100 to £200, on Fridays they are from £300 to £600 and on Saturdays they are £200 to £350.

(4)He takes holiday twice a year for two weeks each year. If he is able to find someone to run the shop whilst he is away, then the shop will remain open during this time. Otherwise, he shuts the shop during this time.

(5)He denies that Unique would give him two purchase invoices on the same day, or two deliveries on the same day. He doesn't have much trading with them – some of their products, especially cod, were too expensive, and their driver would mix up his delivery with someone else's. Unique were not a good company – they lost customers and ceased trading. He had heard they had got others in trouble as well. When he receives a delivery, he would collect the invoice, put it in his file and send it to his accountant at the end of the financial year.

(6)On being referred to HMRC's notes of the meeting on 3 November 2016 which referred to HMRC producing a printout of data held about supplier invoices, Mr Dagdelen couldn't remember this printout.

(7)HMRC sent him the SI Sheets, but they had very tiny lines and if he had staff in the shop they were only young girls from school and couldn't fill in the sheets. When he was busy on his own it was difficult to complete the sheets. He accepted there would be mistakes – they would be "not 100% accurate". However, all the takings from the customers did go in the till; it was just that he had not written everything down.

(8)The till in the shop was very old style, and there was no till roll working.

(9)When HMRC were investigating the takings for the business, he did ask them to send an officer to stay in the shop and monitor the takings themselves, or put in a camera to monitor takings. HMRC refused (Officer Higgins had said this was because of government cuts), and stated their belief that this type of business should be taking £3,000 per week.

48. In cross-examination by Mr Wilson, and replying to questions from the Tribunal, Mr Dagdelen's evidence was as follows:

(1)He initially provided monthly sales information to HMRC for December 2009 to November 2015. He did discuss with HMRC that the sales figures did not vary much.

(2)He did not accept that the numbers provided to HMRC for December 2009 to November 2015 could be unreliable. He kept invoices, counted cash takings and sent everything to the accountant. If HMRC wanted to be sure, they should come and invigilate themselves or put a camera in the shop.

(3)On it being put to him that only 9 of the 19 test purchases made or orders overheard during the self-invigilation were recorded, Mr Dagdelen said he doesn't remember this. When customers came in, whether it was him on his own or one of the girls working with him, they would normally write everything down. He doesn't accept any errors were deliberate. He did accept there could have been mistakes; there was too much stress with trying to write everything down and the sheets can't be 100% correct. He accepted they may be 5% inaccurate, but he didn't accept more than that (whether by him or other staff).

(4)When he provided the self-invigilation numbers to HMRC for June and July 2016, Mr Wilson noted that HMRC put it to him in the meeting in November 2016 that the numbers were higher than for the same months in previous years, with the exception of June 2012 and he had not been able to explain this. Mr Dagdelen initially couldn't remember this: he was taken to the note of the meeting, and added that he couldn't explain this. If a customer comes in, he serves them.

(5)He denied that he received two invoices from a supplier on the same day. When the delivery arrives, if he is busy he doesn't even look at the invoice, he just puts it in a file and sends it to the accountant at the end of the year. He kept the invoices which he did receive.

(6)The shop is quite remote, in a small parade of 9 or 10 shops outside of town which is opposite a park. The parade of shops is mainly takeaway food shops; there is also a pub which is always empty. The customers are mainly regulars, over 35/40, who order fish and chips. Younger customers are more likely to prefer sausages. He doesn't have many customers who are just passing by, but will get some builders come by in the afternoon.

49. Mr Dagdelen was not able to recall the discussions which had taken place with HMRC during some of the meetings during 2016, and did not answer questions as to the stability of the numbers or how come they had (apparently) increased markedly since November 2016. His evidence generally was vague, and the point on which he was clearest in his recollection was his repeated request to HMRC to conduct an invigilation themselves and sit in the shop or put in cameras. HMRC did challenge him as to his failure to record all sales on the SI Sheets, and the allegation that Unique issued two purchase invoices. It will be apparent from the Discussion below that, taking account of the other evidence before us, there are areas where this evidence from Mr Dagdelen has not been sufficient to discharge the burden of proof on him.

50. Officer Morris had provided a witness statement which had been prepared in April 2019 and was sent to Mr Kaney before the hearing. It was not signed until the morning of the hearing. Officer Morris' evidence was as follows:

(1)On 4 May 2016 she had been contacted by Officer Higgins and made aware of a potential risk to income tax based on Officer Higgins' review of Mr Dagdelen's VAT records and information from the supplier Unique. Officer Higgins had told her that there was no working till on the premises, and that some of the invoices they had seen from Unique were missing from Mr Dagdelen's records. Officer Morris did not see a copy of any of the Unique invoices that were said to have been given to the business but not provided by Mr Dagdelen to HMRC – Officer Higgins had done the cross-check.

(2)Officer Higgins told her that she had requested that Mr Dagdelen conduct self-invigilation during June and July 2016. At that time Officer Higgins had not arranged that HMRC would conduct any test purchases during this period. Officer Morris said

she would arrange this, then requested authorisation on 9 June 2016 and received approval on 30 June 2016.

(3)Test purchases were conducted during 13 to 26 July 2016, and the results were passed to Officer Higgins on 1 August 2016.

(4)During this period, Mr Dagdelen called Officer Higgins asking for more SI Sheets. He had said he found them "easy to complete".

(5)Officer Morris attended the meeting with Mr Dagdelen and Mr Mehmet on 3 November 2016 and explained during that meeting that she would be dealing with any additional income tax liability due under the "discovery" provisions.

(6)She received the revised sales figures prepared by Officer Higgins for the period which included March 2010 to April 2015 in March 2017. Officer Higgins had doubled the takings for the business on the basis that the SI Sheets had only recorded about half of the transactions which were made or witnessed during the test purchases.

(7)She received approval to issue extended time limit assessments for the years 2009-2010 to 2012-2013 on 4 April 2017. She explained that the assessments were based on the revised sales figures supplied by Officer Higgins. Officer Morris took us through the approach to the numbers which had been included as Schedule B to the letter which was then sent on 5 April 2017:

> (a) In calculating the adjusted turnover (on which the assessments were based), these used as a starting-point the amounts declared by Mr Dagdelen on his self-assessment returns. Officer Higgins had increased the turnover and deducted output VAT therefrom.
>
> (b) Officer Morris then deducted a Cost of Sales (which was such number as was required to give a gross profit for the business of 60% of turnover, in line with HMRC's experience of similar VAT-registered businesses, and 72% for the earlier non-VATable period).
>
> (c) From this she then deducted the other actual expenses declared by Mr Dagdelen (including wages, rent, repairs, interest and other overheads) and the capital allowances claimed by Mr Dagdelen.
>
> (d) This gave a new taxable profit number, and the excess of this over that which had been declared by Mr Dagdelen was the amount assessed under s29.

(8)On 5 April 2017 Officer Morris wrote to Mr Dagdelen and Mr Mehmet, including her calculations. She also set out her view of the behaviour, concluding it was deliberate.

(9)On 10 April 2017 Mr Mehmet wrote to inform her that he had requested a review of the numbers prepared by Officer Higgins. She was informed that the VAT decision was upheld by the review on 25 April 2017. Separately, Mr Mehmet called her and asked her not to issue the discovery assessments until the VAT appeals had been dealt with.

(10) On 19 May 2017 she sent the penalty explanation letter.

(11) On 13 June 2017 she was informed by Officer Higgins that an appeal against the VAT decision on 17 March 2017 had been referred to the Tribunal on 9 June.

(12) On 27 June 2018 she was informed that the ADR had not led to agreement and so the appeal against the VAT decision would continue to the Tribunal. Mr Kaney asked that the income tax decisions be issued at that stage so that the VAT and income

tax matters could be considered together. She received approval to issue the discovery assessments on 23 August 2018.

(13) She issued discovery assessments on 28 August 2018 based on the calculations set out in her letter of 5 April 2017 and then issued the notice of penalty assessment.

51. During cross-examination by Mr Kaney Officer Morris gave the following additional evidence:

(1)The sales invoices from Unique had been obtained by HMRC by a "section 23" notice. She didn't know the circumstances in which HMRC had requested that information. That data related to all customers of Unique, not just this taxpayer, and she didn't know in what format it had been received by HMRC.

(2)On being asked whether she was aware that Mr Mehmet had asked for the purchase invoices apparently provided by Unique, Officer Morris stated that she didn't have such invoices – she had only been provided with the list in the bundle (see [91]).

(3)Officer Morris had not seen the invoices or other direct evidence from Unique. She had relied on the spreadsheets, believing them to be credible and having no reason to doubt them. She did not know if Officer Higgins had done what Mr Kaney termed as "credibility tests" on this data.

(4)It was put to Officer Morris that just because sales were not recorded in the SI Sheets, did this mean the cash was not put in the till. Officer Morris responded that there were no records from the till until November 2016 – during the self-invigilation exercise it was just used as a cash drawer. She had not done a comparison of the SI Sheets with the daily takings herself.

52. We found Officer Morris to be honest and credible. There were several areas where the information in question was not within her knowledge (as she readily acknowledged), and this limited the usefulness of her evidence. We accept her evidence – but where she says what was told to her, we accept this was what she was told; that is not to say that we accept that the underlying information is true.

53. Officer Morris had been responsible for direct tax matters and, as set out in her evidence described above, the potential under-declaration of income tax had been brought to Officer Morris' attention by Officer Higgins, the VAT officer who had initiated the compliance check. Officer Higgins has since left HMRC; no witness statement from her was provided, either directly or in a form which had been adopted by Officer Morris.

RELEVANT LEGISLATION

54. Paragraph 1 of Schedule 1 provides:

"**1**

(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule—

(a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded £70,000; or

(b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £70,000."

55. Paragraph 5 then provides:

"**5**

(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

(2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.

(3) In this paragraph "the relevant month", in relation to a person who becomes liable to be registered by virtue of paragraph 1(1)(a) above, means the month at the end of which he becomes liable to be so registered."

56. The penalties for failure to notify are set out in Schedule 41. Paragraph 1 of that Schedule provides that a penalty is payable by a person, P, where P fails to comply with an obligation specified therein. The failure to notify a liability to register for VAT is a relevant obligation for this purpose. The calculation of the penalty is then dealt with as follows:

"5

(1) A failure by P to comply with a relevant obligation is–

(a) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation.

…

6

(1) The penalty payable under any of paragraphs 1, 2, 3(1) and 4 is–

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed act or failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

(2) The penalty payable under paragraph 3(2) is 100% of the potential lost revenue.

(3) Paragraphs 7 to 11 define "the potential lost revenue"."

57. The potential lost revenue ("PLR") is defined in paragraph 7(10) as the amount of any tax which is unpaid by reason of the failure to notify. The provisions for reductions in penalties are then:

"12

(1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P discloses a relevant act or failure

(2) P discloses a relevant act or failure by–

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure–

(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 relevant act or failure, and

(b) otherwise, is "prompted".

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

13

(1) Where a person who would otherwise be liable to a 100% penalty has made an unprompted disclosure, HMRC shall reduce the 100% to a percentage, not below 30%, which reflects the quality of the disclosure.

(2) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, 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.

(5) Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30%–

(a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage (which may be 0%), or

(b) in any other case, to a percentage not below 10%,

which reflects the quality of the disclosure.

(6) Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30%–

(a) if the penalty is under paragraph 1 and HMRC become aware of the failure less than 12 months after the time when tax first becomes unpaid by reason of the failure, to a percentage not below 10%, or

(b) in any other case, to a percentage not below 20%,

which reflects the quality of the disclosure.

14

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) "special circumstances" does not include–

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to–

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty."

58. The provisions relating to assessment and appeal are then as follows:

“16

(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall–

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment–

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with–

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

(5) In sub-paragraph (4)(a) “appeal period” means the period during which–

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

(7) The references in this paragraph to “an assessment to tax” are, in relation to a penalty under paragraph 2, a demand for recovery.

17

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18

(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19

(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may–

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14–

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).

20

(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)–

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased."

59. The provisions relating to income tax self-assessment, the ability to issue a discovery assessment and statutory time limits are set out in TMA 1970. Section 9A gives HMRC the power to enquire into a taxpayer's self-assessment returns, and the procedure for bringing an enquiry to a closure is governed by s28A.

60. Section 29 empowers HMRC to raise discovery assessments:

"**29 Assessment where loss of tax discovered**

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income , unauthorised payments under section 208 of the Finance Act 2004 or surchargeable unauthorised payments under section 209 of that Act or relevant lump sum death benefit under section 217(2) of that Act which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquires into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

…"

61. An appeal may be brought against a discovery assessment under s31.

62. Section 34 TMA 1970 provides that the ordinary time limit for the making of an assessment to income tax by HMRC is not more than four years from the year of assessment to which it relates. This is then extended by s36 where the loss of tax was brought about carelessly or deliberately. Section 36(1) provides that "an assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates" and this is extended by s36(1A) to 20 years where the loss of income tax was brought about deliberately.

63. Section 50 then provides that on appeal the Tribunal may reduce or increase the amount of the assessment, and s50(6) provides:

"If, on an appeal notified to the tribunal, the tribunal decides – …that the appellant is overcharged by an assessment other than a self- assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

64. The penalties for inaccuracies are then in Schedule 24, and the Table to which paragraph 1 refers includes a return under s8 TMA 1970:

"**1**

(1) A penalty is payable by a person (P) where–

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to–

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

…

3

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is–

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P–

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC."

65. Paragraph 4 provides that the penalty payable under paragraph 1 is 70% of the PLR if the inaccuracy is deliberate but not concealed, and paragraph 5 provides that the PLR in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy. There are then provisions for reductions for disclosure:

"9

…

(1) A person discloses the matter by–

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the 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, the supply of false information or withholding of information, or the underassessment, and

(b) otherwise, is "prompted".

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

…

10

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
70%	35%	20%

100%	50%	30%

…

11

(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include–

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to–

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…"

66. The paragraphs relating to assessment and appeals are as follows:

"13

(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall–

(a) assess the penalty,

(b) notify the person, and

(c) state in the notice a tax period in respect of which the penalty is assessed (subject to sub-paragraph (1ZB)).

…

15

(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.

…

17

(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may–

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11–

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)–

(a) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the tribunal orders HMRC to suspend the penalty–

(i) P may appeal against a provision of the notice of suspension, and

(ii) the tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the tribunal–

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph."

APPELLANT'S SUBMISSIONS

67. Mr Kaney submitted that HMRC's decision to register Mr Dagdelen with effect from 1 August 2010 (on the basis that the VAT registration threshold had been exceeded on 30 June 2010) was erroneous, and that if this date was not established by HMRC to the requisite standard of proof then all other matters fell away (not just the penalty for failure to notify but also the discovery assessments and penalty assessments related thereto) as HMRC's calculations were based upon that date being correct. He did emphasise that if we were not satisfied of this date and allowed Mr Dagdelen's appeal then that would leave it open for HMRC to make a new decision that Mr Dagdelen was liable to be registered for VAT from a different (later) date.

68. Mr Kaney drew attention to HMRC's letter of 17 March 2017 notifying their decision to register Mr Dagdelen. That letter noted that Mr Dagdelen's own figures showed very little difference between the takings in 2010 and 2015. Officer Higgins' adjusted figures were "based on the evidence held that 50% of sales were suppressed" and were calculated by applying an increase to the figures already provided by Mr Dagdelen. Mr Kaney submitted that HMRC's decision was based on the information it had received from Unique which was not supported by any evidence. It was not purported to be based on the results of the self-invigilation exercise (which was in any event intrinsically flawed), and any variation in the Z readings did not form part of the decision as notified.

69. The information from Unique is denied by Mr Dagdelen. HMRC had not produced copies of any of the invoices, or a printout of the data on which it relied. The reliance by HMRC on hearsay is unsafe, unreliable and undermines HMRC's case. It was significant that the results of the self-invigilation had not informed the decision as set out in the letter of 17 March 2017.

70. Whilst the self-invigilation exercise did not form part of HMRC's decision to register, Mr Kaney accepted that it did form part of the behaviour of Mr Dagdelen. He pointed out that this exercise was difficult to do for a single individual running a business on their own, and there were likely to be inaccuracies. However, Mr Dagdelen had repeatedly asked HMRC to conduct their own invigilation to produce data that was reliable. Furthermore, just because sales were not recorded on the SI Sheets did not mean that the amounts had not been entered in the till and recorded as part of the daily takings.

71. Mr Dagdelen denies the suppression of sales. HMRC have not set out how they consider this was achieved – they have not made arguments based on the takings which were banked to the business account, or based on the accounts prepared for the business.

72. Whilst HMRC had stated that no other sales figures had been provided by Mr Dagdelen, Mr Kaney denied this and referred to figures produced in the bundle (those shown as having been received by HMRC on 4 February 2016). Those set out monthly takings and also include daily takings throughout the period from 15 December 2009 to 30 November 2015.

HMRC'S SUBMISSIONS

73. Mr Wilson emphasised that Mr Dagdelen has not submitted a first period VAT return covering the period from 1 August 2010 to 31 December 2016 and has not produced any alternative figures to those calculated by HMRC.

74. The turnover declared by Mr Dagdelen was regular and static, which HMRC contend is not credible. The information received from Unique led to the compliance check. HMRC rely on the following in support of their adjusted turnover numbers:

> (1)self-invigilation of the business recorded more sales than had been achieved in previous years;
>
> (2)covert test purchases during the self-invigilation showed that only 9 out of 19 sales made or witnessed had been declared – and HMRC's submission was not only that the other 10 sales had not been declared on the SI Sheets but also that they had not been reported in the daily takings;
>
> (3)checks of the purchase invoices received from Unique highlighted that only about 50% had been declared by Mr Dagdelen in the business records. HMRC submit that this suppression of fish purchases continued for a period of at least two years; and
>
> (4)Z readings supplied by Harman covering three days in November 2016 were significantly higher than the corresponding figures for 2015.

75. HMRC submit that previously declared takings figures were, on the balance of probabilities, incorrect and that, in the absence of any alternative figures or a VAT return from Mr Dagdelen, HMRC's turnover calculations are wholly reasonable. These show that the VAT registration threshold was breached in June 2010 and Mr Dagdelen was therefore liable to register with effect from 1 August 2010. The additional turnover is based on the omitted sales figures from the test purchase exercises, on the basis of which HMRC calculate the VAT liability as £148,185 from 1 August 2010 to 31 December 2016.

76. Based on the information available to HMRC, the failure to notify was deliberate. They refer to 9 out of the 19 sales being included on the SI Sheets, the two purchase accounts with Unique and the sales from SI Sheets and Z readings from November 2016 being higher than corresponding figures for earlier years.

77. The maximum penalty under paragraph 6(2)(b) Schedule 41 for deliberate but not concealed behaviour is 70% of the PLR, and this has been reduced to 40.25% in accordance

with paragraph 12(2) Schedule 41 for telling, helping and giving. They have concluded there are no special circumstances.

78. The discovery assessments were properly issued. Section 29(1) TMA 1970 is satisfied as income that ought to have been assessed had not been assessed. HMRC contend that both the first and second condition are satisfied (and thus pursue these as alternative arguments):

> (1)the first condition is satisfied as HMRC submit that Mr Dagdelen deliberately underdeclared his cost of sales and turnover which resulted in him having a lower income tax liability than he should have had; and
>
> (2)the second condition is met as not enough information was made available by the closure of the enquiry windows for the tax years in question which would have alerted the hypothetical officer to the insufficiency. The period between discovery and the issuing of the assessments does not invalidate the assessments as there was no inaction – the delay was at the request of Mr Dagdelen's agent and HMRC were simply being accommodating.

79. The discovery assessments are calculated on the basis of the presumption of continuity, that the deliberate behaviour is likely to have occurred throughout, noting that there have been no major changes in how the business operates.

80. The inaccuracy penalties have been imposed on the basis that the behaviour is deliberate but not concealed. (In the alternative, HMRC contend that the actions are careless.) The penalty percentage range is between 35 and 70% of the PLR. HMRC have given allowances for telling, helping and giving and reduced the penalty to 40.25%. They assert that there are no special circumstances.

81. Addressing the position taken by Mr Kaney, Mr Wilson agreed that if the Tribunal were to find that Mr Dagdelen was not liable to register for VAT at the end of June 2010 and the effective date of 1 August 2010 is wrong, then not only would the appeal against HMRC's decision be allowed but also the Schedule 41 penalty would need to be cancelled. However, the appeal against the discovery assessments (and related penalties) should not necessarily be allowed in this scenario (albeit that the Tribunal may decide to adjust the amounts). HMRC assert that the figures declared by Mr Dagdelen in his income tax self-assessment are inaccurate. The additional turnover has been calculated using figures supplied by Mr Dagdelen and valid credibility checks (eg the test purchase exercise)

DISCUSSION

82. Mr Dagdelen's appeal is against the decisions, assessments and penalties set out at [1] above. The matters to be determined are as follows:

> (1)whether Mr Dagdelen was liable to be registered for VAT with effect from 1 August 2010, the burden of proof being on Mr Dagdelen to show that rolling turnover was below the VAT registration threshold on 30 June 2010, such that the decision was wrong;
>
> (2)HMRC is required to establish that one (or both) of the conditions under s29(4) or 29(5) TMA 1970 are met in respect of the discovery assessments and that the assessments are not time-barred;
>
> (3)once this has been established by HMRC, the assessments are then validly issued and stand good unless Mr Dagdelen establishes that he has been overcharged by the assessments;

(4)whether the penalty determinations (for both failure to notify and inaccuracy)+ have been issued and calculated in accordance with the legislation, the burden being on HMRC;

(5)once this has been established, the burden is then on Mr Dagdelen in his challenge to these penalties, which addresses the characterisation of his behaviour as deliberate and the reductions given by HMRC.

83. If we do not accept that HMRC have established that Mr Dagdelen should have been registered for VAT with effect from 1 August 2010, then it is evident that we must allow Mr Dagdelen's appeal against the decision to register the business for VAT and the Schedule 41 penalty imposed for his failure to notify such liability. We do not accept Mr Kaney's submission that all other matters then necessarily also fall away. We would still need to consider the discovery assessments and related penalties issued by HMRC (noting that we may increase or reduce the amount of these assessments and adjust the amount of the penalties in accordance with the relevant legislation).

84. The only standard of proof is the civil standard, namely whether a party has established a matter on the balance of probabilities.

85. In relation to matters of disputed fact, we remind ourselves of the remarks made by Lord Hoffmann in the Supreme Court *In Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35:

> "If a legal rule requires a fact to be proved (a "fact in issue") a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

86. We consider first, and make findings of fact in relation to, the basis on which HMRC have produced their adjusted turnover numbers, which were then further revised to produce adjusted taxable profits. We then consider these findings and conclusions in the context of the matters under appeal, having particular regard to the burden of proof on the parties.

Basis for HMRC's adjustments to turnover

87. Mr Dagdelen provided monthly sales figures for the period from 15 December 2009 to 30 November 2015 to HMRC on 5 January 2016 at the outset of HMRC's enquiry; these were supplemented by a breakdown of daily takings for the same period on 4 February 2016. Those numbers are challenged by HMRC. They have explained the basis on which they have increased these numbers (addressed further below) and state that this approach should be upheld as it is supported by the evidence and no alternative numbers have been provided by Mr Dagdelen. We take this reference to the absence of alternative numbers as being numbers that are higher than those originally provided by Mr Dagdelen but which HMRC may have been able (upon examination) to agree. Mr Kaney denied that no numbers had been produced, but we find that the information to which he referred, supplied on 4 February 2016, was the same as that provided previously – the monthly sales figures are the same. The difference is that the additional data provided on 4 February 2016 included a daily breakdown of turnover.

88. It is therefore the position that only two sets of numbers for turnover of the business are before us – those supplied by Mr Dagdelen on 5 January 2016 (as supplemented the following

month), and the adjusted numbers produced by HMRC (which were sent by Officer Higgins with the pre-decision letter on 27 January 2017 and have not been further adjusted since).

Information received from suppliers

89. HMRC submit that they received information from a supplier, Unique, that two purchase accounts were being operated, and two purchase invoices were regularly raised, on the same day, to Mr Dagdelen's business. This allegation was put to Mr Dagdelen in the meeting on 3 November 2016. This was denied by Mr Dagdelen then and subsequently, and Mr Kaney submitted that Unique had been under investigation by HMRC itself and had made allegations against other taxpayers which had not been substantiated.

90. We are not concerned with the position of other taxpayers, and consider the evidence which is available before us in respect of Mr Dagdelen.

91. The bundle included a spreadsheet headed "Expected Sales". Officer Morris explained at the hearing that she thought this had been prepared by Officer Higgins using information available to her. That spreadsheet lists purchases from various named suppliers to Mr Dagdelen, setting out the date, invoice number, whether invoice is held, supplier, items purchased, value, number purchased, selling price of each item, expected sales and additional notes/observations. That spreadsheet does set out various instances where Unique is said to have produced two invoices on one date, eg:

> (1) for 7 September 2012 it lists invoice SI09101 (for fishcakes, burger buns, haddock, pukka pies, and sausages), and invoice SI09104 (for fishcakes, beef burgers, haddock, pukka pies and sausages) – the (third) column for "Invoice held" is marked Yes for both invoices;
>
> (2) for 14 September 2012 it lists invoices SI110596 and SI110597. The first invoice is recorded as held but not the second;
>
> (3) for 21 September 2012 it lists invoices SI112059 and SI112060. The first invoice is recorded as held but not the second; and
>
> (4) for 5 October 2012 it lists invoices SI115137 and SI115138. The first invoice is recorded as held but not the second.

92. Officer Higgins did not give evidence and therefore we did not have the benefit of any explanation as to how this spreadsheet was compiled and we did not have a copy of any of the invoices referred to therein. For line items where the spreadsheet recorded that the invoice was held, we infer that this means that it was held by Mr Dagdlen and had been produced by him or his accountant to HMRC. The spreadsheet does, as noted above, record invoice numbers for the invoices which are stated as not held and so we also infer that HMRC did have these invoices from another source.

93. We were not told whether this spreadsheet had ever been shown to Mr Dagdelen or his agent prior to being included in the bundle. We do note that a spreadsheet was shown to them during the meeting on 3 November 2016, but we find that it was not this one. The one discussed at that meeting referred to the final column showing whether the invoice had been produced by the business (see [27(4)]) whereas it is the third column in this sheet.

94. Mr Kaney submitted that Mr Dagdelen and Mr Mehmet had repeatedly asked HMRC for the purchase invoices supplied by Unique. Whilst it is clear from the notes of the meeting on 3 November 2016 (see [27]) that Mr Dagdelen had denied the allegation, it is less clear whether Mr Mehmet asked HMRC for a copy of the pairs of invoices – there is a reference to him wanting to check the accuracy of the Unique data, and being given the spreadsheet that had been discussed during the meeting, but not to him having asked for invoices. His letter of 18 November 2016 did not include a request for the invoices (see [29]). We do, however, note

that the Tribunal's file of correspondence includes an email from Mr Kaney to Mr Wilson on 11 February 2018 stating "We urgently require copies of the HMRC schedule re Unique Seafoods… - and also copies of any of these invoices held by HMRC." We do not know whether or how HMRC responded to this email.

95. We are somewhat surprised that HMRC have not produced, either to Mr Dagdelen or to the Tribunal, a copy of any of the invoices which are said to have been provided by Unique to Mr Dagdelen that were not then produced by Mr Dagdelen to HMRC. But this failure to produce any sample invoices goes both ways – in his letter of 18 November 2016 Mr Mehmet had stated that the Unique invoices were cash invoices which did not specify the name of the trader or shop and gave this as a reason for not accepting HMRC's position that two invoices were ever issued on a single day to Mr Dagdelen, Officer Higgins asked for evidence on which this statement was based in her letter of 2 December 2016 (see [31]), but we have no evidence that Mr Dagdelen or his adviser provided such a sample invoice to HMRC (and none was produced to us).

96. During the meeting of 3 November 2016 HMRC also referred to having received information from Smales, which we infer was another supplier, noting that they had not yet cross-checked that data. No further reference is then made to this supplier. We note that the spreadsheet headed "Expected Sales" refers to invoices from Smales – the relevant columns indicate that only one invoice was issued on any particular date and that the invoices were held (presumably by Mr Dagdelen).

97. In the absence of any additional evidence from HMRC supporting this spreadsheet (eg copies of two invoices from Unique addressed to Mr Dagdelen on the same date, or oral or written evidence from the officer who compiled it explaining the source(s) of information used), we place no weight on this spreadsheet.

Self-invigilation, test purchases and observed (or overheard) purchases

98. HMRC asked Mr Dagdelen to self-invigilate the sales of the business during June and July 2016 to establish if the takings declared previously were correct – this self-invigilation is expressed elsewhere to have been for ten weeks, and it commenced at the end of May 2016. During this period Mr Dagdelen was asked to record each individual sale as it happened, as at the time no Z readings or till rolls were being used in the business. During this time HMRC also carried out covert test purchases at the business.

99. HMRC refer to this period of self-invigilation as the basis for two different submissions:

> (1) they argue that the declared sales seen in the period of self-invigilation were higher than had been declared for June and July 2010 to 2015 with the exception of June 2012 – they say this supports their assertion that the numbers provided by Mr Dagdelen in January 2016 were not credible; and
>
> (2) they also submitted that only 9 of the 19 purchases made or overheard by HMRC had been declared by Mr Dagdelen on the SI Sheets, submitting this was evidence not only that turnover had been under-declared but also that this behaviour was deliberate.

100. As to the level of declared sales during this period of self-invigilation, the only evidence we have as to what this was is that which is set out in the correspondence between the parties and the notes of the meetings. We did not have the full set of SI Sheets (as noted as [26] we had just 11 pages) nor did we have a copy of any spreadsheets which were prepared by HMRC summarising the daily takings from this period.

101. The level of turnover was raised by HMRC in the meeting of 3 November 2016 – the relevant part of the note reads:

> "[Officer Higgins] said she'd compared two complete months of SI ie June and July 2016 with the turnover (TO) declared in the same months for 2010 to 2015 on the questionnaire. She asked who completed questionnaire. [Mr Dagdelen] said he had. [Officer Higgins] said she'd found that TO for months of June and July was highest during SI period. She gave agent schedule of figures. Agent said there was not much difference. [Officer Higgins] said every June and July was lower than for SI period, except June 2012. [Mr Dagdelen] could not explain the increase. He said there had been no change to his takings during his ownership."

102. We accept that this note accurately reflects the substance of what was said and produced during the meeting. Officer Higgins also referred to the takings for these months being higher in her letter of 27 January 2017 (with no additional information being provided), and whilst Mr Mehmet disagreed with the conclusions reached by HMRC, namely that the business was liable to be registered, he did not at that time dispute the factual statement, and nor has he nor Mr Kaney done so subsequently.

103. We therefore find that turnover for June and July 2016 was higher than corresponding months in the years 2010 to 2015, with the exception of June 2012; we also find that no explanation was given for this increase.

104. The Tribunal notes that it is somewhat dissatisfied with the need to make such an imprecise finding in circumstances where it would have been straightforward for either of the parties to produce evidence of the takings which had actually been declared during this period – eg the full set of SI Sheets, or the schedule which Officer Higgins put to Mr Mehmet in the meeting in November, or the daily or monthly takings which Mr Dagdelen would have provided to his accountant for the purpose of preparing his self-assessment for the tax year 2016-2017.

105. We did have more evidence available in respect of HMRC's submission that only 9 out of 19 transactions made or overheard during the self-invigilation period were declared. HMRC (presumably Officer Higgins but we had no evidence to confirm this) had prepared a table showing the results of their test purchases (which include transactions by others that were overheard on those occasions), and we had a copy of the manuscript notes made by the officers who had made the test purchases (none of whom gave evidence). Mr Kaney did not challenge this "9 out of 19" conclusion in his submissions, nor did Mr Dagdelen deny this was the case (either in meetings with HMRC or giving evidence at the hearing). Instead, Mr Kaney submitted that the process of self-invigilating is flawed as it is difficult for someone working on their own to record all transactions accurately, particularly when the shop is busy, and this gives rise to inaccurate results.

106. Whilst it is therefore an agreed fact between the parties that only 9 out of 19 transactions were declared on the SI Sheets, we have carefully considered the underlying evidence as we consider that it is relevant that we understand whether there was a difference between the recording of the test purchases and the overheard transactions and how busy the shop was at the relevant times.

107. HMRC's conclusion was that of the 19 transactions made or overheard, 9 were recorded on the SI Sheets (which is then shown on the table as being 47.3% of the number of transactions). In terms of amount spent, £56.80 was recorded whereas £51.40 was not. This number is more difficult, as three of the transactions that were not recorded had been overheard and the relevant officer did not know the value of the transactions. Based on the amounts known, HMRC recorded 52.5% of the value of purchases as having been recorded and 47.5% as not being recorded. We calculate that the average expenditure on transactions observed by HMRC where it was able to record the amount was £6.76. If it is assumed that this is the

amount spent on each of the three transactions where the amount was not known, then the percentage not recorded based on value of transactions increases to 55.8%.

108. Turing to the notes made by the officers making the test purchases (to which we were not referred during the hearing):

(1) 14 July 2016 – There was one test purchase and two classed as overheard. The officer's notes record that there was one male member of staff and no records or SI Sheets could be seen – he entered at 5.45pm and left at 5.55pm. A customer before him placed an order for £5.20, and was still waiting when the officer left the shop (having made a purchase for £8.20), and whilst he was there another order was overheard for chips only at £2.20. All three orders appeared to be rung up on the till, with the display being visible and matching the amounts paid.

HMRC's examination of the SI Sheets led them to conclude two out of three of these purchases were recorded. We agree. The £8.20 purchase was shown (at 5.40pm), as was the £2.20 (at 5.55pm). (We note that this casts doubt on the relevance of whether the officer can see the sheets when making their purchase, or if they saw a member of staff entering the information on the sheet.) The £5.20 overhead purchase from the first customer is not shown – we did consider whether the practice adopted was to record the transaction only once supplied to the customer (which would not have been seen by the officer as the customer was still waiting) but we conclude that did not happen as the next entry on the sheet is marked for 6.18pm. The three immediately preceding orders also do not match this order – they were at 5.20pm, 5.30pm and 5.34pm, for £4.60, £1.60 and £2.60 respectively.

(2) 15 July 2016 – There was one (male) member of staff, and the SI Sheets were visible (and the officer noted that the most recent entry was entry number 2087 for £2.30). The officer's order at 1.15pm was for £9.40, and another customer came in at which point the man serving began to fill a bag with chips (which the officer thought might have been pre-ordered), then asked for something else as well and paid £3.40. The officer did not see either of these transactions entered on the SI Sheets. There is no information as to how long the officer was in the shop, save that the officer had to wait for his order to be cooked.

HMRC conclude that none of these two transactions were recorded. We agree. The sheets show £2.30 recorded at 12.58pm and there is then no other transaction recorded until 1.31pm when an order for £6 is shown. There are then seven smaller orders and it is not until 5.07pm that an order for £9 is recorded.

(3) 21 July 2016 – The officer visited at 9.01pm and there was one (male) member of staff and no other customers. His order was for £8.80. The notes show he witnessed one customer place an order, leave to go to another shop but at that time they had not paid, and another customer ordered fish and chips and paid. The officer noticed the SI Sheet behind the counter, and could see the last entry was numbered 2329. He left the shop at 9.15pm.

HMRC conclude that none of these transactions were recorded, and they count it as one test purchase by the officer and two overheard transactions. The SI Sheets show a purchase for £1.60 at 8.52pm (on line 2329), then no sales until 9.15pm at which point a transaction is recorded for £3.10. There are then only two more orders shown that evening (at 9.34pm and 9.43pm for £7.40 and £3.20). We conclude that it is correct to conclude that the officer's purchase was not recorded. We also conclude that the (second) overheard order for fish and chips was not recorded. But for the "9

out of 19" being agreed, we would not be satisfied that the first overheard order should properly be counted as an order that was not declared as there is some doubt as to whether they purchased anything (they were not seen paying for anything or leaving with food, albeit that it is possible that they were going to another shop whilst food they had ordered was cooked and would have paid upon returning).

(4) 22 July 2016 – The officer visited at 6.10pm and left at 6.20pm. There were two members of staff in the shop. The officer placed an order for £12.40 and overheard two orders for £13.40 and £3.80 which they saw being entered on the SI Sheet (as well as the officer's order). The officer did witness two other customers placing orders, and a telephone order was taken, but there was little detail on these.

HMRC conclude that three of the three transactions were recorded. Their summary schedule does refer to the possibility of other orders having been placed and not recorded, but these are not counted as part of the 19 transactions. We did have a SI Sheet which started to record the sales on 22 July (first order at 12.15pm), but at 1.30pm the sheet runs out and the next page we have is for 26 July 2016. We are prepared to accept (on the basis of the evidence from the notes and HMRC having then followed this through into their summary sheet as transactions which were recorded and Mr Dagdelen's agreement with HMRC's conclusion on "9 out of 19") that three of three transactions were recorded. We are not, however, able to consider whether the additional two transactions alluded to might also have been recorded as there is no evidence on this. We would add that it is readily apparent from even a quick review of the bundle that very few of the SI Sheets are included, and no request was made on behalf of Mr Dagdelen that the complete set be provided by HMRC).

(5) 26 July 2016 – The officer entered the shop at 7.30pm and left at 7.41pm; there were two members of staff working. The officer placed an order for £6, and another customer placed an order for £4.40 which was entered in the till. The officer notes that "both orders were recorded, by the member of staff serving, on a pad of paper on the counter. The paper was not pre-printed". The officer then placed another order for £2.20 and there was an additional customer who ordered chips (and possibly sauce) and the staff wrote something on the pad of paper.

HMRC concluded that of these four transactions three were recorded (namely the first order by the officer and the two overheard orders, albeit that the summary HMRC prepared showed that the second overheard customer order was for an unknown amount). We do have the sheets for this evening, and an order for £6 is shown at 7.35pm (as well as an order for £3 at that same time). There is no order for £2.20 around this time, nor for £4.40 (although there was such an order at 7.15pm). Were we required to reach a conclusion on this point, we would consider that one order by the officer was recorded, as was one overheard order (which we consider was the £3); the other two orders were not recorded. We concluded the pad of paper seen, where the officer noted that the £4.40 was recorded, was likely to have been an order sheet for person cooking rather than a SI Sheet, given that there were two members of staff working and it was not pre-printed.

(6) 26 July 2016 – A different officer entered the premises at 8.35pm and left at 8.44pm, and there were still two members of staff working. The officer placed an order for large chips, regular cod, jumbo sausage and sprite totalling £8.80 (which was entered in the till). The till was then stated as used to place an order for £6.40, although no mention is made of a customer. A customer then picked up an order and the notes

indicate that this must have been ordered and paid for before the officer entered. Orders were then entered in the till for £6.80 and £6.

HMRC conclude that one transaction was recorded (that overheard for £6.40) and three were not (that of the officer and two for £6.80 each, albeit that we consider this should refer to one for £6.80 and one for £6). We agree that only one order was recorded, shown as at 8.40pm for £6.40. There is an order at 8.35pm for £8.40 and we considered whether this might have been that of the officer but with the wrong amount being recorded, but that entry is described as large cod and regular chips (and is quite different from the officer's order – and other entries do list the items ordered). After the entry at 8.40pm there is nothing on the SI Sheet until 9.10pm.

109. Taking all of the above into account, the statement that 9 out of 19 transactions were recorded breaks down as 3 of 7 transactions made by officers, and 6 out of 12 overheard purchases. If this had not been agreed, we would have found that 8 out of 18 transactions were recorded (with one from 21 July being left out of account as explained above) which is made up of 3 of the 7 purchases by officers and 5 of the overheard orders. Our conclusions are thus different to those of HMRC, but not to a material extent.

110. We stated above that we were keen to understand whether there was a difference between the recording of the test purchases and the overheard orders. We were concerned that there is considerable risk with these overheard orders (which are quite properly recorded by the relevant officers as such) that the information gleaned is incomplete – eg, have amounts been completely misheard such that we are looking for the wrong information on the SI Sheets, or was an order placed ahead by telephone, recorded then and the officer then witnessed the collection of that order (although we do note Mr Dagdelen's explanation to HMRC that he would record these transactions when the customer collected them, which suggests that they should have been recorded when the officer witnessed the collection). If there were a material difference between the rate of recording of test purchases and overheard orders, we would place more weight on what happened with the transactions conducted by the officers themselves – however, on the facts before us, this does not arise as the rate of recording is broadly the same.

111. We have also looked at how busy the shop was on different occasions to understand the level of recording:

(1) On each of 14, 15 and 21 July there was only one member of staff present each time (we infer this was Mr Dagdelen as he said he always did the cooking) and although he was on his own the evidence from the officers' notes suggest that the shop was not busy. Furthermore, the entries recorded on the SI Sheets indicate that there were then no transactions immediately afterwards – there was plenty of time on each occasion for him to have added the orders just taken once the customers left the shop but there is no evidence that he did this.

(2) The shop was busier on 22 July – there were two members of staff working, and during the ten minutes the officer was in the shop he placed his order, overheard two specific orders and witnessed two other customers place unknown orders. All three transactions that HMRC count as having been made were declared. This suggests that even when busy it was entirely possible to maintain the SI Sheets accurately, albeit that we do note that there was another member of staff present.

112. In terms of the practical difficulties which can be presented by the need to keep updating SI Sheets when also trying to work in the shop, Mr Wilson referred to the comment which had been made by Mr Dagdelen (apparently to Officer Higgins and reported by Officer Morris) when he had asked Officer Higgins for more SI Sheets, namely that they were easy to complete, Mr Wilson drew attention to this as support for HMRC's position that any inaccuracies can

only be deliberate. This evidence is hearsay, albeit that we are able to trace the sourcing of it, and we are mindful of this in assessing how much weight to place on this statement. However, and more importantly, we consider that Mr Wilson's conclusion is only one possible conclusion. It is equally possible that Mr Dagdelen was acknowledging that the SI Sheets were simple to fill in and he knew what he was supposed to be doing. That is different from accepting that he always had time to complete them properly when the shop was busy with customers and he was on his own, or he had someone helping with the till and was reliant on them filling it in as they took orders.

113. However, whilst the SI Sheets themselves may well have been a new requirement, we are conscious that from the very beginning of the compliance check Mr Dagdelen had stated to HMRC (see [20]) that he did not use till rolls but wrote down his sales. He had no choice but to do this given that although his till display and cash drawer were operating he did not have a functioning till roll. He should therefore have been used to writing down orders as he went along during the day, and been familiar with the need to explain to staff (who were only serving customers and not trying to do the cooking as well) that they must do this.

114. Mr Dagdelen acknowledged that the SI Sheets would not be 100% accurate. However, Mr Kaney submitted that inaccuracies in the SI Sheets did not mean that the correct takings had not been declared to HMRC. He submitted that whether or not sales were recorded on the SI Sheets the money would be in the till and included with the daily takings. The evidence from the officers' notes does not cast any doubt on the money being put in the till during their time in the shop. However, the only evidence in support of this submission was the denial by Mr Dagdelen that he had suppressed sales (which was challenged by HMRC).

115. We are concerned that the absence of any supporting evidence itself (without any explanation for its absence) casts doubt on the credibility of this position. We have considered this both from the perspective of the self-invigilation period itself, and for earlier periods where Mr Dagdelen was keeping records by writing down orders:

> (1) We did not have a copy of the full set of SI Sheets which Mr Dagdelen sent to HMRC, nor the sheet which HMRC apparently prepared showing the level of takings recorded throughout this period for the purpose of comparing it with the same months in previous years and apparently included a breakdown into daily takings as Officer Higgins drew attention to the variations in the numbers throughout this period. Either of these would have shown the level of takings that were being contemporaneously reported during the period (and neither of which were cash-based).
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> (2) The only context in which Mr Dagdelen was otherwise reporting this information was for the purpose of his income tax self-assessment, where he said he sent all the information to his accountant to prepare his return – we did not see the information which was sent by Mr Dagdelen to his accountant for the tax year 2016-2017.
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> (3) In any event, we have asked ourselves where this different information (ie declaring amounts based on cash in the till rather than the information which had been written down) would have come from – we do not think it is credible that, whilst self-invigilating, Mr Dagdelen was at the same time keeping a separate written record of takings which was somehow more accurate; we consider it more likely that he either used the SI Sheets themselves as his written record for this period, or copied the information from them afterwards.
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> (4) Furthermore we also note that when Mr Dagdelen was told in the meeting on 3 November 2016 that the takings reported during the self-invigilation were higher than in previous years and that there was a high rate of transactions not being reported based on the test purchase results, neither he nor his adviser explained then (or in the

follow-up letter) that the cash takings were higher than the amounts under discussion and providing that information to HMRC at that time or explaining that this information would be used for the purpose of his self-assessment.

(5) We also think it is unlikely that, having sent SI Sheets to HMRC declaring a certain level of daily takings for the purpose of the compliance check, Mr Dagdelen would then have sent different information to his accountant based on cash in the till on the relevant days, particularly in the absence of having raised this as an issue with HMRC in November 2016.

(6) Considering earlier years, where there was no contemporaneous scrutiny by HMRC, Mr Dagdelen was writing down orders and also cashing-out the till to make regular cash deposits of takings at the bank. His evidence was that he sent the information to his accountant, and in the context of supplier invoices said he maintained a file of paperwork for this purpose. He has not explained what information he sent to his accountant in relation to income rather than expenses, or included written evidence thereof. We have seen the bank statements showing regular cash deposits, and these were provided to his accountant; however, without more information, these deposits cannot have been used as the basis of a statement of income. Mr Dagdelen has said he paid suppliers in cash, so the cash deposited is a "net" amount. We consider it is, on the balance of probabilities, more likely that he reported his income by sending him the information from the written record of orders.

116. In the light of the above, Mr Kaney has not satisfied us that the non-reported transactions from the SI Sheets were then included in turnover calculations.

Till rolls

117. It was common ground that, at the beginning of the compliance check, the till which was operating in the business did not have a working till roll. On 18 November 2016 Mr Mehmet provided Z readings for three days in November 2016. HMRC compared these figures to declared sales for corresponding days in November 2015, and that check showed that the readings declared in 2016 were higher than the corresponding days in 2015. This was set out by Officer Higgins in her letter of 27 January 2017 (see [33]). Whilst we were not able to "date" the information from the till rolls before us, the amounts are the same as those used by HMRC, and no challenge was made to HMRC treating these as from the dates they used, and we therefore infer from this that these dates had been confirmed with Mr Dagdelen or Mr Mehmet at the time.

118. Acknowledging that these three days are only a very small snapshot, we do accept HMRC's submission that these takings were significantly higher than for the average of that day of the week in the previous November.

119. HMRC later received further till rolls, which were not provided to us, and HMRC used these to prepare a table of Z readings for 7 November 2016 to 9 January 2017. The daily takings shown vary significantly, from £114 to £934.35. The latter amount was significantly higher than any of the other days, with only four other days recording amounts exceeding £500 (and those were all less than £600), and HMRC's table includes a note that although the till roll recorded £934.35 for that Saturday, this had been crossed through by Mr Dagdelen and he had written £340.38, but the relevant officer's calculation was that this should be £342.50.

120. HMRC's criticism of the numbers originally provided by Mr Dagdelen was that they were static and consistent and this was not credible. Having looked through the information provided by Mr Dagdelen in February 2016, such consistency is readily apparent to us. The question then becomes whether consistent takings (against the background of Mr Dagdelen's evidence that he has not changed the way he runs the business and the customers are mainly

regulars) are credible. HMRC have not introduced any evidence as to what they would expect to see from similar businesses who were accurately reporting their takings. The only evidence was have is therefore that in relation to this business, and our own scrutiny of the information from these till rolls in this two month period is that there is a significant level of fluctuation. Fridays and Saturdays are showing a level of takings higher than other days of the week (which is what we would expect and is in line with Mr Dagdelen's evidence), but there is a variation at other times that we do not see in the numbers provided in February 2016.

121. Looking at December 2016 (on the basis that this was the only complete calendar month represented), the monthly takings were £6,947.65. This same month was declared by the taxpayer in previous years as £6,454 for 2010, £7,300 for 2011, £6,485 for 2012, £6,415 for 2013 and £6,521 for 2014. (We had an incomplete month for December 2009 and did not have information for December 2015.) This was therefore the second highest level of takings for a December. There was thus a level of consistency in monthly takings for December in 2010, 2012, 2013 and 2014. However, the takings shown on the till rolls for December 2016 are not completely out of line with previous years once regard is had to the takings for December 2011.

Potato sales

122. The bundle included a single page spreadsheet headed "Expected potato sales" for the period 6 April 2012 to 5 April 2013 which was described in the contents page of the bundle as a "Potato analysis". We infer from this that HMRC prepared this to assess potatoes bought with portions of chips declared sold with a view to drawing conclusions from this as to levels of turnover. We note that during the meeting of 3 November 2016 Officer Morris had asked Mr Dagdelen about his purchases of potatoes and been told that he bought nine bags of potatoes per week.

123. However, we had no evidence from any officer of HMRC explaining to us the basis on which this spreadsheet was prepared or the source(s) of the information used. We did not have any submissions as to what this information purports to show and neither party made any reference to it at the hearing.

124. We place no weight on this spreadsheet.

Calculation of revised taxable profits

125. Officer Morris explained in her letter of 5 April 2017 how she had calculated the additional tax and national insurance contributions due (see [36]). That approach used Officer Higgins' revised turnover as a starting point and then acknowledged that it was reasonable to accept that in order to achieve a higher turnover, more purchases would have been required, and used HMRC's expectations of similar businesses to produce a higher cost of sales figure for each year. Officer Morris then deducted the other expenses declared by Mr Dagdelen and his claims for capital allowances before producing revised taxable profits.

126. Whilst Mr Dagdelen denies that he has suppressed purchase invoices from suppliers, no other challenge was made to these adjustments (either in submissions or in evidence).

Conclusions on the above evidence

127. Having reviewed the papers very carefully, the Tribunal considers that the evidence presented by both parties is rather sparse.

128. We recognise that within a large organisation such as HMRC roles and responsibilities of officers will change, and people leave, and of itself we do not criticise HMRC for the absence of witness evidence from Officer Higgins. However, given the repeated references to two invoices being issued by Unique on the same dates, we would have expected to see direct evidence of this in another form (most likely to be by way of copies of sample invoices).

129. Similarly, there was evidence that ought to have been in the possession of Mr Dagdelen that could have usefully been produced but wasn't – eg support for Unique having used a system of "cash invoices" which did not specify the business or shop, or evidence showing how cash takings were reported where they differed in amount from those written down. This was a point that was made in the outcome of review letter.

130. We are therefore conscious that our findings are based on limited evidence, but that was the only evidence before us. We are satisfied that, on the balance of probabilities:

> (1) the takings reported by Mr Dagdelen on 5 January 2016 and 4 February 2019 are not credible on the basis of their stability and pattern, features which were absent from the takings shown from November 2016 to January 2017; and
>
> (2) on the basis that when takings were scrutinised by HMRC during the two months of self-invigilation and for the three days in November 2016 for which till rolls were initially produced, takings were generally higher than those reported in previous years, we consider that the reported takings had been under-declared by Mr Dagdelen previously.

131. We now consider the decisions, assessments and penalties under appeal in the light of the above discussion and findings, keeping in mind the evidence which we do and do not have, and the burden of proof on the parties.

Decision to register the business for VAT with effect from 10 August 2010

132. It is common ground that the supplies made by Deep Sea Fish Bar were taxable supplies, and as such, if the value of his taxable supplies in a rolling 12-month period exceeded that of the VAT registration threshold at the relevant time, then VAT registration was mandatory. The time for notifying HMRC is then prescribed by paragraph 5 of Schedule 1. It was accepted by Mr Kaney that if the rolling taxable supplies exceeded the (then applicable) £70,000 threshold at the end of June 2010, then the business must be registered for VAT with effect from 1 August 2010. However, he disputed that this threshold had been reached at that time and argued that this was fatal to HMRC's case (on all matters under appeal).

133. HMRC's decision to register Mr Dagdelen was explained in the letter from Officer Higgins to Harman on 17 March 2017. Mr Kaney submitted this decision was flawed as the decision was based on the evidence from Unique as to two purchase invoices, the existence of which were denied by his client.

134. Section 83(1)(a) VATA 1994 provides that an appeal lies to the Tribunal with respect to the registration of any person under that Act. We have a full appellate jurisdiction in respect of such matters, not a supervisory jurisdiction. The reasons for the decision to register will be relevant in so far as we need to assess the evidence which supports them; however, flaws in the decision-making process, or failing to refer to all relevant information, are not of themselves grounds for appeal against the registration. The matter before us is whether the business was required, on the balance of probabilities, to be registered for VAT with effect from 1 August 2010, not whether the decision of HMRC was flawed.

135. In any event, we do not accept Mr Kaney's submission that the decision was based only on HMRC's argument that Mr Dagdelen maintained two purchase accounts with Unique - not only is neither Unique, nor any other supplier, expressly referenced in the letter of 17 March 2017, but also it refers to the "evidence held" by HMRC (see[35]). We see no reason why this would not also include the other factors which had previously been identified and explained by HMRC in meetings and in correspondence.

136. On the basis of the numbers provided by Mr Dagdelen to HMRC on 5 January 2016 (which are set out at Annex 1), at the end of December 2010 the rolling 12 month turnover was

£70,524 – that is the first full twelve calendar months in which Mr Dagdelen carried on the business. HMRC's table of rolling turnover showed outputs at this time at £961.23, and the relevant registration threshold was taxable supplies of £70,000. Throughout most of 2011 the rolling 12 month turnover was around £69,000 and tipped back over £70,000 in November 2011 (at which time the registration threshold was £73,000). It has since then remained in the range of £70,000 to £80,000 (and was just over £80,000 in November 2012). Outputs were relatively low throughout, never exceeding £2,000 for any month and usually were around £1,000 per month.

137. This is therefore a business which, on its own declared turnover, was operating very close to the registration threshold throughout Mr Dagdelen's ownership.

138. On the basis of the evidence before us and our findings in relation thereto, we are satisfied that:

(1) the turnover declared by Mr Dagdelen on 5 January 2016 showed a level of consistency which is not credible;

(2) the actual turnover was higher than that declared;

(3) there was a high rate of non-declaring of transactions based on the agreed fact that only 9 out of 19 transactions made or overheard were recorded during self-invigilation; and

(4) at other times Mr Dagdelen was responsible for writing down orders in the absence of till rolls and we have no reason to expect that such record-keeping would be any more or less accurate than that during the period of self-invigilation.

139. The presumption of continuity applies in relation to establishing the level of turnover and taxable supplies as it does with establishing the level of taxable profits when considering the amount charged by a discovery assessment. Furthermore, Mr Dagdelen's evidence was that turnover was regular (based on the turnover numbers he provided) and his customers were mainly regulars.

140. The adjusted numbers for turnover and taxable supplies are consistent with our conclusions set out at [138] above, which are themselves based on our detailed consideration of the evidence before us. It is irrelevant whether Officer Higgins also had regard to HMRC's position that Mr Dagdelen maintained two purchase accounts with Unique for this purpose. We therefore consider that HMRC have established, to the required standard of proof, that the rolling level of taxable supplies for the business exceeded the registration threshold at 30 June 2010 and the business was therefore liable to be registered for VAT with effect from 1 August 2010.

Schedule 41 penalty

141. Paragraph 16(1) of Schedule 41 requires that where a person becomes liable to a penalty under paragraph 1, HMRC shall assess the penalty, notify the person and state in the notice the period in respect of which the penalty is assessed. Paragraph 16(4) provides that an assessment must be made before the end of the period of 12 months beginning with the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

142. The penalty assessment which was issued on 13 July 2017 meets the requirements of paragraph 16(1). We also conclude that this assessment was in time – the reference to the ascertainment of the unpaid tax means that it is clear that a penalty assessment can be issued even where no assessment has yet been made of the underlying tax, and HMRC first set out their calculation of the unpaid VAT in their letter of 17 March 2017. Whilst the amount of unpaid tax would necessarily have been ascertained by HMRC before that date, we find that

this would have been after 27 January 2017 as Officer Higgins was seeking further information in that letter in order to enable her to calculate the unpaid VAT.

143. With HMRC having established that the penalties were validly assessed, the burden of proof is then on Mr Dagdelen.

144. It then important to identify for this purpose whether Mr Dagdelen is appealing against the decision that a penalty is payable (under paragraph 17(1)) or as to the amount of the penalty payable (under paragraph 17(2)) as the Tribunal's powers are different in each scenario. On an appeal under paragraph 17(1) we may only affirm or cancel HMRC's decision, whereas on an appeal under paragraph 17(2) we may affirm or substitute another decision that HMRC had power to make.

145. The absence of a Notice of appeal in respect of the Schedule 41 penalty means that there are no grounds of appeal set out therein which can be considered for this purpose. When the appeal against the decision of 17 March 2017 was subsequently amended (by the email of 27 September 2017, adding the VAT penalty to the appeal), Mr Kaney simply asked that the grounds of appeal be "amended accordingly", stating that the VAT penalty (and the income tax assessments and penalties) arose from the same error and unreliable evidence as the disputed VAT decision.

146. We consider that Mr Dagdelen's appeal should properly be treated as an appeal under both paragraphs 17(1) and (2). The challenge that a penalty is due is based on the argument that there was no liability to register and therefore no failure to notify; whereas the challenge to the amount is based on the categorisation of the behaviour as deliberate (and prompted) rather than careless.

147. On the basis of our decision to dismiss Mr Dagdelen's appeal against the liability to register with effect from 1 August 2010, a penalty is payable by Mr Dagdelen under paragraph 1 of Schedule 1. We affirm HMRC's decision to issue the penalty.

148. We have however considered Mr Kaney's challenge to the amount of the penalty, his argument being based on any failure being careless rather than deliberate. We note that paragraph 5 of Schedule 41 draws a distinction between failures which are "deliberate and concealed" and "deliberate but not concealed", and paragraph 6 then imposes different levels of penalty, with a third, lower, level of culpability being "for any other case". Different reductions are then available based on whether the disclosure was prompted or unprompted, and for telling, helping and giving.

149. HMRC have imposed the Schedule 41 penalty on the basis that the failure to notify was "deliberate but not concealed", which is further explained by paragraph 5(1)(b) as the failure is "deliberate but P does not make arrangements to conceal the situation giving rise to the obligation". The third category of behaviour is "any other case", which can potentially apply to failures which are careless or innocent.

150. In *Auxilium Project Management Limited v HMRC* [2016] UKFTT 249 (TC) Judge Greenbank, in the context of penalties imposed under Schedule 24, noted that such schedule does not define "deliberate" and said as follows:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

151. We agree with this interpretation of a deliberate inaccuracy, and readily apply it in the context of the inaccuracy penalties imposed on Mr Dagdelen below, but note that there is a distinction between providing inaccurate information to HMRC and failing to take a required action. The action that Mr Dagdelen was required to take was to notify HMRC within 30 days that he had become liable to be registered for VAT. His failure to do so is deliberate if he knew that his taxable supplies exceeded the relevant threshold and decided not to register for VAT or reveal that information to HMRC.

152. HMRC relied upon the following in the penalty explanation letter:

> "Approximately 50% of the purchases made and overheard by HMRC officers in the period 14 July 2016 to 26 July 2016 were not recorded on the invigilation sheets that you were asked to complete.
>
> The takings you declared during the two complete months of self invigilation were higher than the same months in earlier years. These increased takings are still known to be insufficient as 50% of the sales reported by HMRC officers were not declared.
>
> The takings you provided at the beginning of my enquiry showed a pattern and were not credible. The takings during the self invigilation period and those on the Z readings recently provided are variable.
>
> 50% of the purchase invoices known to have been issued to you by Unique Seafood were missing from your business records.
>
> I consider it likely that you did not declare all your sales in order that your business turnover remained under the VAT threshold."

153. Mr Wilson also referred to Mr Dagdelen's evidence that the SI Sheets would not be 100% accurate, and his acceptance that they may be 5% inaccurate, and submitted that this was an acknowledgement that they were deliberately inaccurate to the extent of the 5%. We do not accept this – Mr Dagdelen was acknowledging that, given that "mistakes happen", his numbers may be inaccurate to that extent. This level of inaccuracy may be careless.

154. Whilst we therefore do not accept Mr Wilson's submission on this point, and place no weight on the reference to missing purchase invoices, we do accept the remaining reasons given by HMRC in the penalty explanation letter as supporting their conclusion that the behaviour was deliberate. We therefore agree with HMRC's categorisation of the behaviour that had led to Mr Dagdelen's failure to notify his liability as deliberate. We also agree that it was prompted – we consider this is clear from the provision of information on turnover when requested by HMRC in January 2016 and from the subsequent meetings with HMRC.

155. The penalty range of 35% to 70% for deliberate behaviour is prescribed by Schedule 41. HMRC have already given a reduction of 85%, which includes the maximum reduction for helping and giving. We consider the reduction given to be sufficient for the quality of disclosure.

156. As to special reduction provided under paragraph 14 of Schedule 41, HMRC considered that there were no special circumstances to merit special reduction, and we agree. Paragraph 20 of Schedule 41 provides for the defence of reasonable excuse in relation to "an act or failure which is not deliberate". The consideration of reasonable excuse is therefore not relevant here.

157. We do not make any further adjustments to the amount of the penalty assessed by HMRC and affirm the penalty assessment of £59,644.46.

Discovery assessments

158. HMRC must show that the conditions for issuing discovery assessments are met. However, once they have done this, s50(6) TMA 1970 applies and has the effect that an

assessment stands good unless Mr Dagdelen meets the onus of establishing that he has been overcharged by the assessments.

159. Section 29(1) TMA 1970 provides that HMRC may make an assessment, generally referred to as a "discovery assessment", if they discover that any income which ought to have been assessed to income tax has not been assessed. Section 29(3) provides that where a person has made and delivered a return for the year concerned, an assessment shall not be made unless one of the conditions at s29(4) or 29(5) is fulfilled. These conditions are thus alternative, and only one needs to be satisfied: they are set out in full at [60], but s29(4) requires that the inaccuracy was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf and s29(5) applies where an officer makes a "discovery". HMRC submit that both are satisfied in the present instance.

160. We do consider both alternative grounds, but note at the outset that the question of whether the inaccuracy was brought about carelessly or deliberately is relevant not only to whether or not HMRC need to satisfy the second condition in s29(5) but also to whether the discovery assessments were in time.

161. HMRC issued discovery assessments in respect of each of the tax years 2009-2010 to 2014-2015 on 28 August 2018. The "ordinary" time limit for issuing assessments is four years from the end of the year of assessment (s34) - if that limit applies, then the only assessment which was in time was that for 2014-2015. The discovery assessments for prior years would be out of time, irrespective of whether s29(5) is satisfied. If the inaccuracy was brought about carelessly, then the time limit is six years from the end of the year of assessment (s36(1)), so the discovery assessments for 2009-2010, 2010-2011 and 2011-2012 would be out of time (again, irrespective of whether the second condition is met). HMRC need to establish that the loss of tax was brought about deliberately by Mr Dagdelen, in which circumstance the time limit is extended to 20 years (s36(1A)) and all of the discovery assessments are in time.

162. On the basis of our findings of fact, including those at [87] to [131] and at [138], we consider that the non-assessment of income to income tax was brought about deliberately by Mr Dagdelen. He under-declared his sales in respect of the tax years in question and provided this lower information to his accountant which was then used for the purpose of completing his income tax self-assessments.

163. On this basis, not only do we conclude that all of the discovery assessments were made in time, but also that the condition in s29(4) has been satisfied such that the discovery assessments were validly made. It is therefore not necessary to consider the second condition in s29(5), namely that HMRC have made a "discovery" that there was a loss of tax, but we do set out our reasoning and conclusions as it was argued before us.

164. It is well-established that the requisite threshold for there to be a discovery is low, and is not dependent on any new information, of fact or law. In *HMRC v Charlton* [2013] STC 866, the Upper Tribunal stated at [37] that:

> "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. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case, such as this,

> where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr Cree's conclusions of their essential newness for s29(1) purposes."

165. That same paragraph above raised what has since become known as the matter of whether a discovery, once made, becomes "stale" such that, although HMRC may have issued a discovery assessment within the statutory time limit, the discovery on which it is based has lost its character of "newness" such that HMRC can no longer use that discovery as the basis for an assessment. That is particularly relevant here, as the discovery assessments for all six tax years were issued on 28 August 2018 and yet Officer Morris had received the information as to the revised turnover from Officer Higgins in March 2017 and informed the taxpayer in her letter of 5 April 2017 that she intended to issue revenue assessments (for the amounts that were ultimately assessed) for the tax years in question. She explained that the reason for this delay was that Mr Mehmet had asked her in April 2017 that she refrain from issuing the assessments until the VAT appeals were dealt with (which evidence was not challenged by Mr Kaney), and the prompt for issuing them was a request to do so in August 2018 from Mr Kaney.

166. In *Beagles v HMRC* [2018] UKUT 380 TCC the Upper Tribunal said as follows:

> "58. In the absence of the authorities, we can see some force in the submission that the concept of "newness" involved in a discovery relates simply to the nature of the discovery at the time at which it is made. Whilst we accept Mr Firth's arguments that the implication of a requirement for HMRC to act promptly following any discovery promotes efficiency in the administration of tax and that the concept of a discovery must clearly involve something new (as confirmed by the House of Lords in *Cenlon*), on the words of s29(1) , there is nothing express which would appear to provide for any requirement that the discovery must retain that quality until the assessment is made. The only requirement on the face of the legislation is that an assessment under s29(1) can only be made following a discovery.
>
> 59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other similar (obiter) statements and so we will follow it.
>
> 60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end.
>
> 61. On that basis, we reject Mr Henderson's submission that there is no concept of "staleness" involved in a discovery.
>
> …

> 80. In *Pattullo*, Lord Glennie suggested that a discovery would become stale "on any view" after a period of 18 months (*Pattullo* [57]). In *Tooth*, the Upper Tribunal expressed the view that a discovery would be stale if the assessment was issued five years later (*Tooth* [83]). These statements are made notwithstanding the observation of Lord Glennie in *Pattullo* that a discovery will only lose its quality of "newness" in "the most exceptional of circumstances" due to inaction on the part of HMRC (*Pattullo* [53]).
>
> 81. On the other hand, as we have mentioned above, in *Charlton*, the Upper Tribunal suggested that a delay (in that case of three or four months) "merely to accommodate the final determination of another appeal which was material to the liability question" would not cause a discovery to lose its essential newness (*Charlton* [37]). In *Pattullo*, Lord Glennie accepted that a discovery could be kept fresh for the purposes of being acted upon later, for example, by HMRC notifying the taxpayer of a discovery in "the expectation that matters could be resolved without the need for a formal assessment" (*Pattullo* [53]).”

167. The references to *Tooth* above are to the decision of the Upper Tribunal. In *HMRC v Tooth* [2019] EWCA Civ 826, Floyd LJ stated in the Court of Appeal that both parties had accepted that the legal approach to whether there is a “discovery” is correctly set out in the first three sentences from *Charlton* cited above. He then referred to the remainder of that paragraph where the Upper Tribunal had referred to the requirement for newness and stated:

> “61. I agree with the UT's approach in both passages. The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present.”

168. There was a delay in the present instance of over a year between the facts relied upon for the discovery and the issue of the assessments. We accept that the delay was not due to inaction on the part of HMRC, and that the reference in *Charlton* to a delay to accommodate the outcome of another appeal is relevant (albeit that in that instance the other appeal was that of another taxpayer), such that on these facts before us the discovery had not become stale. Therefore, we would have found that the condition in s29(5) had been satisfied.

169. For the reasons set out above, HMRC have established that the discovery assessments for the tax years 2009-2010 to 2014-2015 were validly issued. Section 50(6) TMA 1970 then provides that if on appeal the Tribunal decides that the taxpayer is overcharged by an assessment, then the assessment “shall be reduced accordingly, but otherwise the assessment…shall stand good”. It is clear that this shifts the burden of proof onto Mr Dagdelen to satisfy us that, on the balance of probabilities, he has been overcharged by the discovery assessments.

170. In *Nicholson v Morris* [1977] STC 162, the Court of Appeal affirmed the High Court decision of Walton J. That case concerned a clerk to barristers, Mr Nicholson, who had under-declared his fees earned. Goff LJ interpreted s50(6) TMA 1970 as that the General Commissioners are “legally bound” to confirm the assessments, unless it appeared to them that the appellant was overcharged.

171. Officer Morris gave evidence as to how she had used the adjusted turnover numbers prepared by Officer Higgins as the basis for calculating revised profit numbers which were then used for the purpose of raising discovery assessments. That evidence was consistent with the explanation set out in her letter of 5 April 2017. We accepted her evidence.

172. HMRC's position as to the amount of the discovery assessments and how it had made these calculations had thus been clearly set out for more than two years by the time of the hearing. Notwithstanding this, the only evidence adduced on behalf of Mr Dagdelen to address whether he had been overcharged by these assessments was his witness statement and oral evidence. We have referred above (at [129]) to examples of types of evidence that have not been adduced on behalf of Mr Dagdelen that might have assisted with discharging the burden of proof upon him; but we did not have such evidence.

173. Mr Dagdelen's evidence before the Tribunal was that the figures for monthly turnover that he had provided to HMRC in January 2016 were correct, as was, by implication, the information that he had provided to Mr Mehmet for the purpose of computing his taxable profits for completing his self-assessment returns. He did acknowledge that the SI Sheets may be inaccurate – by about 5% - and, from this, we infer he would say the same about his record-keeping throughout other periods which formed the basis for the information he provided to Mr Mehmet. However, given the other evidence before us, and the findings we have made in relation thereto, we do not accept that his figures for monthly turnover were accurate to within 5% or so. Accordingly, he has not satisfied us that he has been overcharged by the discovery assessments. They stand good.

Schedule 24 penalties

174. Paragraph 13(1) of Schedule 24 provides that where a person becomes liable to a penalty, HMRC shall assess the penalty, notify the person and state in the notice a tax period in respect of which the penalty is assessed. An assessment must then be made before the end of the period of 12 months beginning with the end of the appeal period for the decision correcting the inaccuracy.

175. The penalties which were assessed on 31 August 2017 meet the requirements of paragraph 13(1), and were made within the required time limits.

176. HMRC have thus established that the penalties were validly issued, and the burden of proof in an appeal against these penalties is on Mr Dagdelen.

177. As with the Schedule 41 penalties, paragraph 15 contemplates that a person may appeal against a decision of HMRC that a penalty is payable (under paragraph 15(1)) or they may appeal against a decision of HMRC as to the amount of a penalty payable (under paragraph 15(2)), and this Tribunal my affirm or cancel HMRC's decision (on an appeal under paragraph 15(1)) or may affirm or substitute for HMRC's decision another decision that HMRC had power to make (on an appeal under paragraph 15(2)).

178. In the absence of specific grounds of appeal, we treat Mr Dagdelen's appeal as being made under both paragraph 15(1) and 15(2).

179. Paragraph 1 provides that a penalty is payable where P gives HMRC a return under s8 TMA 1970 and two conditions are satisfied. The first is that the document contains an inaccuracy which amounts to or leads to an understatement of a liability to tax. In view of our decision to affirm the discovery assessments, this condition has been met. The second condition is that the inaccuracy was careless or deliberate (and the characterisation of the behaviour then affects the amount of the penalties chargeable).

180. Paragraph 3 provides that an inaccuracy is careless if the inaccuracy is due to failure by B to take reasonable care, deliberate but not concealed if the inaccuracy is deliberate but P does

not make arrangements to conceal it and deliberate and concealed if the inaccuracy is deliberate and P makes arrangements to conceal it, eg by submitting false evidence in support of an inaccurate figure.

181. HMRC imposed the penalties on the basis that Mr Dagdelen's behaviour was deliberate (and prompted), and the penalty explanation letter of 19 May 2017 explains Officer Morris' conclusion as follows:

> "Your sales records were insufficient showing regular static amounts which were not credible. We asked you to record sales over a set period and your sales recorded were higher than previously returned daily sales. Although you told us your recording was accurate, HMRC test purchases in the same period confirmed that your sales still not being recorded correctly as only 9/19 of sales made and overheard by HMRC officers were recorded by you. Supplier checks show that you purchased fish on a weekly delivery basis but the delivery was invoiced in 2 parts and only one of these invoices were included in your records. This happened over a sustained period of time. The amount of the understatement means you did not pay any VAT in these years. Your turnover was declared incorrectly and consistently below the VAT threshold. For these reasons your behaviour is regarded as deliberate."

182. Mr Kaney submitted that any inaccuracies were, at most, careless, referring to Mr Dagdelen's evidence as to the difficulty of keeping accurate records when he was working alone or if the shop was busy.

183. We have applied Judge Greenbank's explanation of the meaning of deliberate from *Auxilium Project Management*. The explanation given by Officer Morris of HMRC's position is expressed in the context of the understatement of turnover leading to no VAT being paid in the relevant years; however, it is clear that Officer Morris relied upon these same reasons in the context of the understatement of liability to income tax. As noted previously, we do not place any weight on the reference to the fish supplier. Nevertheless, we consider that Mr Dagdelen's behaviour was deliberate, in that it was done knowingly and with the intention that tax was imposed on a lower amount of taxable profits. There may also have been a level of carelessness in preparing the information – but that does not make the behaviour we have found any less deliberate.

184. The second condition in paragraph 3 is therefore satisfied and HMRC's decision to apply penalties for the tax years 2009-2010 to 2014-2015 is affirmed.

185. As to the amount of the penalty, Officer Morris had allowed an 85% reduction for telling, helping and giving, resulting in a penalty percentage of 40.25% (against a minimum percentage of 35% for deliberate behaviour). We consider this level of reduction, which is in line with the reduction given in the context of the Schedule 41 penalty, is appropriate. Officer Morris did consider whether there were any special circumstances and concluded that there were not. We do not consider that such decision was flawed.

186. Accordingly, the amount of the penalties imposed under Schedule 24 is affirmed.

CONCLUSION

187. For the reasons explained above, Mr Dagdelen's appeal is dismissed:

(1) the business was required to be registered for VAT with effect from 1 August 2010;

(2) the penalty of £59,644.46 imposed under Schedule 41 for failure to notify is affirmed;

(3) the discovery assessments issued in respect of the tax years 2009-2010 to 2014-2015 are affirmed; and

(4) the penalties totalling £15,578.58 imposed under Schedule 24 in respect of the tax years 2009-2010 to 2014-2015 are affirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

188. 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.

Annex 1
Monthly Sales Figures (£) provided by Mr Dagdelen to HMRC on 5 January 2016

	January	February	March	April	May	June
2010	5,625	5,265	5,942	5,809	5,952	6,060
2011	4,607	5,406	5,712	5,987	5,667	6,161
2012	5,714	5,818	6,397	6,271	7,247	7,023
2013	5,945	5,439	6,471	6,415	6,955	6,478
2014	6,913	5,955	5,909	6,044	6,737	6,069
2015	5,974	5,552	5,866	6,017	6,519	6,088

	July	August	September	October	November	December
2009						3,362
2010	6,536	5,692	6,050	5,435	5,704	6,454
2011	6,355	5,500	6,371	6,069	5,924	7,300
2012	6,285	7,095	6,919	6,802	7,154	6,485
2013	6,550	6,871	6,303	6,523	6,779	6,415
2014	6,349	6,627	6,426	7,233	6,652	6,521
2015	6,494	5,741	5,765	6,619	5,755	

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 02 JANUARY 2020